THE INTERACTION BETWEEN PROPERTY RIGHTS AND LAND REFORM IN THE NEW CONSTITUTIONAL ORDER IN SOUTH AFRICA

by

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For my parents
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CONCLUSION

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The introduction of the first democratic Constitution and the land reform programme in South Africa provided the impetus for the development of a new perception of property. In terms of the traditional private law perception property rights are reduced to abstract, scientific concepts which form part of a hierarchical system of rationally and logically related concepts and definitions, the relationships between which remain largely unaffected by social and political realities. In this view the constitutional property clause is interpreted as a guarantee of existing individual property rights against unwarranted state interference. Proponents of the traditional private law view argue that this perception of property need not be replaced by a new constitutional perception of property, because the traditional private law perception is legitimated by the fact that it developed in an uninterrupted, linear line from Roman law. It is regarded as flexible enough to adapt to new and different social and political circumstances. However, the truth is that the development of property rights was disrupted by a number of discontinuities or fundamental breaks in different periods of its development. It is argued in this thesis that the introduction of the new constitutional order in South Africa can be regarded as another of these discontinuities, and that the strict adherence to the private law perception of property may be abandoned in favour of a new debate on property where the social and political function of property is emphasised more strongly.

Land reform promotes the public interest in that it ensures the equitable use, distribution and exploitation of property. In most cases the implementation of land reform necessitates the limitation of property rights. A conservative judiciary's adherence to the traditional private law perception of property may lead to a constitutional conflict between the judiciary (that aims to afford existing property rights strong constitutional protection) and the legislature (that aims to promote the public interest by implementing land reform). Such a constitutional conflict can be avoided if the South African courts adopt an approach in terms of which the social and political role and function of property in society is recognised.

Key terms: Property; Ownership; Land reform; Redistribution; Restitution; Tenure reform; Constitutional property; Property guarantee
INTRODUCTION

Background

The introduction of the first democratic Constitution and the land reform programme in South Africa heralded a new era in South African property law. Prior to the 1993 Constitution property law was dominated by private law. In terms of the traditional private law view, property rights were reduced to abstract, scientific concepts which formed part of a hierarchical system of rights, the relationships between which were largely neutral and unaffected by social and political realities. This approach to property rights was untenable in a society characterised by inequalities and the maldistribution of land, and became impossible to maintain in view of the new constitutional order. The implementation of the new Constitution necessitates the abandonment of the conceptual, private law approach to property rights and the initiation of a totally new debate on the role and function of property in society. In the new constitutional order property rights can no longer be approached as socially and politically neutral concepts. The way in which the law structures and protects property rights has to account for and contribute to the aim and function of the new Constitution, namely to facilitate the creation of an open and democratic society based on freedom, equality and human dignity. In order to ensure that land reform can be effected, it is important that a properly constitutional perception of property be developed. Adherence to the traditional, private law perception of property as a fundamentally unrestricted and inviolate right may lead to the notion that the purpose of the constitutional property clause is to entrench and insulate existing property rights from all socially or politically inspired, policy-oriented state interference. If the traditional, private law perception of property is accepted and applied in the constitutional context, land reform, which aims to change the way in which land is held and used, may be severely impeded.

In terms of the traditional, private law perception property law is perceived as an abstract science. All property rights are reduced to abstract, scientific concepts which
form part of a hierarchical system of rationally and logically related concepts and definitions. The free will and autonomy of the individual is regarded as a moral force which underlies and informs this approach to property. Inviolate, private property rights that are clearly and strongly protected against state interference are seen as essential for the realisation of the individual's sphere of personal freedom and autonomy, and the nature and extent of a property right is determined by the potential and ability of the right to assist the individual to take control of his/her own life in the patrimonial sphere.

In line with the abstract, scientific and conceptual approach, social, political and religious circumstances are regarded as subjective factors which are peripheral to the science of law and as such the social function of property is largely disregarded. The standard view is that existing, vested or acquired private property rights may not be infringed upon for social and/or political reasons. Due to the fact that property is seen as a means to secure for the individual an area of personal freedom and autonomy in the patrimonial sphere, property rights (especially ownership) are regarded as absolute, in principle unrestricted rights. Although these rights may be limited by the state, limitations may be imposed only with the consent of the property owner or, in exceptional cases, against compensation. All limitations are regarded as exceptional and temporary.

The strong moral force of the traditional, private law view of property is said to be derived directly from Roman law. The apparent reliance on Roman law for the development of the current concept of ownership (and in a wider sense all property rights) is based upon the idea that the traditional, private law perception of property rights developed in an uninterrupted, linear line from the sources of South African law in Roman law. Vulgar and feudal law were seen as the corruption of Roman law, and the Pandectists created the fiction that they removed the influence of feudal law and as such re-established the uninterrupted line of development of Roman law. Once it was realised that medieval divided ownership was not of Roman origin the German Pandectists 'reverted' to what was supposed to be a Roman concept of unitary ownership and a concomitant hierarchical system of property rights. For this they relied
on (their own interpretation of) Roman law. In terms of the traditional view the only difference between the current private law concept of ownership and the Roman law 'concept' of ownership (dominium) is the fact that the current concept of ownership is described in an abstract and scientific manner.

The private law concept of property is regarded as flexible enough to adapt to different social and political circumstances. In line with this way of reasoning it is said that dominium in Roman law survived and withstood the challenges of all societal changes throughout history. It was flexible enough, so the theory goes, to adapt to changing circumstances and retain its character regardless of the role it had to fulfill in different periods of its development. The proponents of this view hold that the current private law perception of property rights need not be abandoned in favour of a new constitutional, socially conscious approach to property rights in order to meet the needs of post-apartheid South African society. It is argued that the concept of property rights, and with that the conceptual, scientific approach to property law, withstood much bigger challenges in its development and it is said to be flexible enough to adapt to the new constitutional order in South Africa as well. It is argued that the traditional private law approach derives its authority from its scientific objectivity, just as it is legitimated by the fact that it is founded on Roman law. In this view the proper application of the objective, neutral, scientific method is trusted to yield just and equitable results. The development of post-apartheid property law can, according to this view, proceed on the basis of the traditional Roman-Dutch law, and large-scale modifications or adaptations are unnecessary.

However, the traditional view and the Roman-Dutch law of property are not necessarily compatible with the needs and requirements of the new constitutional order. For one thing, if the traditional, private law perception of property is accepted and applied in the constitutional context, it might lead to the idea that the constitutional property clause entrenches and insulates existing property rights from regulatory interferences by the state. In this view the state may not impose regulatory measures to control the use of property without compensating the individual property holder. The state would thus be
forced to either leave existing rights unaffected or expropriate them against just compensation.

Furthermore, in terms of the traditional private law perception, land reform does not constitute a legitimate reason for state interference with existing property rights. For the main part, land reform entails the limitation or restriction, for social and/or political reasons, of existing individual property rights to land in the form of control over the use, distribution and exploitation of land. Land reform can be described as publicly controlled measures aimed at the eradication of inequalities with regard to the way in which land is held and used, and may include measures aimed at the redistribution of land, the restitution of land to those people who were unjustly dispossessed of the land, the provision of security of tenure, the imposition of a land tax and land consolidation.

If the traditional private law perception of property is not abandoned in favour of a fundamentally wider debate on the role and function of property in society, the implementation of land reform measures might lead to a constitutional conflict between the judiciary (that wants to protect existing individual property rights against unwarranted state interference) and the legislature (that imposes land reform measures to control the use of property). The constitutional battle in India, which took place between 1950 and 1978, illustrates the possible danger of accepting and applying the traditional private law perception (in terms of which the property clause is seen as entrenching and insulating existing private property rights from state interference for social or political reasons) in a constitutional context. The scientific, context-neutral method of the traditional private law approach to property does and can not account for the importance of the social role and function of property, and especially in South Africa, where the new Constitution aims to facilitate the creation of a freer and more equal society, the traditional private law perception of property can effectively prevent the government from promoting land reform.

The initiation of a proper debate on the social and political role and function of property in society could avert a constitutional conflict between the protection of existing property rights and the promotion of the public interest through land reform. The
recognition of the social role and function of property would amount to much more than
the mere adaptation of the traditional private law perception of property. It would rather
constitute a total and fundamental break with the traditional private law perception of
property. The emphasis on individual freedom and autonomy would be replaced by the
principle of establishing an equitable balance between the interests of the individual
and the public interest, and between the protection of existing property rights and the
promotion of the public interest. In terms of such a new constitutional perception
property rights would assume a completely different meaning. The social function of
property would be recognised and accounted for, and the public interest would fulfill a
central function in the determination of the extent of individual property rights. In a new
constitutional context the courts would ensure that the protection and limitation of
property rights reflect an equitable balance between the interests of the individual
property holder and the public interest. Although the individual property holder would
be protected against unwarranted interferences by the state, the extent of the
protection would be determined with reference to the public interest. This does not
mean that individual property rights would necessarily always be subject to the common
interest, but rather that the extent and the protection of these rights would be
established with due regard to the public interest.

In a constitutional context property rights should not be seen as absolute, in principle
unrestricted rights, but rather as relative rights which may be limited in the public
interest. The extent of the limitation would be determined in terms of an equitable
balance between the interests of the affected individual and the public interest. As a
result of the recognition of the social function of property the state would be able to limit
existing property rights for social and/or political reasons.

Constitutional analysis accentuates the need to take cognisance of and account for the
social and political context within which property rights function. The establishment of
an equitable balance between the individual's interests and the public interest
necessitates the recognition of the social function of property. The introduction of a
constitutional property guarantee does not necessarily lead to contextual sensitivity. 1 In order to ensure that cognisance is taken of the social context within which property functions the traditional, abstract and scientific approach to property needs to be abandoned in favour of a new, overtly constitutional approach in terms of which the social role and function of property play a central role.

The traditional view is based on the pretence of an abstract, conceptual, objective science in terms of which the social role and political function of property is not supposed to play any significant role. The nature, acquisition and protection of property rights are supposed to be solely dependent on the logic of the different concepts. However, the injustices committed in terms of the apartheid-system (which relied on the abstract, scientific approach to property law) have shown that the social and political function of property is indeed relevant and important to ensure that the common interest is served by the just and equitable use, distribution and exploitation of property. The introduction of the new Constitution has forced property lawyers to recognise the importance of the social role and political function of property, and to change the law relating to property accordingly. At first glance the official recognition of the social role and function of property might seem to be in conflict with the protection of existing property rights, but in reality it is in conflict with the abstract, scientific approach to property.

The traditional private law perception of property is described and explained with reference to the abstract, scientific, conceptual approach to property rights, the concept of absolute property, the continuous development of property rights and the apparent flexibility of property rights. Although these topics are related and form part of the larger problem, they can be distinguished from one another. In terms of the abstract scientific approach property rights are reduced to abstract, context-neutral concepts. The different concepts form part of and fit into a hierarchical system of stronger and weaker

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1 The constitutional conflict in India illustrates this proposition. Adherence to the traditional, private law perception of property implied that the social role and function of property were disregarded and existing individual property rights were protected to the detriment of the common interest.
rights. These concepts are rationally and logically related. All limitations or restrictions of property rights are explained and justified, and all legal problems solved, in terms of the relationships between the different concepts. In view of the abstractness of this approach the content and protection of a right are determined with reference to the definition of a particular concept and its place within the system. Social and political realities are regarded as peripheral to the science of law and the different concepts are therefore seen as largely unaffected by the social and political context within which they function.

The abstract, scientific approach to property law is manifested in the concept of absolute, in principle unrestricted property rights. Property rights are regarded as essential to ensure for the property holder a sphere of personal freedom and autonomy, and consequently the property holder is protected against unwarranted state interferences for social and political reasons. In this view property rights can endure limitations or restrictions, but all limitations are seen as unnatural, exceptional and temporary. The continued acceptance of the concept of absolute property rights is justified by the assumption that it is based on Roman law *dominium* and that it enjoyed continuous and uninterrupted development from Roman law to the present. In line with this way of thinking the concept of abstract, context-neutral, absolute property (as the manifestation of the abstract, scientific, conceptual approach to property rights) is regarded as flexible enough to adapt to changing social and political circumstances, and therefore it is able to adapt to suit the needs of post-*apartheid* South African society. The development of property is investigated and discussed in an effort to determine whether there is any substance in the argument that the modern civilist concept of abstract property rights is based on Roman law *dominium*, and that it has always been flexible enough to adapt to different social and political circumstances, and need therefore not be replaced by a new contextual, socially conscious approach. The origin of the current private law concept of absolute ownership is investigated in an attempt to determine in what stage of its development did property rights acquire its absolute character. It is generally accepted that property rights changed throughout history in an attempt to adapt to different social and political circumstances. The nature
and extent of these changes are investigated to determine whether property rights did indeed develop in an uninterrupted, linear line from Roman law *dominium*, or whether the natural development was subject to such dramatic and fundamental change that it cannot be said that Roman law *dominium* withstood the challenges of the past and merely adapted to different circumstances.

A comparative analysis of the scope, protection and limitation of property in a constitutional context in other jurisdictions aims to guide the South African courts when they interpret the property clause in the new South African Constitution. Special attention is paid to the contextual approach and the weight attributed to the social and political role and function of property in society. The importance of the establishment of an equitable balance between the interests of the individual property holder and the common interest in order to ensure the effective implementation of social reform is also investigated.

The treatment of land reform in other jurisdictions is investigated in order to create a framework within which the courts can approach and treat the different land reform measures introduced as part of the South African land reform programme to ensure that an equitable balance is established between the protection of existing individual property rights and the promotion of the public interest through land reform.

Content

Section 1 of this thesis investigates the historical development of the current private law perception of property rights and the contention that property rights (and the conceptual approach to property) developed in an uninterrupted line form the sources of South African law in Roman law and the argument that property rights have always been flexible enough to adapt to new social circumstances. An attempt is not made to provide a complete analysis of the historical development, but this section rather concentrates on specific historical periods where the nature of property rights, the social function of property, or the approach to property changed to suit the needs of a particular society.
The emphasis in this section is on the developments in Roman law, feudal law, and Roman-Dutch law, the influence of the French Revolution and German Pandectism, and developments in South African law prior to the implementation of the first democratic Constitution in 1994. The nature of *dominium* in Roman law is discussed in an effort to determine whether there is any substance in the assumption that the current private law concept of ownership is similar to *dominium* in Roman law, and whether the abstract, conceptual approach to property originated in Roman law. The effect of the introduction and abolition of the feudal law distinction between different forms of *dominium* on the development of property rights and on the social function of property are discussed in the chapters on medieval law and Roman-Dutch law. The development of the scientific approach to property and the development of the current concept of absolute ownership are discussed in the chapters on Roman-Dutch law, the civilist concept of ownership in German law and South African law prior to the implementation of the 1993 Constitution. An effort is made to determine whether property did indeed develop in an uninterrupted line from Roman law and whether it is true that the current concept of property is flexible enough to adapt to new social and political circumstances in post-*apartheid* South Africa. In other words, the question is whether the abstract, scientific approach should be abandoned in favour of a new, constitutional approach to property according to which the social role and function of property play a decisive role to determine the scope, protection and limitation of property.

In most jurisdictions from the civil law tradition (notably Germany, the Council of Europe and South Africa) the constitutional order has strongly accentuated the need for a socialised or social-sensitive approach to property law. In a constitutional context the social and political role and function of property are emphasised, and this heralded the end of the traditional private law tradition (at least as far as the social and political function of property is concerned).

The position in modern Dutch private law is discussed as a representative example of a civil-law system where property rights are not protected in a constitutionally
entrenched guarantee. The traditional private law approach to property is still adhered
to in the Netherlands, and an attempt is made to determine how the Dutch account for
the social function of property. Attention is paid to efforts to change the private law
concept of property so as to accommodate its social role and function within the post-
World War II Dutch society.

Due to the fact that constitutional property is dealt with in terms of (mainly) public law,
the discussion in section 2 is not limited to jurisdictions from the civil law tradition. In
section 2 a comparative analysis is made of the scope, protection and limitation of
constitutional property in Germany, the United States of America and the Council of
Europe. In an effort to develop a framework within which the courts can adjudicate
property (and especially land reform related) cases it is necessary to determine how
constitutional property is treated in other jurisdictions, and to what extent provision is
made for the social function of property. The discussion in this section is limited to the
scope, protection and limitation of constitutional property in Germany, the United States
of America and the Council of Europe because the position in these jurisdictions
provides a representative overview of the position in foreign jurisdictions. Although the
position in a number of other jurisdictions might also have a bearing on the position in
South Africa, it generally corresponds with the trends and different approaches followed
in Germany, the United States of America and the Council of Europe, and as such it
does not add anything significant to the discussion.

The position in German law is of special significance because German and South
African property law shared a similar process of development, and the constitutional
guarantee of property in Germany had a substantial influence on the concept of
absolute ownership in private law. In the constitutional context property is not dealt with
in terms of abstract, scientific concepts, and an effort is made to determine how the
approach to property in a constitutional context differs from the traditional private law
approach. The extent of the influence of the social function of property on the
interpretation and protection of property rights are also investigated.
Although the protection and limitation of constitutional property in the United States of America to some extent reflect the nature of property rights in Anglo-American systems, the meaning of the wide term 'takings', the essentially _ad hoc_ approach to takings cases, and the recognition of so-called 'per se' takings make the position in US law unique. The US has one of the oldest written Constitutions in the world and as such it had considerable influence in most western countries. It may be assumed that the treatment of property in the US will inevitably have an influence on the treatment of constitutional property in South Africa. Therefore, it is of special importance to study the US approach to the protection and limitation of property.

In view of the provision in section 39 of the South African Constitution that the courts must consider international law when interpreting the bill of rights, the position within the Council of Europe is discussed as a representative example of the protection and limitation of property by international institutions. The weight attributed to the social function of property and the establishment of a fair balance between the interests of the individual property holder and the public interest enjoy special attention in the chapter on the Council of Europe.

The scope, protection and limitation of constitutional property in terms of section 25 of the South African Constitution are discussed in the last chapter of section 2. The dual function of the property clause, namely to protect existing property rights and to authorise and control the implementation of land reform, is investigated and discussed.

Section 3 deals with land reform. An overview is provided of the nature, different forms of and reasons for the implementation of land reform. The treatment of land reform by the courts in jurisdictions without an official land reform programme (mostly developed countries) and jurisdictions with an official land reform programme (mostly developing countries) is discussed in this section. The discussion does not aim to provide an exhaustive analysis of land reform in foreign jurisdictions, but aims to provide an overview of general trends in foreign jurisdictions with regard to the possible conflict and interaction between the protection of existing property rights and the promotion of
the public interest through the implementation of land reform measures. The approach to property rights in a constitutional context, the weight attributed to the public interest in land reform cases, and the importance of the social function of property are investigated to determine how a constitutional conflict can be avoided. With reference to the position in jurisdictions with an official land reform programme, the discussion is limited to the positions in Zimbabwe, Namibia, Botswana and Mexico. Whereas the respective positions in Zimbabwe, Namibia and Botswana are representative of post-colonial African countries who, as is the case in South Africa, had problems of racial discrimination and the maldistribution of land as a result of this, the position in Mexico is discussed as a representative example of the nature and scope of land reform in South America. The land reform programme in Mexico is one of the most successful land reform programmes in Latin America, and for this reason a discussion of the nature and extent of the Mexican land reform programme is provided.

The implementation of the land reform programme in South Africa is discussed in the last chapter of section 3. The different forms of land reform (redistribution of land, restitution of land and tenure reform) and the measures enacted to effect land reform are discussed. Special attention is paid to the possible conflict between the two different functions of the constitutional property clause, namely the protection of existing individual property rights and the promotion of the public interest through the implementation of land reform measures.

**Terminology**

Different terms are used to describe the rights under investigation in this thesis. Whereas the term 'dominium' best describes the rights in Roman and feudal law, the terms 'ownership' and 'property' (in the sense of a system of rights) are used with reference to Roman-Dutch law and the subsequent periods of development.

It should be noted that, depending on the nature of the development in a specific period, the emphasis shifts between the concept of ownership or property rights in
general, and the social function of ownership or property. The function of property in society played an important role in both the introduction and abolition of feudal law. The conceptual approach to property, in terms of which property rights are reduced to scientific concepts in a hierarchical system of rationally and logically related rights, concepts and definitions, disregarded the social function of property because the concept of property is seen as a scientific, neutral concept unaffected by social and political realities. The importance of the social role and function of property is accentuated in developments in property law in post-World War II Europe and in post-apartheid South Africa. Property, especially land, is seen as a finite resource and its use, distribution and exploitation should serve to benefit the common interest.

Reference is often made to the absoluteness of ownership. The term 'absolute' is used with reference to the content of ownership, and indicates that ownership is in principle unrestricted. 'Uniformity' of ownership refers to the fact that only one type of ownership is recognised, and 'exclusivity' indicates that there is only one owner with regard to a specific object.

The term 'limitation' refers to all forms of state interferences with the rights of a property holder, and includes both expropriation or the actual acquisition of property by the state (against compensation), and regulatory measures to control the use of property. In US law the term 'taking' is used to refer to all state interferences for which compensation is required. This is a wide term and includes both expropriation or actual acquisition of property by the state and regulatory measures which resemble expropriation in the sense that they affect the individual property holder's rights to such an extent that they require the payment of compensation.
At the time of the introduction of the first democratic Constitution in 1994 South African property law was dominated by the traditional private law perception of property. In terms of the traditional private law perception property law is regarded as an abstract, objective science, largely unaffected by subjective factors such as social and/or political realities. The nature and content of property rights are to a large extent determined with reference to a scientific, hierarchical system of rationally and logically related abstract concepts. The free will and autonomy of the individual is seen as the moral basis of the scientific, conceptual approach, and consequently property rights are characterised by absoluteness, exclusivity and individualism. The paradigmatic weight of this concept depends on the assumption that these characteristics have always been associated with private ownership of property. The traditional private law perception of and approach to property derive its authority from the apparent scientific objectivity of the abstract, scientific, conceptual system of concepts and definitions, and the assumption that the system and its characteristics are based on Roman law. It is argued that the current private law concept of property, as well as the abstract, scientific, conceptual approach to property, developed in an uninterrupted, linear line from its inception in Roman law. In terms of the traditional private law view property rights are flexible enough to adapt to different social and political circumstances. In this view there is no need or justification for the abandonment of the abstract, scientific approach to property law in favour of a totally new debate on the social role and function of property in society. This section aims to contradict the popular view that there is a basic continuity in the development of property rights from its inception in Roman law to its current position in South African law. Instead, it is argued that the development of property law is characterised by a number of discontinuities, that the private law concept of absolute ownership is of relatively recent origin, and that the abstract, scientific approach to property law, in terms of which property is dealt within terms of objective, socially and
politically neutral concepts and definitions, was only developed in the nineteenth century. There does not seem to be a valid justification for the argument that the abstract, scientific approach to property may not or should not be replaced by a completely new debate on the social role and function of property in society.

This section does not attempt to give a complete account of the development of ownership or property, but rather looks at different periods during which property rights underwent fundamental change or was developed in an interesting way.

This section starts by giving an overview of the development of *dominium* in Roman law. The nature and characteristics of *dominium* are discussed and the influence of vulgar Roman law is investigated. The introduction of feudal law constitutes a definite break in the logical development of *dominium*. The nature of the distinction between *dominium directum* and *dominium utile* is investigated and the role and function of property in society are discussed. It was during this period that the first formal definition of *dominium* was formulated, and the extent and meaning of this definition is investigated. This will be followed by a chapter on Roman-Dutch law. Grotius' influence on and perception of Roman-Dutch law is emphasised in this regard. Grotius' classification of rights started a process of scientification of property law. He created a hierarchical system of rights and laid the foundation for the development of the current private law perception of property. The importance of medieval divided ownership in Roman-Dutch law is also looked at. The official abolition of feudalism as a result of the French Revolution constitutes another discontinuity in the natural development of property rights. The impact of the abolition of the medieval distinction between different forms of ownership on the social function of property is investigated in this chapter. This is followed by a chapter on the development of the civilist concept of ownership in Germany during the nineteenth century. Special attention is paid to the development of the abstract, scientific approach to property rights as rationally and logically related, socially and politically neutral concepts within a hierarchical system. The scientific approach to property law meant that concepts fulfilled a central function in the property debate, ownership acquired its absolute character, and that all
questions concerning the social and political role and function of property were regarded as irrelevant.

In each of the different periods of development it is indicated that either the approach to property law, the nature of property rights or the social function of property underwent fundamental change. It is indicated that the traditional view, according to which ownership developed in an uninterrupted line from its origin in Roman law to the current South African private law concept of ownership, seems to be historically unsound. It is argued that the development of the concept of ownership is characterised by numerous discontinuities which had a direct influence on the concept as we know it today. These discontinuities include the impact of the vulgar Roman law, the implementation and abolition of the feudal system, the influence of the French Revolution, the influence of Grotius' structure and hierarchy of rights and the scientification of property law in the nineteenth century on the basis of Grotius' work. Pandectism replaced the Roman and Roman-Dutch traditions to a large extent when the South African law underwent a process of scientification in the twentieth century.

Finally, the position in modern Dutch private law is looked at. Unlike Germany and South Africa (where the private law concept of ownership has the same development history as in the Netherlands), the Netherlands do not have a constitutionally entrenched property guarantee and as such the development of the private law concept of ownership and other property rights differ from that in Germany and South Africa. Unsuccessful attempts were made in the Netherlands to effect the same changes to property law in private law than the changes effected to property law in other jurisdictions via the constitutional route. The nature of the proposed changes and the reasons for their failure are investigated in the last chapter of section 1.
1.1 Introduction

Throughout history the institution of property was construed and interpreted to suit the needs of the times. In almost every period of its development property played a central role in society and was adapted to fit the social, economic, political and cultural needs of society. This is also true of the role of *dominium* in the long history of Roman law.

It is often said that the development of the South African concept of ownership originated in Roman law, but the view that current private law concept is similar to Roman law *dominium* cannot be supported. Although Immink says:

"Niets is gevaarlijker in de geschiedbeoefening dan af te gaan op de klank van een woord ..... Waar de historicus veral en steeds op bedag dien te zijn, is de omstandigheid, dat achter een constant blijvend woordgebruik een hele begripsontwikkeling schuil kan gaan. Houdt men zich in dergelijk een geval aan de woorden, dan blijft men van inzicht in de ontwikkeling, dat wil zeggen van historisch inzicht, ten enemale verstoken"

he comes to the conclusion that ownership has the same meaning in Roman law and in modern Dutch law. Immink reaches this conclusion by asking whether the ownership in modern law and *dominium* in Roman law fulfil the same function in the different societies, and assumes that if they do they must have the same meaning and content.

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1 See Van der Merwe *Sakereg* (1989) 171; Cowen *New Patterns of Landownership* 68 and 70. Both these authors make their statements with reference to specific characteristics, but even so, their view cannot be supported. See also Kunst *Historische ontwikkeling van het recht* 192. Kunst is of the opinion that the concept of ownership as it existed in the classical period amounts to the same concept known today.

2 Immink 1959 *TR* 36 at 41.
Van den Bergh, however, does not share this view. According to him one should pay close attention to the sense in which terminology is used. The same term can have completely different meanings, depending on the period and context in which it is used.

Feenstra criticizes Immink because, although ownership plays an important role in both Roman law and modern Dutch law (the same applies to South African law), one should always keep the social function of and the restrictions on ownership in mind. Van den Bergh supports this view:

"Het is fantastisch, te veronderstellen dat eigendom presies dezelfde plaats en functie sou hebben in twee maatschappij-stelsels die zo hemelsbreed van elkaar verschillen".

Van den Bergh also draws attention to an important difference between the modern and the Roman classification of rights: Instead of the current classification of rights, Gaius never distinguished between real and personal rights, nor between ownership and limited real rights.

Dominium in Roman law cannot be said to be identical to either the South African concept of ownership or the modern civil law concept of ownership. However, Gilissen's statement that both medieval and modern jurists built the modern concept of ownership on notions they found in Roman texts can be supported. While the modern concept of ownership is not identical to Roman law dominium, one can identify similar characteristics in the modern concept of ownership and dominium ex iure Quiritium as it was applied in classical Roman law. Both are seen as the most

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3 Van den Bergh Eigendom 8. To prove his point he shows that dominium had different meanings in classical Roman law and Justinian law and neither of these fit the modern description of ownership.

4 Feenstra 1976 RMT 248 at 254.

5 Van den Bergh Eigendom 33.

6 Gilissen Historische inleiding tot het recht 603.
comprehensive right that an individual can have with regard to a thing and both are described as absolute rights in the sense that they are enforceable against the whole world. However, this observation must immediately be qualified by pointing out that the much wider concept of "property" seems to be in the process of becoming more important than the more limited "ownership", thereby again reducing the apparent similarities between classical and modern South African law.

1.2 Dominium in Roman law

Any attempt to determine the nature of dominium in Roman law is complicated by the fact that the Roman jurists never defined dominium as a juridical concept. Terminology used to refer to the institution of dominium changed through the centuries, as did the perception of dominium as an institution.

The reason why no definition of dominium is found in the sources probably lies in the fact that the Romans followed a casuistic approach to law. They were more interested in solving legal problems than in defining and systematizing legal concepts. Roman law consisted of a system of actions and not of rights or concepts. The question was always who had the action (or vindicatory remedy) in a specific case and not who had the right or what its content was. Dominium was thus never defined as a right. This makes it difficult to trace the development of dominium in Roman law, and in the following sections observations are based on deductions from the practical use of

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7 Feenstra Grondslagen 81.

8 D 50.17.202: "Omnis definitio in iure periculosa est: parum est enim, ut non subverti posset." See Thomas Textbook of Roman law 133; Feenstra 1976 RMT 248 at 257; Feenstra Grondslagen 35; Van den Bergh Eigendom 44; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 218; Van der Walt 1986 THRHR 305; Van der Walt 1988 De Jure 16 at 309; Diosdi Ownership in ancient and preclassical Roman law 51.

9 Schultz History of Roman legal science 69; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 219.

10 Jolowicz Roman foundations of modern law 77.

11 Van den Bergh Eigendom 44.
dominium rather than just on terminology.

1.2.1 Ancient Roman law (up to 250 BC)

In ancient Roman law the term "ownership" was never used in a technical sense. The term meum esse, as used during vindicatory proceedings in ancient Roman law, only identified the entitled party. It had no exact, precisely defined meaning - it merely meant "master" or "belong to". The ancient Romans never defined or distinguished terminologically between concepts such as ownership, possession and other family relationships.

The most important method of transfer in ancient Roman law, mancipatio, did not describe ownership in a technical sense either. Gaius gives a detailed description of the transaction: Mancipatio was originally seen as a unilateral act of acquisition, later as a sale and eventually as an act of conveyance. Mancipatio in ancient Roman law was not seen as a way of transferring ownership, but rather as a way to transfer protected use and control. According to Diosdi mancipatio was used to transfer legal power and a warranty against eviction.

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12 This classification is according to Feenstra Grondslagen 3.
13 Feenstra 1976 RMT 258.
14 Meum esse originated in the in iure phase of the legis actio per sacramento procedure.
15 Van der Walt Houerskap 20; Kaser Eigentum und Besitz im älteren römischen Recht 6.
16 Diosdi Ownership 124; Kaser Römisches Privatrecht - ein Studienbuch 92; Feenstra Grondslagen 36.
17 Mancipatio is the method used to transfer res mancipi. According to Gaius (see G 2.14a) res mancipi includes slaves, beasts of draught and burden - more specifically, horses, donkeys, mules and oxen - land in Italy and the rustic praedial servitudes. All other things were res nec mancipi.
18 G 1.119.
19 Feenstra Grondslagen 53; Van der Walt Houerskap 23.
20 Diosdi Ownership 83.
It must, however, be borne in mind that perceptions regarding ancient Roman law largely amount to speculation, since sources are often scarce or ambiguous, and it is thus difficult to determine the exact meaning and content of the terms that were used to refer to proprietary relationships.

1.2.1 Preclassical Roman law (250 BC to 27 BC)

In the preclassical period *dominium* was distinguished from possession and other power relations with respect to things. During this period the notion of *dominium* acquire a somewhat more specific meaning. Determination of the exact meaning of this notion is, however, complicated by Roman casuistry. According to later Romanists, *dominium* nevertheless had a more or less technical content. Some of the characteristics most commonly associated with *dominium* of the late preclassical period are:

- *Dominium* was absolute in the sense that it was enforceable against the whole world. Everybod had to respect the *dominium* of the *dominus* and if anyone interfered with it, the *dominus* had an action to defend his "right".
- *Dominium* was absolute in the sense that it was the most comprehensive real relationship.
- *Dominium* was reserved for Roman citizens and applied to Italian land only.
- Other forms of ownership (bonitary ownership, ownership of the *peregrini*.

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21 According to Diosdi *Ownership* 135 the term *dominus* in the technical meaning of "owner" was used by authors in the first century BC. The word *dominium*, in its technical meaning, appeared even later. According to Kaser *Eigentum und Besitz im älteren römischen Recht* 309 the word was first used by Labeo. Feenstra 1976 RMT 248 at 258 is of the opinion that the term *dominium* was first used in the second century BC.

22 Kaser *Das römische Privatrecht* 401.

23 Buckland *Text-book of Roman law* 188; Kaser *Das römische Privatrecht* 373.

24 Kaser *Römisches Privatrecht - ein Studienbuch* 94; Feenstra *Grundlagen* 38; G 1.54; G 2.7.
ownership of provincial land and ownership of the dos) existed alongside dominium.  

- Dominium did not apply to all things equally. Dominium of res mancipi could only be transferred by mancipatio and in iure cessio. Traditio was used to transfer res nec mancipi.

1.2.3 Classical Roman law (27BC to 250)

During the classical period (the first two and a half centuries AD) dominium did not change much from the preclassical period. Dominium was still distinguished from possession and other real relations. Important distinctions were also still made according to actions (or remedies) and not rights. Gaius's classification of objects is the first step towards the later classification of rights, but dominium was never defined or classified as a right. As in preclassical law, dominium was not a uniform right - at least five different types of ownership can be distinguished and the possibility of dual ownership was recognized. It was thus possible that more than one person could be owner of the same object, each having a different type of ownership. Mancipatio and in iure cessio were still used as modes of transfer of res mancipi and traditio was used to transfer res nec mancipi.

1.2.4 Vulgar Roman law (350 to 550)

After the classical period, Roman law became "vulgarized" in the Western Roman empire in a process that is often described as the deterioration of and the infiltration of Roman law by Germanic law. In vulgar Roman law the distinction between dominium,

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25 See 1.3.1.
26 Diosdi Ownership 137.
27 G 2.1-14.
28 See 1.3.1.
possession and other rights, as we know them, became blurred. Only one type of proprietary right was recognised in vulgar Roman law, and the description of this right was vague enough to include possession and other real rights. There was no use for more than one type of dominium, and this notion was not developed further in vulgar law.

1.2.5 Justinian law (450 to 550)

Justinian returned to the classical concept of dominium. The distinction between dominium, possession and other proprietary rights as it existed in classical law was re-established in the Justinian codification, which later became known as the Corpus Iuris Civilis. Justinian abolished the difference between res mancipi and res nec mancipi (and therefore also mancipatio and in iure cessio) and traditio became the only method of transfer. The notion of dual dominium was thus also abolished.

1.3 The characteristics of dominium in Roman law

1.3.1 Uniformity

In view of the fact that South African law is acquainted with a uniform concept of ownership - that is to say we know only one type of ownership beyond which there exist no other forms of ownership - the fragmentation of dominium, as it existed in Roman law, remains an interesting and peculiar phenomenon.

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29 Although the Romans did not use the term "rights", it will be used here to indicate what we regard as a real relation between persons and things.


31 Van der Walt 1986 THRHR 307.

32 Van der Walt and Kleyn in Visser Essays on the history of law 213 at 220.

33 Kaser Römisches Privatrecht - ein Studienbuch 95; Feenstra 1976 RMT 260; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 220; Thomas Textbook of Roman law 137.
Gaius stated that *dominium* was exclusive - you either are the owner or you are not. He did, however, go further by adding that there were more than one kind of ownership. The following types of ownership are discussed below:

(i) *Dominium ex iure Quiritium*
(ii) Bonitary ownership
(iii) Ownership of *peregrini*
(iv) Ownership of provincial land
(v) Ownership of the *dos*
(vi) Functionally divided ownership

(i) *Dominium ex iure Quiritium*

*Dominium ex iure Quiritium*, which can be described as Roman civil-law ownership of a Roman thing acquired according to a Roman procedure or formality, was the most important right that a person could have with respect to *res corporales* - it was the ultimate legal title beyond which there was no other. It provided the owner with the most comprehensive control over a thing.

In classical Roman law, *dominium of res mancipi* was transferred by way of the formal procedures of *mancipatio* or *in iure cessio*. *Dominium of res nec mancipi* was transferred by informal *traditio*. To acquire *dominium ex iure Quiritium* the correct

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34 G 2.40.
35 Thomas *Textbook of Roman law* 133; Buckland *Textbook of Roman law* 186.
36 In order to acquire *dominium ex iure Quiritium* the holder of the right had to have the *ius commercii* (the right to acquire rights and duties in Roman law) and the thing had to be *in commercio* (capable of being owned). Only Roman citizens had the *ius commercii*. See Gilissen *Historische inleiding tot het recht* 602.
37 G 1.119.
method of transfer had to be used. Dominium ex iure Quiritium cannot be described as the ius utendi fruendi abutendi, because with the development of in bonis it was possible that one person could exercise all the normal attributes of ownership (ius utendi fruendi abutendi), while another is the true dominus (thus without the ius utendi fruendi abutendi). Dominium ex iure Quiritium was protected by the rei vindicatio.

(ii) Bonitary ownership

It often happened that res mancipi was transferred by informal traditio. In such a case the transferor remained the dominus ex iure Quiritium and the transferee was said to have the thing in bonis. He could only become dominus ex iure Quiritium through usucapio. This situation, which is sometimes described as bonitary ownership, led Gaius to the conclusion that there were more than one kind of ownership. One person could be dominus ex iure Quiritium while another could have the same thing in bonis. Gaius described this situation as duplex dominium or double ownership. He

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38 If res mancipi was transferred by informal traditio, the transferee only became the true dominus ex iure Quiritium through usucapio.

39 Feenstra Grondslagen 41; Thomas Textbook of Roman law 133; Buckland Textbook of Roman law 186.

40 G 2.41; Thomas Textbook of Roman law 136; Kunst Historische ontwikkeling van het recht 193.

41 The term "bonitary ownership" does not appear in the Roman sources. See Diosdi Ownership 169; Birks 1985 Acta Juridica 1 at 37 n176; Buckland Textbook of Roman law 191 n2; Feenstra Grondslagen 44 Van Zyl Geskiedenis en Beginsels van die Romeinse Privaatreg 128 n25; Kunst Historische ontwikkeling van het recht 193. But see Ankum and Pool in Birks New perspectives on the Roman law of property 5 et seq.

42 G 1.54.

43 Nicholas An introduction to Roman law 125 says "Gaius does recognize that ownership is divided, but he seems to have been alone in this." It has been proven by numerous authors that there did indeed existed double ownership in Roman law. See Diosdi Ownership 169; Birks 1985 Acta Juridica 1 at 37 n176; Buckland Textbook of Roman law 191 n2; Feenstra Grondslagen 44; Van Zyl Geskiedenis en beginsels van die Romeinse privaatreg 128 n25; Kunst Historische ontwikkeling van het recht 193. But see Ankum and Pool in Birks New perspectives on the Roman law of property 5 et seq.

44 G.2.40: 'Sequitur ut admoveamus apud peregrinos quidem unum esse domomium: nam aut dominus quisque est aut dominus non intellegitur. quo etiam populus Romanus olim utebatur: aut enim ex iure Quiritium unusquisque dominus erat aut non intellegebatur dominus. sed postea
explained this by pointing out that a slave could be in the *potestas* of the master who has him *in bonis*, while another person could be the bare owner *ex iure Quiritium*. Diosdi\(^45\) is of the opinion that Gaius did not regard *in bonis habere* as ownership:

"but the word *dominus* does not mean 'owner' in this case. It denotes 'master' with respect to the slave".

Gaius,\(^46\) however, specifically used the term *duplex dominium*, and it is clear from the rest of the text that he included *in bonis*. In a later text Gaius\(^47\) contrasted *divisio dominii* (or *duplex dominium*) with *unum dominium*. He also contrasted *dominium ex iure Quiritium* with *in bonis habere* while still including *in bonis* in the notion of *dominium*.\(^48\)

Bonitary ownership is the most important form of ownership that existed apart from *dominium ex iure Quiritium* in Roman law,\(^49\) and according to Feenstra it did not differ much from quiritarian ownership.\(^50\)

The bonitary owner was protected in two ways: If the quiritarian owner tried to recover

\[\text{divisionem accepit dominium, ut alius possit esse ex iure Quiritium dominus, alius in bonis habere.}\]\(\text{\textsuperscript{4}}\); De Zulueta *The Institutes of Gaius Part II: Commentary.*

\(^{45}\) Diosdi *Ownership* 172.

\(^{46}\) G 1.54.

\(^{47}\) G 2.40.

\(^{48}\) Feenstra 1976 *RMT* 248 at 260; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 230. But see Ankum and Pool in Birks *New perspectives on the Roman law of property* 5 et seq. Bonitary ownership has often been described as transitional ownership in the sense that bonitary ownership changes into quiritarian ownership as soon as *usucapio* is completed. See Berger *Encyclopaedic dictionary of Roman law*, Thomas *Textbook of Roman law* 136; Stein *Legal institutions* 156. Wubbe *Res aliena pignori data - De verpanding van andermans zaak in het klassieke Romeinse recht* 14 and 267, however, points out that even after *usucapio* the thing stays *in bonis* of its possessor despite his becoming civil owner as well. See also G.2.40. But see Ankum and Pool in Birks *New perspectives on the Roman law of property* 5 et seq.

\(^{49}\) Thomas *Textbook of Roman law* 136.

\(^{50}\) Feenstra 1976 *RMT* 248 at 260.
the thing his vindicatory action would be met by the *exceptio rei venditae et traditae*,\(^{51}\) and if the holder lost possession he could recover it with the *actio Publiciana*.\(^{52}\) If the quiritarian owner defended himself by claiming that he was the true *dominus* - with the *exceptio iusti domini* - the bonitary owner could reply with the *replicatio rei venditae et traditae*.\(^{53}\)

Justinian abolished the difference between *res mancipi* and *res nec mancipi*\(^{54}\) and therefore also the *differentia inter dominos*.\(^{55}\) In principle this left only one kind of *dominium*. Justinian, however, never abolished the *actio Publiciana* or the *exceptio rei venditae et traditae*, and this has led some authors to doubt Justinian's doctrine of uniformity and exclusivity of ownership.\(^{56}\)

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51 If the *dominus* attempted to recover his property by instituting the *rei vindicatio* against the bonitary owner, the bonitary owner could refute this action with the *exceptio rei venditae et traditae*. That is, he was allowed to plead that the plaintiff sold and delivered the thing to the defendant and proof of this was a complete defence. See Buckland *Textbook of Roman law* 191; Thomas *Textbook of Roman law* 136; Feenstra *Grondslagen* 89.

52 Buckland *Textbook of Roman law* 191. Gaius never mentioned the remedies by which bonitary ownership was protected. In G 4.36 where the *actio Publiciana* is treated, it is stated in general terms that it is granted to anyone who had been delivered a thing *ex iusta causa* and had not yet completed *usucapio*. If this is read with G. 2.41, it is clear that the bonitary owner qualified for this action. The praetor probably created the *actio Publiciana* during the first century BC. This action was used to protect someone that held a thing *in bonis*, but had lost possession and could not prove *dominium*, and who could prove that, had he not lost possession, he would have become *dominus* by *usucapio*. In other words, this action was based on the assumption that *usucapio* was completed. Thus, the bonitary owner had complete protection, for even if he lost possession to the *dominus*, he could still claim the thing with the *actio Publiciana*. See Feenstra *Grondslagen* 88; Thomas *Textbook of Roman law* 137; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 229; Feenstra 1976 RMT 259; Buckland *Textbook of Roman law* 192; Kunst *Historische ontwikkeling van het recht* 193.

53 Thomas *Textbook of Roman law* 137; Feenstra *Grondslagen* 88 et seq that points out that the *exceptio rei venditae et traditae* and the *replicatio rei venditae et traditae* were available only with regard to *res mancipi*, but also with regard to *res nec mancipi*.

54 C 7.31.1.5.

55 C 7.25.1.

56 Feenstra *Grondslagen* 90; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 231.
(iii) Ownership of the *peregrini*

Gaius\(^{57}\) mentions that *peregrini* were acquainted with only one kind of ownership (*unum dominium*). *Peregrini* did not have the *ius commercii* and were thus not able to acquire *dominium ex iure Quiritium*.\(^{58}\) In 212 AD the *constitutio Antoniniana* gave Roman citizenship to all free inhabitants of the empire, resulting in the disappearance of this kind of ownership.

(iv) Ownership of provincial land

No individual, not even a Roman citizen,\(^{59}\) was able to acquire *dominium* over provincial land,\(^{60}\) because it belonged either to the *populus* or to the emperor. However, this does not mean that individuals were not able to have any rights over provincial land. The rights that could be acquired were described as *habere frui possidere licere*.\(^{61}\) The method by which these rights were asserted is not certain, though it is believed to have been an action similar to the *rei vindicatio*. Justinian abolished the difference between provincial and Italian land\(^{62}\) and, consequently, between quiritarian and provincial landownership.

\(^{57}\) G 2.40.

\(^{58}\) It is not known what the content of the ownership which *peregrini* did acquire was or how it was protected - it is believed that an action similar to the *rei vindicatio* was at their disposal. See Feenstra *Grondslagen* 38; Feenstra 1976 RMT 248 at 260; Thomas *Textbook of Roman law* 135; Buckland *Textbook of Roman law* 190; Van der Walt and Kleyn in Visser *Essays on the history of law* 213 at 228; Van der Walt *Houerskap* 54.

\(^{59}\) Certain provincial communities were granted the *ius italicum* which meant that they could have *dominium* over provincial land.

\(^{60}\) Feenstra *Grondslagen* 38; Feenstra 1976 RMT 248 at 260; Thomas *Textbook of Roman law* 135; Buckland *Textbook of Roman law* 190; Van der Walt and Kleyn in Visser *Essays on the history of law* 213 at 232; Van der Walt *Houerskap* 54.

\(^{61}\) *Lex Agraria* 50, 81.

\(^{62}\) Inst. II.1.40; C 7.31.1.
(v) Ownership of the dos

Another example of divided ownership is the ownership of the dowry or dos. Tryphonius said that although the dowry is part of the husband's estate, it nevertheless belongs to the wife. Thus, the dowry was simultaneously owned by both the husband and the wife.

(iv) Functionally divided ownership

Some authors hold that ownership was functionally divided in instances apart from the forms of ownership mentioned above. This is especially true for the old praedial servitudes, pignus, accessio of movables to immovables, emphytheusis and

63 Van den Bergh Eigendom 44; Thomas Textbook of Roman law 428.
64 D 23.3.75.
65 Kaser Eigentum und Besitz im älteren römischen Recht 17; Kaser Das römische Privatrecht 38; Diosdi Ownership 107; Jolowicz and Nicholas Historical introduction to the study of Roman law 158.
66 This applied to the old praedial servitudes iter, actus, aquaeductus and via. According to Kaser Kaser Eigentum und Besitz im älteren römischen Recht 447; Kaser Das römische Privatrecht 143 the holder of the servitude was considered owner of that part of the land over which the road or watercourse passed, so that the holder of the servitude had the Nutzeigentum and the owner of the servient estate had the Haupteigentum. Kaser bases his theory on the fact that the old praedial servitudes were regarded as res mancipi (G 2.14a) that had to be transferred by mancipatio, which originally applied to corporeals only. Thus, according to Kaser the ownership and not the right was transferred. Van der Walt and Kleyn in Visser Essays on the history of law 213 at 226, however, pointed out that already in the Twelve Tables servitudes were conceived as rights and not as a form of ownership of the land itself.
67 With reference to pignus, Justinian (C 8.33.3) stipulated that if a debt was not discharged, the emperor could grant the creditor ownership of the pignus, two years after judgement. This would only happen if the creditor could not find a purchaser. Even after the emperor granted ownership to the creditor, the debtor could still recover the pignus if he paid the debt within two years after the ownership was granted to the creditor. During this period ownership of the pignus was divided - the creditor did not have exclusive ownership and the debtor retained a claim to the thing for two years. This means that ownership was functionally divided between the debtor and the creditor. See Van der Walt and Kleyn in Visser Essays on the history of law 213 at 227.
68 According to the principle superficies solo cedit (G 2.73; Inst 2.1.29; D 41.1.7.10.), if someone built on his land with the materials of another, the movables became part of the land. The owner of the movables could not claim his material back from the owner of the immovables. (He could use the actio de tingo iuncto to claim double the value of the materials.) The owner of the movables would...
Each of the different forms of ownership discussed above had its own role and function in Roman society. Unlike the modern concept of ownership Roman law did not try to accommodate different functions or purposes into one single right. The reason for this most probably lies in the fact that the Romans followed a casuistic approach to law.

### 1.3.2 Absoluteness

Much has been said on the absoluteness\(^\text{70}\) of dominium in Roman law. Some authors suggest that the Roman dominium either knew no restrictions or was seen as in principle unrestricted although it could tolerate restrictions, while others are of the opinion that dominium has always been restricted.\(^\text{71}\)

Dominium in Roman law was never absolute in the sense that it was unrestricted. According to Kunst\(^\text{72}\) dominium was unrestricted in principle, though it could endure restrictions in the public interest and to prevent misuse. However, this formulation is not

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\(^{69}\) During the fourth and fifth centuries BC the development of real rights, such as emphyteusis (this is the perpetual lease of land that could not be terminated as long as the rent was paid. It was alienable (C 4.66.3) and hereditary (D 30.71.5) and was protected by the actio in rem (D 6.3.1.1)) and superficies (the right to build on a piece of land which also is alienable and hereditary. See D 43.18.1), signalled a further division of ownership. See Glissen Historische inleiding tot het recht 603; Thomas Textbook of Roman law 142; Buckland Textbook of Roman law 275. The medieval concepts of dominium directum and dominium utile were based on the distinction between landownership and emphyteusis. This development is discussed in chapter 2.

\(^{70}\) Visser 1985 Acta Juridica 39 at 48 remarks "By this is meant the notion that ownership is in principle unrestricted, although it 'tolerates' restrictions (by way of exception), for no one suggests that ownership has ever been totally unrestricted and the debate about the absoluteness or otherwise of ownership centres around the debate whether it is fundamentally restricted or not".

\(^{71}\) Birks 1985 Acta Juridica 1.

\(^{72}\) Kunst Historische ontwikkeling van het recht 192.
of Roman origin and reveals pandectist rather than classical views. Van den Bergh\textsuperscript{73} and others have pointed out that restrictions have always been an unexceptional part of \textit{dominium}.

\textit{Dominium} was restricted either by the state,\textsuperscript{74} by neighbour relations\textsuperscript{75} or voluntarily.\textsuperscript{76} In the Twelve Tables we find public-law restrictions relating to building, public health, and considerations of a religious character.\textsuperscript{77} Later legislation continued in this direction. Duties were also placed on the owner with reference to the maintenance of roads, aqueducts, buildings, and so on.

Although there were not many restrictions on \textit{dominium} in Roman law, it was not uncommon to place restrictions on \textit{dominium} and there also was no legal theory to set a limit beyond which legislative interference could not go.\textsuperscript{78}

1.3.3 Exclusivity

According to Diosdi\textsuperscript{79} \textit{meum esse} (as the term was used in ancient Roman law)

\textsuperscript{73} Van den Bergh \textit{Eigendom} 40; Birks 1985 \textit{Acta Juridica} 1; Buckland \textit{Textbook of Roman law} 187; Gilissen \textit{Historische inleiding tot het recht} 602; Watson \textit{Rome of the XII Tables} 157; Van Acht \textit{Burenrecht} 4; Thomas \textit{Textbook of Roman law} 133.

\textsuperscript{74} Kaser \textit{Das römische Privatrecht} 125. These restrictions either had a religious character or they were aimed at regulating land use.

\textsuperscript{75} A few examples of restrictions on ownership by neighbour relations are: the law relating to overhanging branches where the neighbour was entitled to have the branches cut off up to a height of 15 feet - see the Twelve tables Tab.vii.9 and D.43.27.1.2; the dangerous flow of rainwater from a neighbour's land - see Tab.vii.8; where one neighbour interferes with the natural flow of water to the detriment of another - D.39.3.1; way of necessity - D.8.6.14.1.

\textsuperscript{76} Probably the best examples of these kind of restrictions are servitudes (\textit{iter, aqua, via} and \textit{aquae ductus}) granted by the owner to his neighbour.

\textsuperscript{77} Kaser \textit{Das römische Privatrecht} 125. The Twelve Tables placed restrictions on burials in the city, cremations in the vicinity of the city (10.1 ff), provisions relating to clearances between buildings and with regard to duties of road construction of owners of houses facing the street (7.6 ff).

\textsuperscript{78} Birks 1985 \textit{Acta Juridica} 1 at 31.

\textsuperscript{79} Diosdi \textit{Ownership in ancient and preclassical Roman law} 124.
provided the claimant with exclusive power - you either were owner of the thing in question, or you were not. There were no intermediate degrees of ownership.  

However, the mere fact that there were more than one kind of ownership in classical Roman law implies that ownership could not have been exclusive. Gaius said that "in olden times" the principle was followed that you were either considered to be owner ex iure Quiritium or you were not considered owner at all. Ownership was thus considered to be exclusive - there could only be one owner of a specific object. However, he continues to say that ownership was made divisible so that one man may be one owner by Quiritary title and another by bonitary title.

The mere fact that the Romans knew more than one form of ownership (up to the reforms of Justinian) means that ownership - no matter what specific form of ownership - could not have been exclusive. The possibility that someone else could have a claim to the object in question always existed. This means that the notion or characteristic of exclusivity (as viewed by Gaius) meant something else than we understand under it.

1.4 Conclusion

*Dominium* in Roman law changed throughout the history of the Roman empire to suit

80 There is some academic dispute as to whether *meum esse* - as the term was used in ancient Roman law - had the character of a relative or an absolute claim. Kaser *Eigentum und Besitz im älteren römischen Recht* is of the opinion that *meum esse* amounted to a relative claim regarding a specific object. The reason for this lies in the fact that the claimant could only enforce his claim against a specific respondent. The respondent had to prove a better claim with regard to the object in question, and if he failed, the claimant would succeed. This theory entails that *meum esse* was only judged with regard to one specific respondent and not with regard to the whole world (absolutely) - thus against anybody that might possibly interfere with that relationship in future. According to Diosdi *Ownership* 94 et seq however, *meum esse* had an absolute character. This he bases on the fact that *meum esse* provided the claimant with exclusive power - you either were owner of the thing in question, or you were not - there were no intermediate degrees of ownership. Kaser can be supported as this does not mean that *meum esse* was enforceable against the whole world. The exclusiveness of ownership does not prove that ownership is absolute. The fact that there can only be one owner of a thing does not mean that the owner can enforce his right against the whole world.

81 G.2.40.

82 Ancient and preclassical Roman law.
the needs of a changing society. Although it might be true that some of the characteristics of the South African concept of ownership originated in Roman law, it cannot be said that the South African concept of ownership is similar to Roman law *dominium*. The absolute, uniform and exclusive concept of ownership as we know it in South Africa today was never part of Roman law. In fact, there was hardly a real "concept" of ownership as such. Roman law *dominium* cannot be described as an absolute or in principle unrestricted right, and it was never regarded as a uniform right or equated with individual ownership as we know it today.
2

DOMINUM IN FEUDAL LAW

2.1 Introduction

It is pointed out in the previous chapter that dominium was construed in Roman law to fit the needs of a specific society. It is shown in this chapter that both dominium in feudal law and the structure of society were completely different from that in Roman times and that dominium was developed and changed to suit the needs of medieval society. This chapter must be seen as a slice of history and not as an attempt to give a detailed account of the development of dominium since the fall of the Western Roman empire in 476 BC.¹

It was during this period of the development of dominium that the distinction between dominium directum and dominium utile was created. The concept of divided ownership, especially as it has become associated with the medieval distinction between these two forms of dominium, has captured the minds of jurists for centuries and continued to influence the development of ownership until the early 1900s.²

This chapter concerns the social function of ownership in feudal law and the changes in ownership that reflect the special social function of ownership in medieval (feudal) society.

¹ Roman law did not develop uninterrupted since Justinian, but it did not disappear either. For the reasons for the continued existence of Roman law see Feenstra Romeins recht 102.

² The concept of divided ownership was finally rejected in all civil law systems. In South Africa the idea of divided ownership was finally rejected in 1910 in Johannesburg Municipal Council v Rand Townships Registrar 1910 TPD 1314. See chapter 6 in this regard.
2.2 Feudalism in the middle ages

Society in the middle ages had a feudal structure. It is difficult to define feudalism. Maitland describes feudalism as a state of society in which all or a great part of public rights and duties are inextricably interwoven with the tenure of land, in which the whole governmental system - financial, military, judicial - is part of the law of private property. According to Ganshof feudalism was a body of institutions. This system was based on the personal relation between a free man, the vassal, who has the duty to obey and serve (usually in the form of military service) another free man, the feudal lord, who in his turn had the obligation to protect the vassal and to provide him with a fief. The fief could take different forms, but the most important was land tenure. This included not only the land itself, but everything that was attached to or associated with the land: people bound to the land, jurisdiction over the inhabitants, the right to gather tax, to hunt, to fish and a range of other rights, privileges and duties.

Feudalism had its origin in the merger of two institutions, *beneficium* and vassalage. *Beneficium* was similar to *usufructus* in many ways. The right to use something was granted to a person as a gift and no counterperformance was necessary. Vassalage, on the other hand, originally had no connection with land tenure. It was the personal relation between two men. They were bound by the mutual obligation to protect and

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3. Van den Bergh *Eigendom* 17; Stair *The laws of Scotland* vol 18 par 53.


5. Ganshof *Qu'est-ce que la féodalité*. Also see Van de Kieft 1974 *Bijdragen en mededelingen betreffende de geschiedenis der Nederlande* 193 at 194.

6. Such as the post of ranger or the right to the periodic payment from the user of a specific piece of land.

7. Van den Bergh *Eigendom* 17.

8. Gilissen *Historische inleiding tot het recht* 605; Stair *The laws of Scotland* vol 18 par 55. Also see Cairns in Birks *New perspectives on the Roman law of property* 75 et seq.

9. *Beneficium* originally ended with the death of either the usufructuary or the owner. *Beneficia* became hereditary in 877.
support each other. In the politically uncertain medieval society a weaker party, the vassal, sought the protection of a stronger party, the feudal lord. In turn the vassal was obliged to serve and support the feudal lord. In order to make this possible the personal vassals usually received their *beneficia* in the form of land. Vassalage was almost always coupled to a *beneficium* with a military character: the vassal had to render military service to the feudal lord. The feudal lord would have had many vassals and they could all count on each other in time of need. These two institutions began to merge in the eighth century so that all those who held *beneficia* - usually in the form of land - became vassals to the owner. This system continued to develop and reached its zenith in the eleventh and twelfth centuries.

One of the characteristics of feudalism was that there was no distinction between public and private law. The system of feudalism applied widely in the middle ages and this led to the decentralisation of state authority. The feudal state formed a pyramid with the king at its top. In this network of feudal relations the king, as the ultimate feudal lord, would grant land to his noblemen, as vassals. They in their turn would act as feudal lords to their subjects, and so on. Each feudal lord would have jurisdiction over all his vassals.

### 2.3 Dominium directum and dominium utile

The concepts of *dominium directum* and *dominium utile* were introduced in medieval law by the glossators. Pillius, who wrote towards the end of the twelfth century, was the first to use the term *dominium utile*. He, like many other jurists in the middle ages, was confronted by the question of how to explain feudal land tenure: did the vassal have any form of ownership in the feudal land? Pillius asked the question "*utrum vassalus habeat aliquod dominium feudi*" (whether the vassal had any *dominium* of his fief) and

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10 The distinction between public and private law played an important role in Roman law and continues to influence modern law.

11 Van den Bergh *Eigendom* 17; Gilissen *Historische inleiding tot het recht* 606; Van der Walt and Kleyn in Visser *Essays on the history of law* 242.
he answered this question in the affirmative. According to him the vassal had *dominium utile* as opposed to the *dominium directum* of the feudal lord.\(^{12}\)

The origin of *dominium directum* and *dominium utile* is controversial and is the source of a debate in which three arguments can be distinguished.\(^{13}\) Lautz\(^{14}\) based his view on acquisitive prescription in Roman law. He argued that *dominium utile* was derived from the *actio utilis* granted to the *praescriptor* of immovables. This created the impression that both the *praescriptor* and the owner had *dominium* - the *praescriptor* had beneficial *dominium*, while the owner had direct *dominium*. According to Lautz this situation was extended to feudal law.

Meynial\(^{15}\) held the view that *dominium utile* was the result of the introduction of Germanic principles into Roman terminology. Germanic law placed much more emphasis on the welfare of the group, rather than that of the individual. Ownership was not individualistic, as was the case in Roman law. The right to use a thing played a very important role in Germanic law and *usufruct* was on the same level as *dominium*. It was thus logical to regard the vassal (who had a right to use the feudal land) as owner. This fragmentation of ownership (a Germanic idea) was, according to Meynial, introduced into Roman terminology. The right to use of the vassal was described as *dominium* (*dominium utile*), while the true owner was described as *dominus directus*.

Feenstra\(^{16}\) criticises both the abovementioned arguments. According to him Lautz's argument that *dominium utile* was the direct result of the treatment of acquisitive prescription in Roman law does not hold water. It is illogical to assume that the

\(^{12}\) For a discussion see Feenstra 1976 RMT 248 at 265 et seq; Feenstra in *Fata iuris Romani* 215 et seq; Van den Bergh *Eigendom* 36 et seq; Meijers 1934 TR 129 et seq.

\(^{13}\) See Van der Walt and Kleyn in Visser *Essays on the history of law* 213 at 236 where the argument of Lautz is discussed as part of the debate between Meynial and Feenstra for the first time.

\(^{14}\) Lautz *Entwicklungsgeschichte des dominium utile* 16 et seq.

\(^{15}\) Meynial in Melanges Fitting vol 2 409 et seq.

\(^{16}\) Feenstra in *Fata iuris Romani* 215 et seq.
Glossators, who were obviously conversant with feudal law, would ignore feudal law completely in developing *dominium utile*. With regard to Meynial's argument Feenstra points out that feudal law was much closer to Roman law than was previously thought and that *dominium utile* was much more than a mere translation of Germanic custom into Roman terminology. It must rather be seen as an attempt to resolve the apparent contradiction between texts which seem to regard both the true owner and the *emphyteuticus* as owners.\(^{17}\) The Glossators argued that both were owners, but that the types of ownership differed from one another. The one was direct ownership while the other was beneficial (indirect) ownership.

The arguments in the debate on the origin of *dominium directum* and *dominium utile* are based on the writings of Pillius. Pillius\(^ {18}\) based this division of *dominium* on a text of Justinian where he (Justinian) refers to the *emphyteuticus* as a *dominus*.\(^ {19}\) The quitrent-holder had the *actio in rem utilis* to protect his claim, whereas the *dominus* protected his claim with an *actio directa* (which was used in Roman law as the opposite of the *actio utilis*). Pillius\(^ {20}\) applied this situation to feudal law. According to him the feudal lord had direct ownership or *dominium directum*, while the vassal had indirect ownership or *dominium indirectum*. The only difference between these two forms of *dominium* was that each had a different content - whereas *dominium directum* provided the *dominus* with the power of disposal, *dominium indirectum* merely provided the *dominus* with the power to use the property.

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\(^{17}\) C 11.62.2; C 11.62.4; C 11.70.4; C 11.68.2; C 11.62.12.1.

\(^{18}\) Feenstra 1976 RMT 248 at 265; Feenstra in Birks New perspectives on the Roman law of property 111 at 112; Van den Bergh Eigendom 36; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 235.

\(^{19}\) D 6.3.1; C 11.62.12.

\(^{20}\) Pillius gloss "De suis rebus" on Libri feudorum 2.3 "respondeo falsum est imo dominium alienat: scilicet utile. Retinet tamen directum: Unde utilis: et non directa vindicatio datur", See also the gloss "Tertiam personam" on Libri feudorum 2.34.3: "Dominium utile penes vassalos: directum penes dominium", and the gloss "Dominium distincta" on D 1.1.5: "vel dic dominium distincta, scilicet directa ab utilibus et e contra". Also see Feenstra in Fate iuris Romani 215 et seq and Meijers in 1934 TR 129 et seq.
2.4 Bartolus' definition of *dominium*

Bartolus de Saxoferrato (1313-1357) was responsible for the first formal definition of *dominium* in the history of the development of Roman law. Bartolus defined *dominium* as:

"Dominium est ius de re corporali perfecte disponendi nisi lege prohibeatur".\(^{21}\)

This definition, which is most probably based on the definition of freedom (of persons) of the classical jurist Florentinus,\(^{22}\) has been studied extensively throughout history and played a very important role in the later formulation of definitions of ownership.\(^{23}\)

At a first glance the definition can create the impression that Bartolus regarded *dominium* as an absolute, unlimited right. A detailed analysis shows, however, that this is not the case. Bartolus did not use the term *perfecte disponendi* to imply that *dominium* was an absolute, unlimited right.\(^{24}\) *Disponere* was used to distinguish between *dominium* and *possessio*. Whereas the *dominus* had the *ius de re disponendi* (the power to dispose of a thing), the *possessor* had the *ius de re insistendi* and could merely control the thing.\(^{25}\) *Disponere* was used in the wide sense to include the power

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\(^{21}\) Bartolus on D 41.2.17.1 no 4.

\(^{22}\) D 1.5.4: "naturalis facultas eius quod cuique facere libet, nisi vi aut iure prohibetur" See Feenstra 1976 RMT 248 at 253; Van den Bergh *Eigendom* 45; Van der Walt 1986 THRHR 305 at 310; Coing 1953 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte 348 et seq.

\(^{23}\) See section 544 Code civil; section 625 BW; section 5.1 NBW.

\(^{24}\) Van den Bergh *Eigendom* 44; Feenstra 1976 RMT 248 at 251; Feenstra in Birks *New perspectives on the Roman law of property* 111 et seq; Coing 1953 Zeitschrift der Savigny-Stiftung für Rechtsgeschichte 348 et seq; Van der Walt 1986 THRHR 305 at 310; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 242.

\(^{25}\) Van den Bergh *Eigendom* 44; Feenstra 1976 RMT 248 at 251; Van der Walt 1986 THRHR 305 at 310.

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to use, consume, alienate, and so on. Bartolus refers to another passage where he distinguishes between dominium and possessio. Here he defines dominium as the ius disponendi vel vindicandi (the power to dispose of and vindicate the thing). It ought to be clear from the above that Bartolus' only intention was to draw a distinction between the power of the dominus to dispose and power of the possessor to control property.

The word perfecte must not be misinterpreted either. It simply signifies the full power to dispose. The "full power" is, however, much more limited than the absolute entitlement to dispose of the modern concept of ownership. Perfecte merely implies that the dominus can decide (within the limits of the law) what will be in his best interest.

Nisi lege prohibeatu puts the entitlement to dispose of the dominus in perspective. The dominus had no unlimited entitlement and had to exercise his powers within the limits of the law and of other rights.

2.5 Shifting of landownership

Land played a very important role in the feudal system. The feudal lord had a social, political and legal bond with the land. As is pointed out above, feudalism was a land tenure system with a military character. The more land a feudal lord had, the more vassals he could have and this naturally meant that his army was stronger and that he had more power. Land also played an important role in the running of the feudal state. Only nobility could own land and only landowners could vote. The size of the territory

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26 Van den Bergh Eigendom 45.

27 Bartolus on D 41.2.1 no 6.

28 Bartolus refers to C 4.35.21 and states that the owner may dispose of a thing freely, as opposed to the mandatary, who must act with caution. See Van den Bergh Eigendom 45; Van der Walt 1986 THRHR 305 at 310.

29 The inspiration for this part of the definition most probably comes from C 4 38.14 which deals with the freedom of a seller to look for a buyer, or from the definition of freedom of persons in D 1.5.4. See Feenstra 1976 RMT 249 at 253; Van den Bergh Eigendom 45.
a feudal lord controlled determined the weight of his vote.\textsuperscript{30}

As the social situation in the middle ages became more secure, the need for a strong military power was diminished and the obligation of the vassals to lend military support to the feudal lords became less important. The purpose and nature of the feudal relation between the vassal and the feudal lord changed. Seen in a modern perspective, we can say that the feudal lord was owner, and the person using the land had a limited real right.

The relation between the parties was initially expressed in the payment of an annual amount of money. This amount is often referred to as rent, quitrent, interest or land tax.\textsuperscript{31} Over the years the bond between the feudal lord and the land became more and more tenuous, while the vassal's bond with the land grew ever stronger - the right to live on and use the land became perpetual and hereditary, and the amount to be paid annually became fixed. The only connection the \textit{dominus directus} had to the land, was that he could collect the yearly payment, but with the devaluation of money the annual amount payable to the feudal lord eventually became so insignificant it barely had any value at all.

According to De Blécourt and Van Iterson this situation amounts to a shift in landownership or \textit{eigendomsverschuwing}.\textsuperscript{32} Van Iterson\textsuperscript{33} states that the amount

\textsuperscript{30} Van den Bergh \textit{Eigendom} 20; Van der Walt and Kleyn in Visser \textit{Essays on the history of law} 213 at 240.

\textsuperscript{31} Van den Bergh \textit{Eigendom} 60.

\textsuperscript{32} De Blécourt originally used the term \textit{rolverwisseling}, but Van Iterson has shown that the \textit{dominus directus} and \textit{dominus indirectus} did not change roles in the true sense of the word. De Blécourt consequently adopted \textit{eigendomsverschuwing}, the term used by Van Iterson. See De Blécourt \textit{Kort begrip van het oud-vaderlandsch burgerlijk recht} (1939) 261; Van Iterson 1971 \textit{Verslagen en mededelingen van de Vereniging tot uitgave van het oud-vaderlands recht} 407 at 418; Van den Bergh \textit{Eigendom} 61.

\textsuperscript{33} Van Iterson 1971 \textit{Verslagen en mededelingen van de Vereniging tot uitgave van het oud-vaderlands recht} 407 at 418. Also see Fockema Andreae \textit{Het oud-Nederlandsch burgerlijk recht} (1906) 173, 207 and 328; Gramata \textit{Het beklemrecht in zijne geschiedkundige ontwikkeling} (1895) 84, 95; De Blécourt \textit{Kort begrip van het oud-vaderlandsch burgerlijk recht} 1 ed (1922) 124, 2 ed
payable to the *dominus directus* was originally seen as a land tax, but over the years this changed to ground rent (*grondrente*)\(^{34}\) paid by the user of the land. In modern terms it could be said that whereas the owner (*dominus directus*) originally collected tax from the user of the land (*dominus indirectus/utilis*), the situation has changed so that the original owner now only had a limited real right (the right to receive ground rent), while ownership of the land vested in the user of the land. Ownership has thus shifted from the *dominus directus* to the *dominus indirectus*.

This theory is criticised by Immink\(^{35}\) and Van der Linden.\(^{36}\) Immink\(^{37}\) states that it is hard to believe that all the true owners treated their ownership with such a degree of disinterest that it was possible for them to be reduced to "*grondrenteheffers*" and for the shift in landownership to take place.

This so-called common-sense argument of Immink does not convince. It has never been suggested that all owners were reduced to "*grondrenteheffers*" by the *eigendomsverschuiwing*. Every case has to be proven individually. Besides, history has

\(^{34}\) Translation according to *Van Dale Groot woordenboek Nederlands-Engels*. Ground rent is a limited real right according to which the entitled person could receive an annual amount from the owner. This amounted to a positive obligation to the effect that the owner had to pay a annual amount to the entitled person - as opposed to a negative obligation to endure something or to refrain from doing something. Ground rent was orginally used when the owner was in need of capital. He would sell the right of ground rent to another person and would then have to pay a fixed amount to the the buyer. This limited real right was included in the first drafts of the NBW (5.9), but was excluded in the final text. See Beekhuis *et al* *Asser* 293.

\(^{35}\) Immink 1959 *TR* 36.

\(^{36}\) Van der Linden *De cope - bijdrage tot de rechtsgeschiedenis van de opleggings der Hollands-Utrechtse laagvlakte* 336.

\(^{37}\) Immink 1959 *TR* 36 says: "Men zal het mij eens zijn, dat de hedendaagse eigenaar, die so weinig orde op zijn zaken weet te stellen dat hij het eigendomsrecht op zijn grond kwijtraakt aan zijn erfpachter, tot de uitzonderingen behoort. Zou dit dan in vroeger eeuwen niet evenzo zijn geweest? Het kost mij moeite dit te geloven. Maar het is mij volstrekt onmogelijk, aan te nemen dat enige eeuwen geleden alle eigenaren van een zo verregaande verontschuldiging van hun rechten zouden hebben blijk gegeven, dat zij a.h.w. en bloc genoeg gingen nemen met het recht van een simpele grondrenteheffer".
shown that what we believe not to be possible, often does happen. Immink goes further to say that a shift in landownership could not have taken place, since both parties involved were already owners (one being dominus directus and the other dominus indirectus). It was thus unnecessary for one of the parties to become owner. Van den Bergh, however, points out that although this might be true, it is also true that according to modern measures the position of the dominus indirectus can be equated with ownership. Van Iterson has also shown that land that was given in quitrent in the seventeenth century, was regarded in the nineteenth century as ownership burdened with ground rent.

An important argument to refute the theory of eigendomsverschuwing was made by Van der Linden. He states that the amount payable to the feudal lord does not necessary imply a quitrent relation. It must rather be given a public law character and seen as an acknowledgement of the authority of the feudal lord over the land in question. If it should appear that the user of the land indeed acts as owner, it must not be assumed that this is the result of the eigendomsverschuwing: he has been owner (dominus) from the start.

The criticism levelled against the theory of eigendomsverschuwing does not disprove the theory in its entirety - it merely shows that the theory is not watertight and that some arguments need closer scrutiny. According to Van den Berg one should be careful not to study and evaluate history with modern dogma in mind. The phenomenon of dominium directum and dominium utile was not solely a private law construction, it was definitely influenced by public law. Eigendomsverschuwing must thus be judged

38 Van den Bergh Eigendom 62.
39 Van Iterson 1971 Verslagen en mededelingen van de Vereniging tot uitgawe van het oudvaderlands recht 407 at 433.
40 Van der Linden De cope; bijdrage tot de rechtsgeschiedenis van de oplegging der Hollands-Utrechtse laagvlakte 366. See also Van den Bergh Eigendom 62.
41 Van der Walt and Kleyn in Visser Essays on the history of law 213 at 241.
42 Van den Bergh in Streefkerk and Faber Ter recognitie 9 at 17.

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with this in mind.

2.6 Conclusion

The importance of the middle ages for the development of ownership is the fact that it was during this period that the first definition of ownership was created. This definition must, however, be judged and interpreted in view of the social circumstances in which it originated. The purpose of this definition, namely to distinguish between ownership and possession, must also be kept in mind and one must be careful not to read more into Bartolus' definition than what he intended. Bartolus never regarded restrictions on dominium as exceptions and as such he never regarded dominium as absolute. The nature of divided ownership furthermore dictates that neither the dominus directus nor the dominus indirectus could have had absolute or exclusive ownership.

The feudal system of landownership illustrates the fact that Roman ownership did not develop logically and undisturbed through the middle ages. The continuity of the development of ownership was influenced by fundamental breaks or discontinuities throughout its development. The feudal system represents one of these discontinuities. The feudal system and its differences from Roman society had the effect that the nature and function of ownership changed dramatically from that of Roman law. The needs and the character of medieval society differed from that of society in the Roman empire, and in order to cater for the specific needs of medieval society ownership had to change to suit the new environment in which it had to function.

According to the traditional view ownership is flexible enough to undergo change in order to adapt to totally new circumstances. This view cannot be supported. The development of ownership is characterised by fundamental changes or discontinuities. Although it is true that ownership is flexible and capable of change, ownership did not always develop undisturbed in a logical manner. The particular circumstances in which ownership had to function in the middle ages necessitated a radical change in the concept and social function of ownership. The introduction of divided ownership
illustrates that ownership had to undergo a fundamental change to suit the needs of medieval society. Roman law *dominium* did not merely adapt to the needs of medieval society, but a new divided ownership was created to fulfill the needs of society. The particular nature and needs of feudal society necessitated the creation of divided ownership. The emphasis was not on the *concept* of ownership, but on the social and political function of ownership. The nature and protection of the different forms of *dominium* thus reflected the nature and needs of society.
3.1 Introduction

Developments in the law of ownership during the seventeenth and eighteenth centuries in Holland contributed significantly to change the way in which ownership is perceived in civil law. Not only did it have an influence on the prevailing perceptions, but it also changed the course of future developments.

A large part of this chapter is dedicated to Hugo Grotius (1583-1645), the reason being the extraordinary importance of his writings. Grotius departed from more or less established medieval practice and learning, and introduced new ideas on the origin of private ownership and the theoretical structure of the law of property. Grotius started a process of scientification of property law according to which a hierarchical system of concepts is created and emphasised. This constitutes another discontinuity or break in the development of ownership in that Grotius rejected the distinction between dominium directum and dominium utile as it was applied in medieval law and continued to develop a new system of what we now call real rights.

This chapter looks at the views of Grotius, as well as other Roman-Dutch authors, on the nature and origin of private ownership and the theoretical structure of the system of real and personal rights. The rejection of divided ownership as well as the idea of an absolutist view of ownership in Roman-Dutch law is also discussed.

3.2 The nature and origin of private ownership

Grotius' view on the origin and nature of private ownership was first discussed in De
iure praedae (1604)\(^1\) and developed further in De iure belli ac pacis (1625) and in Inleidinge tot de Hollandsche rechtsgeleerdheid (1620). This view is based on the assumption that individual ownership of property amounts to divided, separate and mutually exclusive rights accruing to individuals. It is pointed out in De iure praedae\(^2\) that ownership did not originally imply proprietas as it does in the later development of the concept; it amounted to no more than the mere facultas or power to have usus facti of common property. Individual ownership only developed when ownership became proprietas of specific individuals. The exclusive proprietary right of an individual owner implied that property was separated and removed from what was formerly common property accessible to everybody for common use.\(^3\)

According to Grotius\(^4\) individual ownership became separated from property for common use through occupatio. Grotius explains that occupatio had its origin in the acquisition of ownership through the use and consumption of consumables, from where it was extended to other movable property and finally to the occupation of immovable property.

Grotius expanded on this theory of the origin of private ownership in De iure belli ac pacis.\(^5\) He refers to this as the origin of proprietas, but states that other jurists refer to this as dominium. According to Grotius the origin of private ownership through

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1 The twelfth chapter of De iure praedae was published anonymously in 1609 as Mare liberum on request of the directors from Zeeland of the Verenigde Oost-Indische Compagnie for negotiations with South Holland on an armistice. See Feenstra 1976 Acta Juridica 269.

2 De iure praedae (1868) 215, 215. See also Feenstra 1976 RMT 248 at 270; Feenstra 1976 Acta Juridica 269 at 274; Van der Walt in Feenstra and Zimmermann Das römis-cholländische Recht 486 at 488.

3 De iure praedae (1868) 214: "Nam dominium nunc proprium quid significat, quos scilicet ita est aliculuis, ut alterius non sit eodom modo".

4 De iure praedae (1868) 216, 228 et seq; Inleidinge II.3.2-3 (1952) 50. Also see Feenstra 1976 Acta Juridica 269 at 274; Van der Walt in Feenstra and Zimmermann Das römis-cholländische Recht 486 at 488.

5 II.2 (1939) 186 et seq.
occupation was founded on the basis of a social contract - either express or tacit.  

While Grotius originally, in De iure praedae, presented occupatio as the only basis for private ownership he modified this view in De iure de belli ac pacis, where occupatio is mentioned as only one example of the kind of agreement upon which the acquisition of individual ownership is based.

Van der Walt points out that the importance of Grotius' theory for the doctrine of private ownership lies in the emphasis he placed on the concept of proprium. Grotius makes the "belonging to" aspect the most important feature of ownership. This is emphasised by his definition of ownership in Inleidinge II.3.1 and II.3.4 where the power to reclaim lost possession is accentuated. Feenstra points out that Grotius' definition of ownership was most probably influenced by Bartolus' definition of dominium as ius disponendi vel vindicandi. The proprium aspect is further emphasised by his classification of things in Inleidinge II.1.16, where all things are classified as belonging to either all people, to a group of people, to a specific person or to nobody. The proprium aspect of the definition of ownership is not new - it has its roots in Roman law and the strong link between ownership and the rei vindicatio. What is new is the fact that Grotius combines the proprium aspect with another aspect of dominium according

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6 De iure belli ac pacis II.2.2.5 (1939) 189. Also see Feenstra 1976 Acta Juridica 269 at 275; Feenstra 1976 RMT 248 at 270 et seq, Van der Walt in Feenstra and Zimmermann Das römis-ch-holländische Recht 486 at 489.

7 Grotius De iure belli ac pacis II.3.19 (1939) not only distinguishes between occupatio by an individual and occupatio by the community, but in the last instance he also distinguishes between occupatio where the community acquires imperium (and with this the ius eminens) and occupatio where the community acquires dominium privatum plenumque or full private ownership, which will be distributed amongst private individuals. In the last instance the individual will have dominium that is subject to the dominium of the community. For a discussion see Feenstra 1976 RMT 248 at 271.

8 Van der Walt in Feenstra and Zimmermann Das römis-ch-holländische Recht 486 at 489.

9 Inleidinge II.3.1 (1952) 50: "Eigendom is het toebehooren van een zaecw waer door iemand, schoon het bezit niet hebbende, 't zelve vermag rechtelick te bekomen". The second definition in Inleidinge II.3.4 (1952) 53 also accentuates the owner's power to reclaim lost possession: ".... dat den eigendom bestaat in dat recht om weder te bekomen het verloren bezit".

10 Feenstra 1976 RMT 248 at 272.
to which ownership is a facultas or potestas. This facultas or potestas is based on the human will and intellect which man exercises over himself and his exterior world.\textsuperscript{11} Ownership is thus characterised by the exercise of power and is something typically human.\textsuperscript{12} This perception of ownership creates the philosophical foundation\textsuperscript{13} for Grotius' whole concept and system of private law rights, which is worked out in the \textit{Inleidinge}.\textsuperscript{14} Grotius' perception of ownership had a considerable influence on the concept of ownership, not only in Western European civil-law systems and in South Africa, but in most modern legal systems.

\textbf{3.3 Grotius' theoretical structure for real and personal rights}

This part deals with the second part of Grotius' contribution. It concerns the conceptual and logical analysis in which he attempts to create a science of law based on a system of concepts which are connected by strict logic. Ramus\textsuperscript{15} exercised great influence upon the scientific, rationalistic approach to law according to which techniques such as definition, division and logical reasoning play a major part. According to this approach solutions to any problem can be produced by application of these techniques. The importance of this approach lies in the fact that Grotius creates a system of concepts that classify private law rights and in particular property rights.\textsuperscript{16}

\begin{itemize}
  \item \textsuperscript{11} The facultas aspect of ownership is emphasised by Grotius' definition of volle eigendom in \textit{Inleidinge} II.3.10 (1952) 54: "waer door iemand met de zake alles mag doen nae sijn geliefte ende t'zijnen bate dat by de wetten onverboden is". For a discussion see Van der Walt 1988 \textit{De Jure} 16 at 317 et seq.
  \item \textsuperscript{12} Feenstra 1976 RMT 248 at 268 et seq; Van der Walt 1988 \textit{De Jure} 6 at 17 et seq.
  \item \textsuperscript{13} Grotius relies heavily on Aquinas and the late scholastics in this part of his contribution. See Feenstra 1976 RMT 248 at 268 et seq.
  \item \textsuperscript{14} See 3.3 below.
  \item \textsuperscript{15} See in this regard Van der Merwe in Visser \textit{Essays on the history of law} 32; Van der Walt 1995 \textit{THRHR} 396 at 402 et seq.
  \item \textsuperscript{16} Van der Walt 1995 \textit{THRHR} 396 at 402 et seq; Van der Walt 1993 \textit{THRHR} 569 at 583 et seq.
\end{itemize}
Although his later classification of rights in *De iure belli ac pacis* contributed to the development of modern perceptions of patrimonial rights, Grotius' earlier classification of patrimonial rights in the *Inleidinge* had a far greater influence on Roman-Dutch law and the subsequent Dutch code.

The importance of the classification of rights in the *Inleidinge* lies in the fact that ownership is placed within a specific hierarchical system of rights. This system is not entirely new, although it is regarded as such by many. The classification does, however, contain crucial new elements and emphases.

Patrimonial rights are divided into *beheering* and *inschuld*. Grotius provides two alternative translations in the margin for both *beheering* and *inschuld*. *Beheering* is translated as *ius in rem* and *ius reale* and *inschuld* is translated as *ius in personam sive creditum* and *ius personale*. *Beheering* is defined as a patrimonial right that...

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17 In *De iure belli ac pacis* patrimonial rights are classified as being either *potestas* (*dominium*) or *creditum*. This resembles the modern distinction between ownership and personal or creditor's rights. *Dominium* is subdivided into *dominium plenum* and *dominium minus plenum*. The last category includes *ususfructus* and *ius pignoris*. See *De iure belli ac pacis* l.1.5 (1939) 32: “Facultatem juris consulti nomine Sui appellant: nos posthac ius proprium aut stricte dictum appellabimus: sub quo continentur Potestas, tum in se, quae libertas dicitur, tum in alios, ut patria, dominica: Dominium, plenum sive minus pleno, ut ususfructus, ius pignoris: et creditum cui ex adverso respondet debitum”.

18 “Patrimonial rights” seems to be the best translation for "toebehooren".

19 Feenstra 1976 RMT 248 at 271.

20 Feenstra 1976 RMT 248 at 271.

21 *Inleidinge* l.2.57-59 (1952) 48.

22 *Inleidinge* l.2.58 (1952) 48.

23 *Inleidinge* l.1.8 (1952) 1.

24 *Inleidinge* l.2.59 (1952) 48.

25 *Inleidinge* l.1.8 (1952) 1.

26 *Inleidinge* l.2.58 (1952) 48: “Beheering is 't recht van toebehooren bestaende tusschen den mensch ende de zaecie zonder noodigh opzicht op een ander mensch". Feenstra *ius in re* 25 points out that Grotius' definition of *beheering* is original, as it is not found in earlier sources. It could, however, be
exists between a human being and a thing without reference to any other human being. This definition accentuates the difference between real and personal rights: in essence a personal right exists between two or more legal subjects.

Grotius' distinction between beheering and inschuld was generally accepted by later Roman-Dutch authors. Van der Linden's distinction between *ius in re* and *ius ad rem* illustrates the fact that Grotius' division of the partimonial rights was still regarded as authoritative during the eighteenth century.

According to Grotius' classification ownership is not regarded as the only real right, but it is rather seen as one of the real rights. *Beheering* is divided into *bezitrecht* (possession) and *eigendom* (ownership). This seems to imply that real rights must be either possession or ownership. Van der Walt points out that this impression is misleading in view of Grotius' treatment of *gebrekelike eigendom*. Some of the rights that were initially defined as *gebrekelike eigendom* are later redefined as *gerechtigheden* and they turn out to be neither ownership nor possession. These rights seem to form a category on their own and are today known as limited real rights.

In the *Inleidinge* Grotius divides ownership into *volle* and *gebrekelike eigendom*. This distinction as such is not new - it existed in Roman law and played an important role throughout the middle ages. The division refers to situations were someone else than the owner has a legal right to the object in question. This can occur either where a person has lawful use and possession of the object, based on the owner's consent

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27 Van der Linden *Regtsgeleerd, practicaal en koopmans handboek* 1.6.1 (1806) 50.

28 Van der Walt in Feenstra and Zimmermann *Das römisch-holländische Recht* 486 at 491.

29 Full ownership.

30 Incomplete ownership.

31 *Inleidinge* II.3.9 (1952) 54.
and effectively excluding the owner's *rei vindicatio*, or where different people have the same or different rights to the object in question.

After discussing the acquisition and loss of full ownership, Grotius returns to incomplete ownership or *gebreckelicke eigendom*.\(^{32}\) In the case of those who have incomplete ownership, one must distinguish between the person who has nude ownership and the person who has the power to use the object in question - in terms of the medieval concept of divided ownership both were regarded as owners. This implies that where ownership is split up in title and use, both persons have *gebreckelicke eigendom*.\(^{33}\) Grotius explains this by referring to the situation where one person has the right of way over another person's land. The use right of the first person does not amount to full ownership because he is not entitled to sell the land or enjoy the fruits thereof. The second person who has to suffer the exercise of the right of way does not have full ownership either because he has to endure the burden on his land and may not exclude the first person from exercising his right of way. Each person's right is thus limited and diminished by the right of the other, thereby distinguishing both from *volle eigendom*. With regard to right of way, one must therefore say that both parties have *gebreckelicke eigendom*. Van der Walt points out that this is where Grotius introduces a theoretical sleight of hand.\(^{34}\) Up to here Grotius is explaining the situation in terms of established medieval learning, with reference to the existence of divided ownership, but now, he says, he wants to avoid confusion between the two forms of incomplete ownership (title and use). To distinguish between the two Grotius calls the one right *eigendom* or ownership and the other a *gerechtigheid* or right.\(^{35}\) The distinction is made by looking at the value of the right rather than the benefit thereof - the more valuable

\(^{32}\) *Inleidinge* II.33.1-6 (1952) 151.

\(^{33}\) *Inleidinge* II.33.1 (1952) 151: "...dat waer gebreckelicke eigendom is, ghemeenlick 't gunt den eenen ontbreekt is by iemand anders, die over-zulcks mede heeft een ghebreckelicken eigendom, ...".

\(^{34}\) See in this regard Van der Walt in Feenstra and Zimmermann *Das römisch-holländische Recht* 486.

\(^{35}\) *Inleidinge* II.33.1 (1952) 151: "... maer om onderscheidelijk te spreken noemtmen eighendom 't recht van den ghene die 't meerendeel heeft van den eighendom, als die 't land mag verkoopen ende verhuiren: ende 't minste deel noemtmen een gerechtigheid, als het recht van 't voetpad".
one being ownership and the less valuable one a right.\textsuperscript{36} It is interesting to note that in the feudal system the use right of the vassal was often more beneficial than the title of the feudal lord. By proposing that the value, rather than the benefit, should be looked at to determine who should be the owner, Grotius practically ensures that the feudal lord will be regarded as owner, because his title will more often than not be more valuable than the use right of the vassal.

The implications of Grotius' distinction between the different forms of gebrekelicke eigendom signalled a definite break with the past and introduced a new era in the way in which real rights are perceived. Where both rights were previously seen as ownership or dominium (directum and utile), only one is now regarded as dominium and the other as something less, namely a (limited real) right. This forms the basis of the current hierarchical, conceptual distinction between ownership and limited real rights.

According to Feenstra\textsuperscript{37} it seems as if Grotius distanced himself from the medieval romanists and their followers as well as the natural law authors who accepted the civil law distinctions - at first glance, the distinction between dominium directum and dominium utile does not seem to be of any importance in Grotius' exposition. However, this impression is misleading. Grotius starts out from the medieval distinction but then uses the logical and terminological move set out above to destroy it completely. Grotius very clearly sets out the whole system of what we now call real rights: this passage is a clear prefiguration of the distinction between dominium and iura in re aliena. Feenstra\textsuperscript{38} originally attributed the origin of the current distinction between ownership and limited real rights to Grotius, but subsequently qualified this view,\textsuperscript{39} and pointed out

\textsuperscript{36} Inleidinge II.33.1 (1952) 151: "Doch om te vinden het meerder ende minder deel zietmen dickmael meer op de waerde als op de baef". Note that the Latin term for "baef" is utilitas, and that this bears strong resemblance to dominium utile.

\textsuperscript{37} Feenstra 1976 RMT 248 at 273.

\textsuperscript{38} Feenstra lus in re 26.

\textsuperscript{39} See Feenstra in Birks New Perspectives 111 at 115. Feenstra states that although Grotius' division was not original, his ideas exercised a greater influence on legal practice than Donellus' ideas, especially as far as the division of dominium is concerned.
that Donellus not only used the term *ius in re aliena*, but also that the prefiguration of the Pandectist distinction is much clearer in his work than in the work of Grotius.

According to Grotius ownership is now regarded as full ownership when it allows the owner to do with the object as he pleases for his own advantage, as long as it is not prohibited by law. *Gebrekkelicke eigendom*, on the other hand, describes the situation where the owner lacks something that would provide that power. Feenstra points out that the definition for *volle eigendom* is virtually the same as Bartolus' definition of *dominium* that dates from the 14th century, but that Grotius' definition is restricted to *dominium perfectum*.

This development signifies another fundamental break in the normal, logical development of the current concept of ownership. The continuity in the development of ownership is disturbed by the definition of *volle* and *gebrekkelicke eigendom* and by the structure of real rights as worked out by Grotius. His perception of real rights, and ownership in particular, proved to be the impetus for a change in the direction of the future development of these concepts.

This section of the *Inleidinge* replaces the medieval perception, according to which title and use were regarded as forms of *dominium*, with a new system in which title is equated with ownership and use is no more than a (limited real) right, which is fundamentally and structurally less than ownership. The full impact of this only

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40 *Inleidinge* II.3.10 (1952) 54: "Volle is den eigendom waer door iemand met de zake alles mag doen nae sijn geliefde ende t'sijnen bate dat by de wetten onverboden is".

41 *Inleidinge* II.3.11 (1952) 54: "Gebrekkelicke waer aen iet, om zulcs alles te moghen doen, onttreecf". Feenstra *ius in re* 26 points out that Grotius does not supply a latin term for *gebrekkelicke eigendom* and whereas most medieval romanists would refer to these rights as *dominium*, Donellus rejected the term *dominium utile* and classified these rights as what would later be known as *ius in re aliena*.

42 Feenstra 1976 *RMT* 248 at 272.

43 Note that although Grotius uses the term *dominium plenum* in the margin, these two terms (*dominium perfectum* and *dominium plenum*) are regarded as synonyms. See Feenstra 1976 *RMT* 248 at 272.
becomes clear when one realises that the two medieval definitions of *dominium*\(^44\) do not apply to use rights (the old *dominium utile*) any more. As soon as the distinction between *dominium perfectum* and *dominium imperfectum* (full ownership and *nuda proprietas*) falls away the definition could be applied to imperfect ownership. The definition dealing with vindication applied to imperfect ownership straight away - it did not mean much except that the burden of proof was on the user. The user now loses the right to vindicate, because he is no longer regarded as an owner. This signifies another fundamental change in the development of ownership. According to Grotius' system of rights the user no longer has *dominium imperfectum* or *dominium utile* and as such the user's position cannot be upgraded to *dominium* by the process of *eigendomsverschuiving*.

Grotius' definition of *eigendom* and *volle eigendom* and his views on the nature and origin of private ownership were accepted by most Roman-Dutch writers. Vinnius\(^45\) defines *dominium* as *plena in re potestas; sive jus de re pro arbitru statuendi*. Huber\(^46\) combines Grotius' definitions of *eigendom* and *volle eigendom* and defines ownership as the owner's complete power over a thing together with the right to claim it wherever he finds it. According to Simon van Leeuwen\(^47\) ownership is the right according to which everybody's property belongs to himself. Van der Walt\(^48\) points out that Van Leeuwen's definition contains only the *proprium* aspect of Grotius' definition. Johannes van der Linden\(^49\) defines ownership as the right according to which a thing belongs to someone,

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\(^44\) See *Inleidinge* II.3.1 (1952) 50 and *Inleidinge* II.3.4 (1952) 53 where ownership is defined as the power to reclaim lost possession, as well as the definition in *Inleidinge* II.33 (1952) 151.

\(^45\) Vinnius *IV libros Institutionum imperialium commentarius* (1659) on Inst. 2.1.3.

\(^46\) Huber *Heedendaegse rechtsgeleertheyt* 2.2.5 (1768) 101: "Eygendom is een recht, waer door mensch volckomen macht heeft over een lichamelijke sake, met recht om deselve dadelijk te eyschen, waer hy se ook vind".

\(^47\) Van Leeuwen *Het rooms-hollands regt* 2.2.1 (1732) 108: "Eygendom is het regt daar uit yeders zaak hem eygen toebehoor".

\(^48\) Van der Walt in Feenstra and Zimmermann *Das römisch-holländische Recht* 486 at 506.

\(^49\) Van der Linden *Regtsgeleerd, practicaal en koopmans handboek* 1.7.1 (1806) 52: "Eigendom is dat recht, waar door eenige zaak aan iemand, met uitsluiting van alle anderen, toekomt".
with the exclusion of others. This definition emphasises the exclusivity or individuality of ownership.

3.4 The recognition of divided ownership in Roman-Dutch law

Grotius' classification of beheering had an important influence on later developments of ownership. The restriction of Bartolus' definition to volle eigendom laid the foundation for the unitary concept of ownership according to which only one owner is recognised and all other rights with regard to the object in question are reclassified as limited rights. Grotius achieved the creation of an unitary concept of ownership by defining eigendom is such a manner that the user of property is no longer regarded as dominus. The crucial element is the combination of this definition and the system or hierarchy of rights which Grotius created.

The unitary approach to ownership meant that the value of the distinction between dominium directum and dominium utile was diminished in Roman-Dutch law. This distinction clearly did not form part of Grotius' theoretical structure for real rights and he hardly ever used the terms dominium directum and dominium utile. Although he did use the term dominium utile in the margin as a Latin equivalent for tocht, Feenstra states that he probably intentionally avoided any direct use of the term dominium utile. It is also interesting to note that Grotius preferred the term opper-eigendom to indicate

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50 Van der Walt in Feenstra and Zimmermann Das römisch-holländische Recht 486 at 493.

51 Feenstra 1976 RMT 248 at 273; Feenstra 1976 Acta Juridica 269. Visser 1985 Acta Juridica 39 et seq holds a different view. According to Visser the unitary perception of ownership was only weakly developed in Roman-Dutch law, and the concept of divided ownership was an integral part of the Dutch legal system at the time. He also contends that Grotius reserved the term eigendom for dominium directum and gerechtigheden for dominium utile. For a discussion and criticism of this view see Van der Walt in Feenstra and Zimmermann Das römisch-holländische Recht 486 at 493. Van der Walt is of the opinion that the concept of divided ownership was effectively destroyed by Grotius' approach to and structure for real rights.

52 Inleidinge II.38.5 (1952) 158.

53 Feenstra 1976 RMT 248 at 273; Feenstra in Birks New perspectives 120.

54 Inleidinge II.33.1 (1952) 151.
dominium directum as used by the Glossators. It is pointed out by Feenstra\textsuperscript{55} that it was not unusual for Roman-Dutch authors to display a certain ambiguity with regard to the use of these terms.

Huber\textsuperscript{56} still distinguished between volle eygendom and bloote eygendom. This distinction, according to which volle eygendom\textsuperscript{57} includes the power to use and bloote eygendom\textsuperscript{58} excludes enjoyment (where the power to use rests with someone else), bears strong resemblance to Grotius' distinction between volle and gebrekelicke eigendom. Huber, however, also provides another distinction: Whereas the first is based on Roman law, the second is based on medieval law. He states that ownership can also be divided into beheerschende eygendom and nuttelijke eygendom.\textsuperscript{59} It seems as if this distinction of Huber is meant to provide for the medieval concept of divided ownership,\textsuperscript{60} but it is clear that Huber regards nutelijke eygendom as gerechtigheden in the same sense as Grotius, and that they are no more than what we now call limited

\begin{itemize}
\item \textsuperscript{55} Feenstra in Birks New perspectives 121 et seq.
\item \textsuperscript{56} Huber Heedendaegse rechtgeleerthyt 2.2.11 (1768) 102.
\item \textsuperscript{57} Huber Heedendaegse rechtgeleerthyt 2.2.12 (1768) 102: "Volle eygendom wordt genoemt, daer het vrucht gebruik mede te zamen gevoegt is".
\item \textsuperscript{58} Huber Heedendaegse rechtgeleerthyt 2.2.13 (1768) 102: "Bloote eygendom is soner genot; wanneer het vrucht gebruik mede te zamen is".
\item \textsuperscript{59} Huber Heedendaegse rechtgeleerthyt 2.2.14 (1768) 102.
\item \textsuperscript{60} It should be borne in mind that Huber was not a humanist, and thus he would not reject the influence of vulgar law outright. Furthermore, there is a strong possibility that the concept of divided ownership survived longer in Friesland (Huber wrote mostly on Friesland law) than it did in Holland.
\end{itemize}
real rights. Huber states that both these types of ownership are present in the case of feudal tenure, quitrent and ownership of a house built on someone else's land, and that ownership in these instances are classified as halve eygendom. This bears close resemblance to Grotius' description of gebreckelieke eigendom.

After he dealt with beheerschende eygendom Huber returns to the other types of beheeringe under the heading halve or nutlijke eygendom. He names halve eygendom, servitude, pledge, eeuwige renten and stem-recht as the other categories of beheeringe. Leen-recht, huis-recht and erf-pacht qualify as halve eygendom. He states that these gerechtigheden are called halve eygendom or nutlijke eygendom because it resembles ownership in that you can claim it from all possessors. It seems as if Huber's distinction between beheersende and nutlijke eygendom is strongly influenced by Grotius' description of volle eigendom, gebreckelieke eigendom and gerechtigheden. Not only does Huber distinguish between eigendom and gerechtigheden, but he also describes both beheersende and nutlijke eygendom as halve eygendom in the case of feudal tenure, quitrent and ownership of a house built

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61 Beheerschende eygendom is defined as the case were the use of the thing is with someone else, while the opper-eygendom and recognition remains with the (feudal) lord (Heedendaegse rechtgeleertheyt 2.2.15 (1768) 102: "Beheerschende is, wanneer het voornaemste genot der sake by een ander is, maar de opper-eygendom, en eenige erkentenisse deer van aen den Heer is verbleven"). Nuttijke eygendom is where a person has the use of a thing, but has to pay something to the feudal lord as recognition of his opper-eygendom (Heedendaegse rechtgeleertheyt 2.2.16 (1768) 102: "De nuttijlijke in tegendeel, is by die geene, die het meeste genot der saken hebben, maer echter aen den Heer tot erkentenisse van opper-eygendom, yets betalen").

62 Huber Heedendaegse rechtgeleertheyt 2.2.17 (1768) 102: "Beide dese soorten van eygendom komen te zamen in de Leen-goederen, Erf-pachten, en in Gebouwen, die op een anders grondt staen. Doch wy brengen die beneeden tot de soorten van halve eygendom".

63 Inleidinge II.33.1 (1952) 151.

64 Huber Heedendaegse rechtgeleertheyt 2.36 (1768) 260.

65 Huber Heedendaes rechtgeleertheyt 2.36.1 (1768) 260: "Dus verre van eygendom en Erf-recht. Volgen nu de ander soorten van beheeringe ... Welke zijn halve eygendom, Dienstbaertheyt, Pand ende Stem-recht, sampt eeuwige renten").

66 Huber Heedendaegse rechtgeleertheyt 2.36.3 (1768) 260: "Wy noemen dese gerechtigheden met de naem van halve eygendom, om datse naer eygendom gelijken, immers hier in, dat mense kan vervolgen ende eyschen van alle ende yder bezitter. Men noemt het ook nutlijken eygendom".
on someone else's land.

Although Voet⁶⁷ includes dominium directum and dominium utile amongst the various divisions of ownership, and states that those who enjoy dominium utile is referred to as domini, he adds that it cannot be regarded as such when dominium directum is properly regarded.

Interestingly, Van der Keessel⁶⁸ states that quitrent, feudal tenure, servitudes, pledge and similar rights can be regarded as ownership, because these rights diminish the full or complete ownership of another. This statement can be interpreted to mean that Van der Keessel does not regard Grotius' treatment of ownership as a complete abandonment of the medieval notion of different types of ownership.⁶⁹ Van der Keessel, however, continues to follow the rest of Grotius' classification, according to which a clear distinction is made between gebrekeliche eigendom and gerechtigheden, very closely.⁷⁰ Van der Linden⁷¹ does not refer to divided ownership at all, and merely distinguishes between volkomen eigendom and onvolkomen eigendom. Vinnius⁷² also

⁶⁷ Voet Commentarius ad Pandectas (1707) 6.1.1.
⁶⁸ Van der Keessel Praelectiones iuris hodierni ad Hugonis Grotii introductionem ad iurisprudentiam Hollandicam (1963) on Inleidinge II.33.1.
⁶⁹ For a discussion see Visser 1985 Acta Juridica 39 at 42; Van der Walt in Feenstra and Zimmermann Das römisch-hollandische Recht 486 at 513.
⁷⁰ One can only speculate as to the reason why he continues to follow the rest of Grotius' treatment of ownership very closely after stating that quitrent, feudal tenure, servitudes, pledge and similar rights can be regarded as ownership. It might be that he did not quite appreciate Grotius' very subtle revolution in Inleidinge II.33 or that he was unwilling to depart from very old authorities.
⁷¹ Van der Linden Regtsgeleerd, practicael en koopmans handboek 1.7.1 (1806) 52: "Eigendom is dat recht, waar door eenige zaak aan iemand, met uitsluiting van alle anderen, toekomt. - Het is inzonderheid kenbaar aan deszelfs gevolgen. Het bevat 1) het recht om te genieten de vrugten, die van de zaak voortkomen. 2) Het recht, om zig van de zaak te bedienen tot zoodanig betamelijk gebruik, als men goedvindt. 3) Het recht, om de form of gedaante der zaak, naar goedvinden, te veranderen. 4) Het recht, om de zaak, des goedvindende, geheel te vernietigen. 5) Het recht, om aan anderen te beletten, zig van de zaak te bedienen. En 6) Het recht, om de zaak te vervreemden, of eenige andere zaak van recht, b.v. gebruik, aan anderen over te dragen. - Waar deze gevolgen allen niet gevonden worden, is de eigendom onvolkomen. - Men moet dit alles egter opvatten met die bepaling, mits het voorschrift der wetten, of het recht van een derden niet beledigd worde".
⁷² Vinnius IV libros Institutionum imperialium commentarius (1659) on Inst. 2.1.3.
follows Grotius classification closely, and only uses the term *dominium utile* once as a synonym for *dominium minus plenum*. The fact that Vinnius seems to reject the concept of divided ownership is not strange in view of the fact that he was a humanist, and as such he would reject any medieval influence on Roman law.\(^{73}\) Van Leeuwen\(^{74}\) merely discusses Grotius' distinction between ownership and possession, as well as the distinction between *volle eygendorp* and *gebreeklijke eygendorp*, and makes no mention of either *dominium directum* or *dominium utile*.

Grotius' distinction between *eigendom* and *gerechtigheden* placed the Roman-Dutch law of property on a route that differed from other European countries at the time and thus the effect of divided ownership was much less influential in Holland.\(^{75}\) Although it is clear that most of the Roman-Dutch authors did not abandon divided ownership completely, it is equally clear that they did not emphasised it, nor did they regard it as the only approach to private ownership. The occasional reference to *dominium directum* and *dominium utile* seems to indicate that divided ownership nominally still formed part of Roman-Dutch law, though most Roman-Dutch authors followed Grotius' distinction between *eigendom* and *gerechtigheden*. According to Van der Walt\(^{76}\) the actual theoretical basis and impetus for the abandonment of the concept of divided ownership was already provided by Grotius' definition of *gebrekelicke eigendom*.

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\(^{73}\) See in this regard Van Zyl *Geskiedenis van die Romeins-Hollandse reëg* 140 et seq.

\(^{74}\) Van Leeuwen *Het Rooms-hollands regt* 2.2.1 (1732) 108: "Alle regt op enig goed bestaat, of in eygendorp, of besit-regt: Eygendorp is het regt daar uit yeders zaak hem eygen toebehoort. ...Derhalven den eygendorp onderscheyden werd, in volle, of gebreeklijken eygendorp. Vollen eygendorp is als yemand beeffens het regt van eygendorp, ook het volkomen gebruik heeft. Gebreeklijke, so wanneer den eygendorp hem wel toekomt, maar of het gebruik een ander heeft of immers iets ontbreekt, waarom hy niet alles daar me kan doen wat hy begeert".


\(^{76}\) Van der Walt in Feenstra and Zimmermann *Das römisch-holländische Recht* 486 at 493.
3.5 The absoluteness of ownership in Roman-Dutch law

The way in which ownership is defined and the place it takes within the structure of rights in a particular system will determine whether ownership within that specific system is regarded as absolute or relative.

The fact that ownership in Roman-Dutch law was restricted quite severely is not disputed, but this does not necessarily imply that ownership was regarded as relative. Restrictions have always formed part of ownership. Bartolus' definition is a clear example in that he defines ownership as the right of complete disposal, but with the express proviso that this right is limited by law. Even the German Pandectists, who defined ownership in absolute terms, recognised the fact that ownership will always be subject to restriction. In order to determine whether or not ownership was perceived as an absolute right, it should be determined whether restrictions on ownership are regarded as an integral and natural part of ownership in a specific system or whether the unlimited nature of ownership is regarded as natural within that system.

It is difficult to determine whether ownership had an absolute or relative character in Roman-Dutch law. Grotius' theory on the nature and origin of private ownership was widely accepted by Roman-Dutch authors. According to Grotius' theory two aspects, the *proprium* and *facultas* aspects, can be identified. The theory is based on the assumption that individual ownership of property amounts to divided, separate and mutually exclusive rights accruing to individuals - this is described as the *proprium* aspect. The discretionary use of an individual owner - the *facultas* aspect - implies that property is separated and removed from what was formerly property accessible to everybody for common use. According to this approach, ownership would be regarded

77 For examples of various restrictions on ownership in Roman-Dutch law see Visser 1985 *Acta Juridica* 39.

78 Bartolus on D.41.2.17.1 no 4: "Dominium est ius de re corporali perfecte disponendi nisi lege prohibeatur".

79 Savigny *System des heutigen römischen Rechts* 367; Windscheid *Lehrbuch des Pandektenrechts* 492.
as absolute. It should, however, be noted that the Roman-Dutch authors never really theorised about or considered the possibility of the absoluteness of ownership. They merely made structural and terminological changes which made it possible for future generations to interpret ownership as an absolute right.

Judged against the background of the hierarchy of rights - as devised by Grotius - it seems easier to argue that (at least full) ownership has an absolute character. Ownership is the strongest real right in the scientific system of logically connected concepts and the different definitions, divisions and logical relations place ownership at the pinnacle of the structure of real rights, while all the other real rights are limited rights and have a relative character. Grotius could only succeed in creating this new vision of the concept of ownership by destroying the old, medieval concept of divided ownership.\textsuperscript{80}

The fact that divided ownership was not quite dead in Roman-Dutch law complicates this argument. Divided ownership \textit{per se} implies a relative right of ownership and this stands in the way of simply classifying ownership in Roman-Dutch law as absolute. Thus, although ownership in Roman-Dutch law cannot be described as absolute, it can be said that there was a strong tendency towards the recognition of such a view. Van der Walt\textsuperscript{81} points out that although the actual absolutist formulation of ownership had its origin with the German Pandectists, the approach of Grotius and other Roman-Dutch authors, and the fact that the remnants of divided ownership were practically meaningless, laid the foundation for this perception of ownership.

\subsection*{3.6 Conclusion}

Grotius destroyed the feudal forms of divided ownership and emphasised the importance of the individual by reverting to individual, uniform ownership. Although he

\textsuperscript{80} Van der Walt 1995 \textit{THRHR} 396 at 405.

\textsuperscript{81} Van der Walt in Feenstra and Zimmermann \textit{Das römisch-holländische Recht} 486 at 509.
started out from the medieval distinction between *dominium directum* and *dominium utile*, he used the logical and terminological distinction between the different forms of *gebrekelijke eigendom* to destroy it. Most other Roman-Dutch authors did not emphasise divided ownership and to a large extent they followed Grotius' distinction between *eigendom* and *gerechtigheden*. Most Roman-Dutch authors emphasised the free will and autonomy of the individual some extent, and this, coupled with the move away from medieval divided ownership, accentuated the individualistic nature of ownership and paved the way for the creation of the concept of absolute ownership in subsequent periods of development.

Grotius also created a hierarchical system of property rights by defining *volle eigendom* as the most complete (real) right and all other rights with regard to property as lesser rights. Grotius set out the whole system of what we now call real rights. Up to this point in history the emphasis was on ownership or *dominium*, but the system of rights created by Grotius can be viewed as the transition of the focus from ownership to property is the sense of a system of rights. This indicates that the current private law perception of property rights is based, not on Roman law, but rather on the work and influence of Grotius and other subsequent influences.
4.1 Introduction

The French Revolution is often perceived as a turning point in the historical development of private law, especially as far as the social function of ownership is concerned. Before the Revolution ownership was basically still a feudal institution. Ownership was centred around the family or clan and the way in which the owner exercised his rights was determined by the needs and interests of the community in which the right functioned.¹ Numerous burdens were placed on ownership in feudal law and ownership was subject to many restrictions.² In the nineteenth century, by contrast, ownership was perceived as individual and absolute in the sense that the owner can use his property as he sees fit.³ Personal freedom and liberty were accentuated more strongly and the interests of society have to play second fiddle to the needs and will of the individual. The French Revolution is regarded by many as the event that brought about this change in the function of ownership.

4.2 The French Revolution: A brief historical overview

In order to explain the significance and influence of the French Revolution on the concept of ownership, a brief historical overview of the events that led to the adoption of the Declaration des droits de l'homme et du citoyen (and with this the abolition of

² See chapter 2.
³ This development is discussed in chapter 5. Also see Van den Bergh Eigendom 51 et seq.
feudalism) and the Code Civil is provided in this section.

4.2.1 The abolition of feudalism

The eminent threat of bankruptcy of the French state compelled Louis XVI in May 1789 to convocate the States General (Etats-Généraux). This set the stage on which the Revolution would unfold around a demand, not for mere fiscal reforms, but for change in the whole structure of government and society. On 4 May 1789 Louis XVI decreed that the classes (citizenry, the clerical order and the nobility) were to meet separately and that voting would take place per class. The citizenry consequently left the States General and created a new forum which they called the Assemblée Nationale Constituante or Constituent Assembly. The clerical order, the nobility and the citizenry

4 It is generally believed that the French revolution is the result of a class struggle between the nobility and the clerical order on the one hand and the citizenry on the other. See Kelly A short history of western legal theory 247 in this regard. Van Goethem 1989 Rechtskundig Weekblad 209 et seq, however, points out that this view is not entirely correct. According to him the strict division between nobility and citizenry was not part of the social reality of pre-revolutionary France. It was not only nobility that enjoyed the privileges of the feudal system. The vast majority of the feudal privileges were not in the hands of the nobility, but rather in the hands of a part of the citizenry - the reason being that since the eighteenth century these privileges could be sold (and indeed were sold to commoners). On the one hand the reason for the revolution lies in the struggle between the landowners and the people that had to work the land, and on the other it lies in the disgruntlement of the landowners with the arbitrariness of state power.

5 As part of the preparations for this meeting the representatives from the different areas had to provide the king with Cahiers de doléances (letters in which the grievances and wishes of the French people were set out) to indicate what the king could expect from the meeting. Two aspects were present in almost all the cahiers de doléances: firstly, a call for the unification and codification of the law in general and secondly the need for the protection of ownership - which included protection against the feudal system according to which the men that actually worked the land were made dependant on the feudal lords. See Van Caenegem An historical introduction to private law 7; Lokin and Zwalve Hoofstukken uit de Europese codificatiegeschiedenis 156; Van den Berg Codificatie en staatsvorming 230 et seq.

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were all represented in this new body.\textsuperscript{7}

Before the Assembly started work on the constitution they concentrated on drafting the Declaration des droits de l’homme et du citoyen. On the night of 4 August 1789 the Constituent Assembly unanimously\textsuperscript{9} abolished feudalism and the attached privileges of the nobility,\textsuperscript{9} and a few days later, on 26 August, the Declaration was likewise accepted unanimously. This meant that the citizenry not only inherited a capitalist system, but also a comprehensive power position.\textsuperscript{10} Political liberalism, the realisation of personal freedom and equality were emphasised by the Constituent Assembly.\textsuperscript{11} The relation between the freedom of the individual and the freedom of landownership from feudal bondage are emphasised in sections 1 and 17 of the Declaration. Section 1 of the Declaration des droits de l’homme et du citoyen determines that all people are born free and equal in rights and that social distinctions are to be founded exclusively on their social utility. The inviolability of private ownership is guaranteed is section 17 of the Declaration. Ownership is described as a “droit inviolable et sacré” and can be taken from someone only on the clear ground of social necessity, according to statutory authority, and on condition of compensation.

\textsuperscript{7} The main purpose of the Constituent Assembly was to draft a written constitution for France. Since the king was reluctant to act against the new Constituent Assembly, it gained some sort of legal status. See Lokin and Zwalve Hoofstukken uit de Europese codificatieschiedenis 158.

\textsuperscript{8} The nobility agreed to the abolition of the feudal system and their privileges. According to Van den Bergh Eigendom 51 these privileges had outlived their historical right of existence. Lokin and Zwalve Hoofstukken uit de Europese codificatieschiedenis 158 point out that the suggestion to abolish feudalism came from the nobility itself - in the person of the viscount of Noailles - and was accepted in a gush of overexcited enthusiasm. The nobility felt that they would gain more by abolishing the feudal system: they would be free from the burdens of feudalism and only have to share their political power with the citizenry. See Van Goethem 1989 Rechtskundig Weekblad 209 at 212.

\textsuperscript{9} Van den Bergh Eigendom 51; Van Goethem 1989 Rechtskundig Weekblad 209 at 212; Lokin and Zwalve Hoofstukken uit de Europese codificatieschiedenis 158; Van den Berg Codificatie en staatsvorming 247 et seq; Kelly Historians and the law of postrevolutionary France 129.

\textsuperscript{10} Van Goethem 1989 Rechtskundig Weekblad 209 at 210.

\textsuperscript{11} Van den Bergh Eigendom 51.
The abolition of feudalism went to the core of the grievances of the citizenry. The class system was rejected and with it the distinction between dominium directum and dominium utile was abolished. From this point on all citizens would have equal rights and everybody would be free to acquire and hold property in full ownership. According to Van den Bergh the abolition of the feudal system also meant that a clear distinction was drawn between public and private law. This meant that the link between political rights and landownership was severed and that government powers could no longer be held and controlled by private individuals and sold as personal property.

4.2.2 The drafting of the Code Civil

Napoleon Bonaparte commissioned four men to draft the French civil code.

12 Van Caenegem An historical introduction to private law; Lokin and Zwalf Hoofstukken uit de Europese codificatieschiedenis 157. One of the things that was named specifically during the debate on the abolition was the freedom from taxes of the nobility. See Van den Bergh Eigendom 51.

13 French authors tended to see the actual user of land as the real owner, even while the distinction between dominium directum and dominium utile was still in vogue. See Pothier in Oeuvres Completes 1 1 3. For a discussion see Van der Walt 1986 THRHR 305 at 316; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 246.

14 Van Goethem 1989 Rechtskundig Weekblad 209 at 212; Van den Bergh Eigendom 51.

15 Van den Bergh Eigendom 51.

16 This system was, however, replaced by a system of census franchise. This meant that franchise was made dependent on the amount of taxes one pays or the number of hours one works. See Van den Bergh Eigendom 24; Kelly A short history of western legal theory 293.

17 The first French Constitution, which included the Declaration des droits de l'homme et du citoyen, was officially endorsed by Louis XVI on 14 September 1791. This constitution determined that France would henceforth be a constitutional monarchy. This form of state, however, would not last long, for on 10 August 1792 the king was suspended for using his veto too often. From this point on the Revolution would radicalise. On 25 September 1792 France was declared a republic, "une et indivisible", and shortly after Louis XVI and hundreds of others were executed. The period of political and social turmoil that followed - and with that the French Revolution - ended on 9 November 1799 with the coup d'état lead by Napoleon Bonaparte. Napoleon himself declared: "Citoyens, la Révolution est fixée aux principes qui l'ont commencée. Elle est finie". During the period from the declaration of the republic to Napoleon's coup various attempts were made to codify French civil law, but without any success.

18 Before this three different attempts at codifying the French civil law were made by Cambacérès (1793, 1794 and 1798). In each of these attempts Cambacérès tried to reflect the political view of
Tronchet, Bigot-Préameneu, Portalis\(^{19}\) and Maleville set to work and finished the first draft within four months. On 21 March 1804 the *Code Civil des Français* was adopted. Ownership is defined in section 544 *Code Civil*:

"La propriété est le droit de jouir et disposer des choses de la manière la plus absolue, pourvu qu'on n'en fasse pas un usage prohibé par les lois et par les règlements".

According to Van Caenegem\(^{20}\) the *Code Civil* is the culmination of the evolution of French law. It contains both old law - some of it is directly derived from customary and Roman law of the middle ages - and new law, and is not as revolutionary as one might expect. The distant sources of the code included customs, Roman law and case law of the *parlements* - especially the *Parlement de Paris*. The authors of the code also consulted traditional commentators of French law such as Bourjon and Pothier. Although old law was the most important element of the code, the authors had no intention of re-establishing the old regime: it replaced most of old law with a single and uniform code for the whole of France, incorporated several ideological measures that stemmed from the Revolution and attempted to make the role of the legal scholar superfluous by prohibiting doctrinal commentary on the code.\(^ {21}\)

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\(^{19}\) Portalis, who wrote the famous preface to the *Code Civil*, is considered the most important draughtsman of the code. See Derine *Grenzen van het eigendomsrecht in de negentiende eeuw* 53 et seq; Van Caenegem *An historical introduction to private law* 7 et seq; Van Dievoet *Het burgerlijke recht in België en in Nederland van 1800 tot 1940* 5 et seq; Valkhoff 1957 RMT 21 at 24.

\(^{20}\) Van Caenegem *An historical introduction to private law* 1 et seq.

\(^{21}\) Also see Kelly *A short history of western legal theory* 312.
The general tone of the code is distinctly conservative. According to Portalis the essential role of the state is to ensure preservation, peace and security in law. The code attempts to achieve this by emphasising its respect for the family and absolute property rights as the basis of the social order.

One of the characteristics of the different codes of the early nineteenth century - and with that the Code Civil - was the abolition of feudalism and inequality and, in doing so, it attempted to make the law accessible to all. It must, however, be said that although the Code Civil recognised the fundamental principle of the disburdenment of landed property, it did not liberate or emancipate the owner totally. Many inequalities and burdens (especially feudal burdens) were abolished, but the code also introduced new ones.

The Code Civil introduced a new era in the development of private law. According to Van Kan the realisation of the code in that time and under those circumstances was indeed an achievement. It meant that legal uniformity replaced legal diversity, legal simplicity replaced legal disorder and security in law replaced legal insecurity. From this point on all citizens would be free and equal with regard to corporeal things, subject to nothing but the law, and only restricted in so far as they wished to commit

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22 Van Caenegem *An historical introduction to private law* 7.

23 Portalis in his *Discours préliminaire* (preface) to the *Code Civil des Français*.

24 In Book I, whose main characteristic is submission to the power of husband and father.

25 In Books II and III. For Portalis' view of the extent of the absoluteness of the property rights see par 4.4.

26 Robinson, Fergus and Gordon *An introduction to European legal history* 414.

27 For a discussion see Van Caenegem *An historical introduction to private law* 9 et seq.

28 Van Dievoet *Het burgerlijke recht in België en Nederland van 1800 tot 1940* 3; Van den Bergh *Eigendom* 51.

29 Van Kan 1920 *TR* 359 et seq.
themselves or acted unlawfully.  

4.3 The general perception regarding the influence of the French Revolution on the concept of ownership

The French Revolution and the Code Civil are often regarded as the catalysts for the development of the modern individual and absolute concept of ownership. According to Kelly, the modern character of ownership is directly derived from the French Revolution. The unjust legalism of the old regime was superseded by the idea of absolute property based on subsistence and the legitimising force of labour. Van Goethem states that with the abolition of the feudal burdens the elements of ownership were no longer divided among different parties, but was concentrated in the hands of one person who has absolute ownership. A definite break with the old regime is evident in the way that the owner is described by authors in the nineteenth and early twentieth century. The post-revolutionary owner is seen as an absolute lord and master, as a despotic sovereign that may dispose of his property with unlimited power. To emphasise the absoluteness and individualism of ownership, it is described as "individualisme absolu", "individualisme unilatéral", "individualisme abstait" and "individualisme excessif". Under the influence of the practitioners of civil law most jurists were misled to summarise the entitlements of the owner in abstracto. According to Savatier these entitlements included, amongst others, the power to destroy one's property. However,

30 Van den Bergh Eigendom 51.
31 Kelly Historians and the law in post-revolutionary France 129.
33 Derine Grenzen van het eigendomsrecht in de negentiende eeuw 6 and the sources mentioned there.
34 Savatier Du droit civil au droit public 53. According to Savatier the owner may even go so far as to destroy his house during a housing shortage. For further discussion see Derine Grenzen van het eigendomsrecht in de negentiende eeuw 9.
the second part of section 544 *Code Civil* mentions the fact that limitation by statute or regulation is possible.

Ownership in the nineteenth century is often seen as essentially unlimited. Limitations that do exist are not seen as something inherent to ownership, but rather something placed on ownership from outside. The unlimitedness of ownership is seen as a natural law principle so that each and every limitation needs to be justified. This unlimitedness is also directed at the legislature who has to refrain from measures that restrict the owner's freedom, in so far as these measures are not absolutely necessary.\(^\text{35}\)

This perception of ownership as an absolute, individual right is based on the description of ownership as "droit inviolable et sacré" in the *Declaration des droits de l'homme et du citoyen* and as a "droit de jouir et disposer des choses de la manière la plus absolue" in the *Code Civil*.\(^\text{36}\) A second argument that is used to support this view is that the *Code Civil* (and with that section 544 specifically) is not only the product of juridical work, but it is also that of a philosophical revolution that developed in the eighteenth century and reached its zenith in the French Revolution.\(^\text{37}\) The fact that very few limitations on ownership existed in the nineteenth century is also used to support the view that ownership became absolute.\(^\text{38}\)

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\(^{35}\) For a discussion see Beekhuis et al *Asser* 21. Reehuis et al *Pitlo* 276 confirm this view by stating that the modern concept of ownership developed from the essentially unlimited concept of ownership in the early nineteenth century.

\(^{36}\) Derine *Grenzen van het eigendomsrecht in de negentiende eeuw* 10; Beekhuis et al *Asser* 21.

\(^{37}\) The work of Grotius, Pufendorff, Rousseau and Kant are often quoted to support the argument that every individual is a sovereign with an absolute autonomy to exercise his own will. These authors have, however, stated that the autonomy is tempered by the interests of society and is not boundless. See Derine *Grenzen van het eigendomsrecht in de negentiende eeuw* 11 et seq; Kelly *Historians and the law of post-revolutionary France* 127 et seq; Kelly *A short history of western legal theory* 292 et seq; Morin 1929 *Revue de Métaphysique et de Morale* 271 et seq.

\(^{38}\) Derine *Grenzen van het eigendomsrecht in de negentiende eeuw* 147 et seq points out that there did indeed exist many limitations on ownership. Also see Valkhoff 1957 *RMT* 21 at 25. Reehuis et al *Pitlo* 276.
4.4 An alternative view

Van den Bergh warns that the influence of the French Revolution on the development of ownership must not be overemphasised. In his view, historical analysis shows that the idea that the absolute character of ownership is directly derived from the Revolution is not as obvious as is often believed.

The famous description of ownership as a "droit inviolable et sacré", which is often quoted to summarise the liberal, capitalist, absolute concept of ownership that supposedly stems from the Revolution, was a principle of political rather than legal import. It had nothing to do with the freeing of land from feudal bondage or the entitlements of the owner, but rather with the question of expropriation in the public interest. Section 17 of the Declaration des droits de l'homme et du citoyen was aimed at a specific abuse: that of the theory of dominium eminens, which in some circles meant expropriation without compensation. Section 17, which was proposed by Duport, was not meant to make ownership absolute. This is evident from Duport's own view of the concept of ownership. In his view, which is derived from jurists such as Grotius, Pufendorf and Van Bijnkershoek, ownership is an essentially limited right.

39 Van den Bergh Eigendom 51. Also see Feenstra 1976 RMT 248 at 256; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 245.

40 Van den Bergh Eigendom 53; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 245.

41 Section 17 determines that rights of ownership are sacred and inviolable, and can be taken from somebody only on the clear ground of social necessity, according to statutory authority, and on condition of indemnity.

42 For the different interpretations of the theory of dominium eminens see Van den Bergh Eigendom 53.

43 Adrien Duport was a member of the moderate liberal faction in the National Assembly. See Sandweg Rationales Naturrecht als revolutionäre Praxis 230; Van den Bergh Eigendom 53.

44 Grotius Inleidinge tot de Hollandsche Rechtsgeleerdheid (II.3) 52.

45 Pufendorff De jure naturae et gentium 378.

46 Van Bijnkershoek Dissertatio de domnio maris 1. II, 124.
Ownership, according to these authors, is not a natural right in the absolute sense and does not negate public interest. Rather, it is a social institution, created for the benefit of an orderly society. Public interest requires that ownership be protected, but ownership finds its limits in that same public interest.\textsuperscript{47} The description of ownership as a sacred and inviolable right is thus directed at protecting the owner from arbitrary action by the state, and not to indicate that ownership is an unlimited or absolute right. Or put differently, the description is aimed at the state's power of eminent domain and not at the police power limitation of ownership.

Section 544 Code Civil, and especially the words "de la manière la plus absolue", has led many a jurist to the conclusion that ownership is an absolute right and that the owner has total freedom to use or abuse his property as he sees fit. Derine\textsuperscript{48} points out that the description of ownership in section 544 - according to which the first part sets out the freedom of the owner and the second part qualifies this freedom by stating that the freedom is subject to limitation by law and regulation - is not a product of the Revolution. Bartolus\textsuperscript{49} and others\textsuperscript{50} have also described ownership in this way. The words de la manière la plus absolue, however, is a new addition to the definition and its exact origin is not known.\textsuperscript{51} What the authors of the Code Civil tried to accomplish with these words is not entirely clear. What is clear, however, is what they did not intend to suggest that ownership is absolute in the sense that it is an unlimited right. Pothier,\textsuperscript{52} who is generally accepted as the jurist who had the biggest influence on the

\textsuperscript{47} Sandweg Rationales Naturrecht als revolutionäre Praxis 230

\textsuperscript{48} Derine Grenzen van het eigendomsrecht in de negentiende eeuw 31. Also see Feenstra 1976 RMT 248 at 250.

\textsuperscript{49} Bartolus on D 41.2.17.1 no 4. Also see chapter 2 for a discussion.

\textsuperscript{50} Duarenus Omnia Opera I.XVII 1348; Cujacius Opera omnia XLI.1 860; Gothofredus Corpus iuris civilis D 41.1; Pothier Pandectae Justianaeae 95.

\textsuperscript{51} Feenstra 1976 RMT 248 at 250; Derine Grenzen van het eigendomsrecht in de negentiende eeuw 39.

\textsuperscript{52} Pothier De domaine de propriété 15 et seq. The examples provided by Pothier clearly indicates that the limitations on ownership can be quite severe. According to him a ban can be placed on the planting of tobacco or the exporting of grain in times of shortage. The owner can even be
content of the code, emphasised the fact that ownership is always subject to limitations.

The authors of the code, including Napoleon, did not view ownership as an unlimited right. Portalis emphasised this fact in his explanatory note to the ownership clause. He states that, although ownership entails the freedom to enjoy and dispose of one's property in the most absolute manner, it must be kept in mind that ownership always functions within a specific society, and that the owner must exercise his freedom within the bounds of that society. Freedom always exists within the bounds of the law and must be exercised in harmony with the law and never in conflict with the law.

Maleville refers to the description of ownership as the *ius utendi* and the *ius abutendi*, and points out that the *ius abutendi* must not be interpreted to mean the right to abuse one's property. It merely indicates that the owner can use his property in such a way that the property is consumed - as opposed to *ius utendi* where the property is not consumed, but remains in existence. Grenier, as spokesman for the Tribunate, also praised the ownership clause in section 544 *Code Civil* for not recognising the right to abuse.

It ought to be clear that the authors of the *Code Civil* did not intend to suggest that ownership was absolute by using the words *de la manièr e la plus absolue* to describe the owner's right. Although it is not entirely clear, it seems that they described ownership as the most absolute right to enjoy and dispose of property to distinguish between ownership and other more limited rights such as usufruct. The texts of

compelled to sell his products on the market, and not to influence the price of grain by withholding the product.

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53 Derine *Grenzen van het eigendomsrecht in de negentiende eeuw* 60 et seq and 79 et seq; Valkhoff 1957 RMT 21 at 24.

54 Fenet *Recueil des travaux préparatoires de Code Civil* XI 116.

55 Maleville *Analyse raisonnée de la discussion de Code Civil au Conseil d'Etat* 29; For a discussion see Feenstra 1976 RMT 248 at 251; Derine *Grenzen van het eigendomsrecht in de negentiende eeuw* 41.

56 Fenet *Recueil des travaux préparatoires de Code Civil* XI 158.
Maleville and Grenier, that distinguish between "abut" for ownership and "uti" for usufruct, point in this direction.\(^{57}\)

4.5 Conclusion

Although it is clear that the Revolution and the political, social and economical developments that accompanied it had a significant effect on the development of ownership, Van den Bergh can be supported in his view that the importance of the French Revolution must not be overemphasised. The liberation of land from feudal bondage was a strong incentive for the shift in landownership with its concomitant political effect on equality and freedom. The result was that the functional fragmentation that was recognised throughout the Middle Ages was rejected and replaced by a more individualistic view of the relationship between man and land.\(^{58}\) Feudalism, and with that divided ownership, was finally abolished in the \textit{Declaration des droits de l'homme et du citoyen}. Section 544 \textit{Code Civil} defines ownership as part of a whole system of rights. The most important influence of the French Revolution is the fact that the feudal system, and with that the property relations associated with that system, was abolished and replaced by individual ownership.

However, the abolition of feudal ownership did not have the effect that ownership acquired an absolute character. Although the emphasis shifted to individualism and the power of the individual to make his/her own decisions with regard to the use and enjoyment of his/her property, this should not be seen as an implication that ownership is an absolute or in principle unrestricted right.

The abolition of feudalism in the \textit{Declaration des droits de l'homme et du citoyen} shifted

\begin{itemize}
  \item \(^{57}\) Derine Grenzen van het eigendomsrecht in de negentiende eeuw 42.
  \item \(^{58}\) The principle of an individualistic right was, however, limited by the its treatment in the \textit{Declaration des droits de l'homme et du citoyen} according to the \textit{Declaration} ownership is granted in order to promote the social objective of an orderly society. See Van den Bergh \textit{Eigendom} 52 et seq; Van Maanen \textit{Eigendomschijnbewegingen} 23; Van der Walt and Kleyn in Visser \textit{Essays on the history of law} 213 at 245.
\end{itemize}
the emphasis to individualism, and the institution of ownership consequently acquired its unitary character. This created the possibility for the drafters of the Code Civil to define ownership as a right which forms part of a hierarchical system of rights. The Code provided for both ownership and limited real rights. This had a bearing on the institution of ownership as well as on the concept of ownership, and laid the foundation for the later recognition of the concept of absolute ownership. This system, which had its origin in the work of Grotius, would be developed further by the German Pandectists.

The Revolution represents another discontinuity in the natural and logical development of ownership. The Revolution led to the abolition of the feudal system and the creation of the modern state. The social and political changes brought about by the Revolution led to and necessitated a shift in the nature, content and protection of property rights. The post-Revolution society differed completely from medieval society and property right had to undergo fundamental change to provide for the social and political needs of post-Revolution society.
5.1 Introduction

It was pointed out in Chapter 4 that, although the French Revolution was the catalyst for the removal of many restrictions on ownership, it did not lead to the creation of the modern unitary and civilist concept of ownership. Although many restrictions on ownership were removed in Roman-Dutch law, as a result of the French Revolution, and in German law, it is generally accepted that the most influential version of the modern civilist concept of ownership was created in the nineteenth century by the German Pandectists.¹

This chapter looks at how the modern civilist concept of ownership was created in German law. The concept of ownership according to the authors in the tradition of the *Usus Modernus Pandectarum* and the followers of the Historical School is considered briefly, and finally the work of the German Pandectists, especially Bernhard Windscheid, is discussed.

5.2 The *Usus Modernus Pandectarum*

In an important phase of the development of German law during the seventeenth and eighteenth centuries, a group of jurists concentrated on the development of German national law.² Their positivist approach to legal practice was known as the *Usus*

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¹ Van den Bergh *Eigendom* (1979) 5; Visser 1985 *Acta Juridica* 39 at 46; Van der Walt 1993 *THRHR* 569 et seq; Van der Walt in Feenstra and Zimmermann *Das römisch-hollandische recht* 485 at 519; Van der Walt and Kleyn in Visser *Essays on the history of law* 213 at 247.

² Wieacker *A history of private law in Europe* 160; Van Zyl *Geskiedenis van die Romeins-Hollandse reg* 237.
The authors of the *Usus Modernus* gave full recognition to both Roman law and local law, and attempted to reconcile these two systems. After Conring refuted the Lothar legend, according to which Lothar III expressly imported Roman law into Germany in 1135 (the so-called *translatio imperii*), it became possible for jurists to query the validity of any text or give it a heterodox meaning. No longer in awe of the *Corpus juris*, the authors of the *Usus Modernus* examined all the laws of all the different parts of Germany, whether Roman or Germanic, as actually applied in the higher courts. Whenever Roman law principles or rules differed from native law, the authors of the *Usus Modernus* attempted to change and adapt Roman law to such an extent that it corresponded to the needs of local German legal practice. The authors of the *Usus Modernus* did not distinguish sharply between Roman and Germanic law.

With reference to property law, the authors of the *Usus Modernus Pandectarum* were not responsible for any major changes. Generally they still referred to Bartolus' definition of *dominium* and they recognised the medieval distinction between *dominium directum* and *dominium utile*. Dominium was divided into *dominium plenum* and

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3 Wieacker *A history of private law in Europe* 160 points out that the name *Usus Modernus Pandectarum* comes from the title of one of the main works of this movement, Samuel Stryk's *Usus Modernus Pandectarum* (1690-1712). The term *Usus Modernus Pandectarum* refers to the method applied by this group, namely the current practice of Roman law or the modern application of the pandects (Roman law according to Justinian's Digest). The terms *nova practica* and *mores hodiemi* are also used in this context. See also Van Zyl *Geschiedenis van die Romeins-Hollandse reg* 237.

4 Conring *De origine iuris Germanici*. See in this regard Wieacker *A history of private law in Europe* 107 and 160; Van Zyl *Geschiedenis van die Romeins-Hollandse reg* 238.

5 Wieacker *A history of private law in Europe* 160 et seq; Van Zyl *Geschiedenis van die Romeins-Hollandse reg* 237 et seq.

6 Kroeschell in *Rechtshistorische Studien: Festschrift H Thieme* 34 at 47 et seq. See also Van der Walt *Houerskap* 294.

7 It is interesting to note that the distinction between *dominium directum* and *dominium utile* played a far more prominent role in Germany than it did in the Netherlands at the time. The reason for this probably lies in the fact that German lawyers focused more on legal practice than their Dutch counterparts, or perhaps feudal law was much stronger in Germany than in the Netherlands during this period. See 3.4 above. See also Feenstra 1976 *RMT* 248 at 273.
dominium minus plenum. Dominium minus plenum was subdivided into dominium directum and dominium utile. The authors of the Usus Modernus, however, developed their own distinction on this basis. They distinguish between Obereigentum and nutzbares Eigentum or Untereigentum. This distinction differs from that of their Romanist predecessors in that they credited the dominus utilis with a part of the proprietas more explicitly and thus clearly accepted the possibility of the simultaneous existence of two distinctly separate forms of ownership. The existence of dominium utile was also extended beyond the more traditional Roman emphyteusis, feudum and ususfructus to include phenomena from local customary law. The reason why the authors of the Usus Modernus recognised the distinction between different types of ownership probably lies in the fact that a divided ownership was recognised in practice and they, as legal practitioners, had to work from that assumption to explain and solve existing practical problems.

5.3 Natural Law

Because of the special significance of the natural law codes for the Historical school,
which is discussed below, brief mention is made here of the natural law movement.

The purpose of the natural law codes was to fit the whole body of law into a systematic order in pursuance of a comprehensive plan for society. Wieacker points out that the motive behind all these codes was the characteristic Enlightenment conviction that if government and people acted in a rational and moral manner the result would be a better society. These codes offer themselves as draft plans for a better future and seem to be dismissive of the past.

With regard to ownership, the proponents of natural law more or less shared the views of the authors of the Usus Modernus. They also refer to Bartolus' perception in their description of dominium, and many of them held the view that dominium and proprietas are synonymous. The proponents of natural law also recognised the distinction between dominium plenum and dominium minus plenum and thus this distinction was included in the first natural law code, the Allgemeines Landrecht für die Preussischen Staaten (1794).

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14 See 5.4 below.
15 Wieacker A history of private law in Europe 257.
16 See in this regard Voltaire's statement "Voulez-vous avoir de bonnes lois? Brûlez les vôtres et faîtes-en de nouvelles" ("Do you want good laws? Then burn the ones you have and make new ones") as quoted in Benda Dictionnaire Philosophique 566.
17 Althusius Disputatio 1; Wolff Ius Naturale 2.2.131. See also Allgemeines Landrecht für die Preussischen Staaten 8.1: "Eigenthümer heisst derjenige, welcher befugt ist, über die Substanz einer Sache, oder eines Rechts, mit Ausschliessung Andrer, aus eigner Macht, durch sich selbst, oder durch einer Dritten, zu verfügen."
18 Thomasius Institutionum 2.10.38: "Proprietas enim et dominium hic sunt synonyma, etsi quandoque a scriptoribus usurpentur diversimodl"; Pufendorf Elementa 1.5.3: "Dominium plenum est proprietas rei et ususfructus"; Pufendorf De Jure 4.4.2: "Quid proprietas sive dominium? Sunt enim dominium et proprietas nobis unum et idem".
19 Allgemeines Landrecht für die Preussischen Staaten 8.9-8.11 states that:
"9. Zum vollen Eigenthume gehört das Recht, die Sache zu besitzen, zu gebrauchen, und sich derselber zu begeben.
10. Das Recht, über die Substanz der Sache zu verfügen, wird Proprietät genannt.
11. Das Recht, eine Sache zu seinem Vorteil zu Gebrauchen, heisst das Nutzungsrecht."
These authors also recognised the distinction between *dominium directum* and *dominium utile* and, according to natural law thinking, this distinction is based on the law of nature itself.²⁰ The contribution of the proponents of natural law lies in the creation of a rational system in which the law, legal rights and legal relationships are explained in terms of well-defined and logically related concepts. The fact that remnants of feudal law are detected in this system indicates that the idea of an abstract natural law was based on historical remains and it thus was not as pure as they thought it to be.

### 5.4 The Historical School

Although the Historical School had no direct influence on Roman-Dutch law (the Dutch code was completed in 1838), it would be unwise to ignore this development in German law. The Historical School and the Pandectists had a substantial influence on the law of most European countries and on South African law.²¹

The Historical School was created as an antipode for natural law and especially the natural law codes - in particular the *Code Civil* of France and Prussia's *Allgemeines Landrecht*. The codes were thought to embody revolutionary ideas and as such these codes were unacceptable to many German jurists.²² Savigny, who is generally regarded as the founder of this school, advocated the idea that "law must be regarded as a

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²⁰ To illustrate that the distinction between *dominium directum* and *dominium utile* is perceived as different forms of ownership the *Allgemeines Landrecht* contained the following provisions: *Allgemeines Landrecht für die Preussischen Staaten* 8.16: "Das Eigenthum einer Sache ist getheilt, wenn die darunter begriffen verschieden Rechte, verschieden Personen zukommen"; *Allgemeines Landrecht für die Preussischen Staaten* 18.1: "Wenn das Eigenthum getheilt ist, so wird derjenige, welchem nur ein Mitigenthum an der Proprietät, aber kein Antheil an dem zum Eigenthume gehörende Nutzungsrechte zukommt, Obereigenthümer genannt"; *Allgemeines Landrecht für die Preussischen Staaten* 18.12: "Die verschiedenen Bedingungen, unter welchen das Obereigenthum von dem Nutzbaren getrennt worden, bestimmen die verschiedenen Arten des getheilten Eigenthums".

²¹ See in this regard Van Zyl Geskiedenis van die Romeins-Hollandse reg 246 et seq; Visser 1985 Acta Juridica 39 at 46.

²² Wieacker *A history of private law in Europe* 279 et seq; Van Zyl Geskiedenis van die Romeins-Hollandse reg 248.
product of the entire history of a people; it is not a thing that can be made at will, or even has been so made; it is an organic growth, which comes into being by virtue of an inward necessity and continues to develop in the same way from within by the operation of natural forces. Savigny held the view that law is created organically (and not inorganically or rationally as in the case of the natural law codes) by the Volksgeist or popular conviction, that is by custom, scholarship and practice. The "Volk" or people, in this context, is not seen as an ethnic group, but rather as a cultural concept. Savigny equates "people" with the intellectual and cultural community bound together by a common education. The country's judges and legal scholars make up this cultural community. Wieacker points out that although this equation may seem strange it must be kept in mind that the Historical School wanted legal scholarship to take the place of official codification in public life.

According to the Historical School, Roman law and especially Justinian Roman law forms the foundation of the Volksgeist. The Historical School's approach to Roman law differed from the approach of the authors of the Usus Modernus in that they did not concentrate on the modern (present-day) application of Roman law - for them the emphasis was on the finding and recognition of Roman law in its original form.

Because they were not essentially practitioners, the Historical School had a different approach to law than the approach of the authors of the Usus Modernus. They did not

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23 Sohm *The Institutes of Roman law* 155.

24 Wieacker *A history of private law in Europe* 284; De Vos *Regsgeskiedenis* 116; Van Zyl *Geskiedenis van die Romeins-Hollandse reg* 249.

25 Wieacker *A history of private law in Europe* 310 et seq.

26 Roman law became a natural part of the German legal tradition through the *translatio imperii* of Justinian to Charlemagne. See in this regard Wieacker *A history of private law in Europe* 107 and 160; Van Zyl *Geskiedenis van die Romeins-Hollandse reg* 238 and 249; De Vos *Regsgeskiedenis* 116.

27 Wieacker *A history of private law in Europe* 312; De Vos *Regsgeskiedenis* 116; Van Zyl *Geskiedenis van die Romeins-Hollandse reg* 249; Lokin and Zwelve *Hoofstukken uit de Europese codificatiegeschiedenis* 213 et seq.
regard the solving of practical problems as their first priority, but rather attempted to construct a system of legal concepts, rules and principles according to which practical problems could be solved. According to Wieacker\textsuperscript{28} they raised the legal doctrine of the \textit{Usus Modernus} to the level of a science "with a firm critical and empirical base, capable of organising the whole mass of actual law into an internally consistent system".

It must be borne in mind that the Historical School did not regard law as history. They rather saw the science of law as a historical science. History only determines the material which must be organised into a whole by legal science.\textsuperscript{29} Kant's philosophy played an important part in this regard. It disproved the philosophical basis of natural law by pointing out that ethical decisions are conditioned by the situation in which they are taken, and this caused the Historical School to search for a systematic, method-conscious approach to law. Whereas history provides the material for the science of law, the philosophical arrangement of this material constitutes the form of the science.\textsuperscript{30}

It should be noted that the Historical School was not totally opposed to all elements of the idea of natural law. Although they objected to enlightened rationalism in the natural law codes - especially in the \textit{Code Civil} and the Prussian \textit{Allgemeines Landrecht}, certain elements of natural law thinking, inasfar as it was compatible with Kant's criticism, were taken over by the Historical School. These include the anachronistic system of the Pandects as such,\textsuperscript{31} the method of constructing concepts, deducing legal decisions from them in a logical manner and forming them into a system, the basic concepts of the natural law systems and the idea that all law is ethically determined.\textsuperscript{32}

\textsuperscript{28} Wieacker \textit{A history of private law in Europe} 292.

\textsuperscript{29} Wieacker \textit{A history of private law in Europe} 283 et seq.

\textsuperscript{30} Wieacker \textit{A history of private law in Europe} 281-2 and 292 et seq.

\textsuperscript{31} This system, which remained authoritative for the Pandectism of the nineteenth century, dates back to the natural system of Pufendorf.

\textsuperscript{32} For a more detailed discussion see Wieacker \textit{A history of private law in Europe} 296 et seq.
After it was proven that feudal divided ownership was not of true Roman origin, it was abandoned and the Historical School continued to develop the idea, based on the philosophy of Kant, that ownership embodies the freedom and autonomy of the individual. (This corresponds to some extent with the position regarding the French Revolution and the work and influence of Grotius. Ownership was disconnected from feudalism and the emphasis moved to individualism. This move accentuated the social function of ownership.) The idea of personal autonomy is central to Savigny's treatment of ownership. The individual must have the freedom to exercise his rights as he sees fit, and the exercise of his rights must be such that the free exercise of his will can co-exist with everybody else's freedom. The purpose of a legal relation and of a right (in the subjective sense) is to serve and secure the independent development of the personality. Ownership and personal rights thus enable a person to attain his purpose, namely moral and personal independence and development. Savigny defines ownership as the lawful power to deal with the thing at will, and states that ownership constitutes the unrestricted and exclusive domain over an object. The arbitrariness of the owner's right is accentuated by Savigny and his contemporaries. Although Grotius defined ownership in terms of the arbitrariness of the owner's right, this aspect of ownership acquired a slightly different character in view of the Kantian

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33 Thibaut Über dominium directum und utile in Versuche über einzelne Theile der Theorie des Rechts 67 et seq.

34 Savigny System des heutigen römischen Rechts vol III 103.

35 Van der Walt 1993 THRHR 569 at 587.

36 Savigny Das Recht des Besitzes: eine civilistische Abhandlung 27: "Da nämlich das Eigenthum die rechtliche Möglichkeit ist, auf eine Sache nach Willkür einzuwirken".

37 Savigny System des heutigen römischen Rechts vol I 387: "Als recht erscheint es einfach und vollständig in der Gestalt des Eigenthums, oder der unbeschränkten und ausschließenden herrschaft einer person über eine Sache".

38 See Puchta Pandekten 207.

39 See 3.3 above.
philosophy and German Idealism.\textsuperscript{40} Savigny\textsuperscript{41} thus states that the moral or immoral exercise of a right is of no consequence insofar as property is concerned.

Puchta's\textsuperscript{42} description of ownership closely resembles Savigny's definition. His description highlights a few new elements added to the concept of ownership by the Historical School: ownership is limited to corporeals, all rights with regard to the thing are parts of ownership\textsuperscript{43} and limited real rights are seen as mere restrictions on ownership.\textsuperscript{44}

Whereas the Historical School was originally politically in favour of the retention of the social order, including the remnants of the feudal order, the realisation that feudal divided ownership was not based on Roman law caused the authors of the Historical School to move in the direction of a more rational legal order. The emphasis moved from the social function of ownership to the concept and institution of ownership.

The Germanist branch of the Historical School held the view, contrary to the view of the Romanist branch of the Historical School, that old Germanic law, and not Roman law, should form the basis of the national German culture. The Germanists were opposed to Savigny's attempt to accommodate the Romanist tradition in his idea of the

\textsuperscript{40} Van der Walt 1986 \textit{THRHR} 305 at 321.

\textsuperscript{41} Savigny \textit{System des heutigen römischen Rechts} vol I 371: "Dagegen wird in den Vermögensverhältnissen die Herrschaft des Rechtsgesetzes vollständig durchgeführt, und zwar ohne Rücksicht auf die sittliche oder unstitliche Ausübung eines Rechts".

\textsuperscript{42} Puchta \textit{Pandekten} 207: "Das Eigenthum ist die volle rechtliche Unterwerfung einer Sache, die vollkommene rechtliche Herrschaft über einen körperlichen Gegenstand. Die volle Ausübung des Eigenthums ist die totale faktische Unterwerfung der Sache, also der Besitz. Als die Totalität aller dingliche Rechte enthält das Eigenthum an sich die ausschliessliche Befugniss zu jeder Anwendung der Sache, zu jeder Verfüigung über sie". See also Puchta's description of ownership in \textit{Cursus der Institutionen} 579: "Das Eigenthum ist die totale rechtliche Unterwerfung einer Sache. Es ist das vollkommene Recht, theils durch seinen Gegenstand, welcher der einzige dem menschlichen Willen völlig hingegenebt ist, theils durch seinen inneren Umfang, weil es diesen Gegenstand nach allen Seiten, von denen er im Recht sur Sprache kommt, unterwirft".

\textsuperscript{43} This is referred to as the totality of ownership. See Van der Walt 1986 \textit{THRHR} 305 at 314 \textit{et seq}.

\textsuperscript{44} This implies that as soon as the restriction falls away, ownership will resume its former completeness. This is referred to as the elasticity of ownership.
Volksgeist. According to this group old Germanic and medieval sources should rather be consulted in the quest for an own German legal culture.  

5.5 The German Pandectists

The Pandectists, the successors of the Historical School, applied the natural law method of constructing systems and concepts on the basis of the substantive *ius commune*. Wieacker⁴⁶ points out that the justification for this echoes Savigny's *Beruf*,⁴⁷ where he calls his age that of the scientification of legal study, and accorded to lawyers the right to develop and apply the law. This was a continuation of Grotius' conceptual work. The period of large scale social repositioning was over and the social function of ownership was no longer considered all that important. The attention now moved to the law as science with the emphasis on concepts and the institution of ownership. It was argued that the scientification of the law would serve and preserve the social and legal order.

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⁴⁵ See in general Wieacker *A history of private law in Europe* 319 et seq; Van Zyl *Geschiedenis van die Romeins-Hollandse reg* 254 et seq; Kroeschell in *Rechtshistorische Studien: Festschrift H Thieme* 34 at 46 et seq.) The importance of the Germanists for this discussion is the fact that they concentrated on and developed a theory of ownership. This theory is based on a article by Albrecht *Die Gewere als Grundlage des älteren deutschen Sachenrechts* in which he presented his theory on Gewere. According to this theory Gewere is a true Germanic notion, and it is indicative of the unique nature of Germanic property law. The Germanists held the view that the Roman-based concept of ownership has no place in Germany. See Beseler *System des gemeines deutchen Privatrechts* 318 et seq. They were of the opinion that the true Germanic concept of ownership is not fundamentally unrestricted, that ownership can be divided between different people, that ownership is not an abstract uniform concept, but that it is differentiated according to the object in question, and that ownership concerns both corporeal and incorporeal things. See Kroeschell in *Rechtshistorische Studien: Festschrift H Thieme* 34 at 36. See also Van den Bergh *Eigendom* 31. It has, however, since been pointed out that this perception does not originate in German antiquity, but was created in the nineteenth century and is often no more than a mere projection of what was considered as the opposite of Roman law. See Kroeschell in *Rechtshistorische Studien: Festschrift H Thieme* 34 et seq; Van den Bergh *Eigendom* 31; Feenstra in *Fata iuris Romani* 215 at 222; Feenstra 1976 *RMT* 248 at 262 et seq; Van der Walt 1993 *THRHR* 569 at 570.

⁴⁶ Wieacker *A history of private law in Europe* 341.

⁴⁷ *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft* (1814) was Savigny's reply to and article by Thibaut *Über die Notwendigkeit eines allgemeines bürgerlichen Rechts für Deutschland* in which he (Thibaut) pleads for the codification of German law.
The Pandectists perceived law as a positive science in which the law is explained exclusively in terms of its rules, concepts, principles and doctrines. The legal positivists attempted to develop a system of law into which all legal concepts, rules and principles fitted logically. As was the case with the Historical School, the Pandectists were not practitioners and as such they perceived law as a science and concentrated on developing a system of law, rather than solving practical problems. According to the legal positivist method religious, social or scientific aims and values are not supposed to influence the creation, alteration or application of the law, and as such these aims and values are supposed to become more and more peripheral to the science of law.

In fact, the science of law is supposed to safeguard and entrench of the status quo. As a result of this, the whole legal order (and the social order on the background) becomes dependent on a closed system of legal rules, concepts and principles. The premise of this method is that if a rule is conceptually logical and fits into the system it must be right. It would thus be possible to solve any legal problem by referring to and mechanically applying the system of legal principles and concepts. Wieacker points out that the system of positive legal science is both insulated and integrated. The aim is to create a system that is free of gaps, and although there may be gaps in fact, these can be filled by inventive application of the logically coherent system where every concept has a logical place within the conceptual pyramid. Kant’s theory of law, according to which the law is an independent entity with the purpose not to ordain ethical conduct, but to render it possible, serves as the ethical justification for this

48 Wieacker A history of private law in Europe 341 et seq points out that Savigny opined that although considerations of ethics and politics are not the business of the jurist, it does not imply that the legislator is disallowed such considerations.

49 Legal positivism is often criticised for excluding considerations of policy and society (especially since the social and political upheaval of the past century), but it must be kept in mind that legal positivism itself contained a value judgement and took a stance on policy and social ethics - it reflected the position of the judicature in the nineteenth century Rechtsstaat. One must also distinguish between positive legal scholarship and a positive approach to statutes, for it is only if positive legal science refuses to be subservient to statutory law that the dangerous situation can arise where the naked interests of the majority is served by the monstrous use of legislation. For a discussion see Wieacker A history of private law in Europe 346 et seq.

50 Wieacker A history of private law in Europe 344.
This constituted a move away from the Historical School. History was left behind and instead the Pandectists believed that they rely on Roman law itself. This move constituted the origin of the idea that the modern civilist concept of ownership developed in an uninterrupted line from Roman law.

Once the feudal tradition of divided ownership was proved to be not of Roman origin the Pandectists, following in the footsteps of the Romanist branch of the Historical School, discarded split ownership and propagated the idea of uniform ownership. Following German Idealism, according to which individual freedom and the autonomy of the individual was accentuated, ownership was seen as part of the individual's autonomous sphere of freedom. The Pandectist perception of ownership reflects this line of thinking and ownership is thus defined as an exclusive, absolute real right. In a sense this resembles the view of Grotius and the perception of ownership after the French Revolution - ownership is free from feudalism. However, the Pandectists went further and explained this within the framework of a conceptual science.

Windscheid is regarded as the most important exponent of the Pandectists, because of his stature and influence. His view of ownership can be discussed as a representative example of the Pandectist perception of ownership.

It should be noted that Windscheid was at least partially influenced by Grotius. Traces of Grotius’ views on the distinction between eigendom and gerechtigheden and the way

51 Wieacker A history of private law in Europe 341 et seq; Van Zyl Geskiedenis van die Romeins-Hollandse reg 257 et seq; Van der Walt 1993 THRHR 569 at 586.

52 Thibaut Über dominium directum und utile in Versuche über einzelne Theile der Theorie des Rechts 67 et seq. See also Kroeschell in Rechtshistorische Studien: Festschrift H Thieme 34 et seq.

53 Van den Bergh Eigendom (1979) 5 et seq; Van der Walt 1993 THRHR 569 at 570; Visser Acta Juridica 39 at 47. For the influence of the philosophies of writers such as Kant and Hegel see Negro Das Eigentum: Geschichte und Zukunft - Versuch eines Überblicks 136 et seq.

54 For more on Bernhard Windscheid see Wieacker A history of private law in Europe 351 et seq; Van Zyl Geskiedenis van die Romeins-Hollandse reg 258; De Vos Regsgeskiedenis 121.
in which *eigendom* (especially *volle eigendom*) is defined\(^{55}\) can be found in Windscheid’s work.\(^ {56}\) As in the case of Grotius, Windscheid concentrated on creating a system of legal principles and concepts - the emphasis was not on catering for specific needs of legal practice, but rather on perfecting a system into which all legal concepts, rules and principles fitted logically.

The influence of Kant’s theory, according to which individual autonomy and freedom is accentuated, can clearly be detected in Windscheid’s work. In his discussion of rights, Windscheid emphasises individual freedom. According to his theory the law issues a norm or principle which permits specific acts or behaviour. It grants this norm or principle to an individual for his free disposal. The individual is free to decide whether or not to act or behave in accordance with these norms or principles, or whether or not to use the provided remedies to enforce his right. The will of the individual is thus decisive for the enforcement of the norm or principle. Windscheid\(^ {57}\) describes this by saying that a right becomes your right. In view of this approach a right is defined as a power to exercise the will that is conferred by law.\(^ {58}\) Van der Walt\(^ {59}\) points out that the link between Kant and Windscheid is probably to be found in Savigny, the reason being that Savigny was the first to create a modern civil-law system of private law based on the Kantian ideal of personal freedom and autonomy. Windscheid continued to develop this idea.

With reference to the distinction between real and personal rights,\(^ {60}\) Windscheid states

\(^{55}\) See 3.3 above.

\(^{56}\) Van der Walt in Feenstra and Zimmermann *Das römisch-holländische Recht* 485 at 516 et seq.

\(^{57}\) Windscheid *Lehrbuch des Pandektenrechts* vol 1 book 2 par 37 at 131.

\(^{58}\) Windscheid *Lehrbuch des Pandektenrechts* vol 1 book 2 par 37 at 131: "Recht ist eine von der Rechtsordnung verliehene Willensmacht oder Willensherrschaft".

\(^{59}\) Van der Walt 1993 *THRHR* 569 at 587.

\(^{60}\) This is based on the second part of the work of Grotius (and with this the influence of the French Revolution) where a distinction is made between ownership and limited real rights.
that real rights are those rights where the individual's will is decisive for a thing and personal rights are those where the individual's will is decisive for the behaviour or actions of another person. It is interesting to note that Windscheid does not regard a real right as a right that has a thing as its object, because he regards all rights as relationships between different persons. He states that all rights exist between one person and another person and not between a person and a thing. Thus, in the case of real rights, the subject determines the behaviour of everybody else with regard to the object in question. This description of real rights ties in with Windscheid's personalist theory according to which real rights are absolute in the sense that they are enforceable against the whole world (everybody else) and personal rights are relative in that they are only enforceable against specific people. The result of the influence of Grotius and the French Revolution, namely to free ownership from the shackles of feudalism and to create a distinction between ownership and limited real rights, is now explained as part of one single theory based on the individual's free will as a moral concept underlying the entire legal science.

Real rights are defined as exclusive rights. A real right confers on the subject the power to determine the behaviour of all other people with respect to the thing. Windscheid states that the power conferred by a real right is negative in the sense that all other people must refrain from interfering with the object or with the subject's right as regards the object.

The distinction between ownership and limited real rights is explained with reference

61 Grotius held a different view in this regard. See 3.3 above.

62 Windscheid Lehrbuch des Pandektenrechts vol 1 book 2 par 38 at 140: "Alle Rechte bestehen zwischen Person und Person, nicht zwischen Person und Sache".

63 Windscheid Lehrbuch des Pandektenrechts vol 1 book 2 par 41 at 149.

64 Windscheid Lehrbuch des Pandektenrechts vol 1 book 2 par 38 at 140: "Der inhalt das dingliche Recht ausmachenden Willensmacht aber ist ein negativer: die dem Berechtigten Gegenüberstehenden sollen sich der Einwirkung auf die Sache - alle oder einer bestimmten - enthalten, und sie sollen durch ihr Verhalten zur Sache die Einwirkung des Berechtigten auf die Sache - eine beliebige oder eine bestimmte - nicht verhindern".
to the extent of the exclusivity: ownership enables the owner to enforce his right against all other people in the totality of its relations, whereas a limited real right enables the holder of the right to enforce his right against all other people with regard to specific relations. Ownership thus entails total exclusivity, while limited real rights entail limited exclusivity.

Ownership is defined as the most complete real right. It is described as complete because it confers on the owner the complete right of disposal. The owner may enforce his right against all other people with regard to the use and control of the object. The element of arbitrariness in Windscheid’s definition of ownership reflects the true spirit of German Idealism, which accentuates individual freedom. According to Windscheid the complete right of disposal implies on the one hand that the owner may dispose of his property as he sees fit, and on the other hand it gives the owner the complete right of exclusion in the sense that no-one else may dispose of the object in a way contrary to the will of the owner.

Despite the fact that ownership is defined as the most complete right of disposal, and that the different entitlements of the owner can be listed, ownership will always amount

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65 Windscheid Lehrbuch des Pandektenrechts vol 1 book 3 par 145 at 629: "Dasjenige dingliche Recht, kraft deren der Wille des Berechtigten ist für die Sache in der Gesammtheit ihrer Beziehungen, ist des Eigentumsrecht".

66 Windscheid Lehrbuch des Pandektenrechts vol 1 book 3 par 145 at 629: "Dingliche Rechte, kraft deren der Wille des Berechtigten für die Sache nur in einen einzelnen Beziehung (oder in einer Mehrheit einzelner Beziehungen) massgebend ist, heissen Rechte an fremder Sache". Note that Windscheid refers to limited real rights as Rechte an fremder Sache. See vol 1 book 3 par 38.

67 Windscheid Lehrbuch des Pandektenrechts vol 1 book 3 par 167 at 756: "Dass aber Jemandem eine Sache nach dem Rechte eigen ist, will sagen, dass nach dem Rechte sein Wille für sie entscheidend ist in der Gesammtheit ihrer Beziehungen". See also Van der Walt 1986 THRHR 305 at 315.

68 Van der Walt 1986 THRHR 305 at 322.

69 Windscheid Lehrbuch des Pandektenrechts vol 1 book 3 par 167 at 756: "Dies zeigt sich nach einer doppeln Richtung: 1) der Eigenthümer darf über die Sache verfügen, wie er will; 2) ein Anderer darf seinen Willen über die Sache nicht verfügen". 81
to more than the sum total of the owner's entitlements. According to this perception ownership can never be described as a bundle of entitlements - it is an abstract concept and will always amount to more than the sum of enumerable entitlements. It follows that if the sum total of entitlements does not amount to ownership, just as the sum total of restrictions cannot have a fundamental effect on the nature of the right. Ownership will never cease to exist as a result of many restrictions or limitations. This view of ownership constitutes the origin of the idea that ownership is flexible enough to adapt to different circumstances. In terms of this view the development of ownership has never been disrupted by historical changes and discontinuities.

Windscheid declares that ownership is fundamentally unrestricted, although it can accommodate restrictions or limitations. The Pandectists are the first to describe ownership explicitly as an intrinsically unrestricted right, and as Van der Walt points out, this was a reaction against the medieval feudal system, which was regarded as a social and economic disaster. Here Windscheid works with the social function of ownership, but he casts it in the mould of a conceptual and institutional theory. It was thus important to emphasise the fact that ownership - especially landownership - remains free from feudal-type restrictions. The rise of German Idealism also

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70 Windscheid Lehrbuch des Pandektenrechts vol 1 book 3 par 167 at 756: "Es lassen sich ferner einzelne Befugnisse namhaft machen, welche dem Eigentümer kraft des Begriffs des Eigenthums zustehen, z.B. die Befugniss die Sache zu gebrauchen und zu nützen, die Befugniss jeden von aller Einwirkung auf dieselbe auszuschliessen, die Befugniss sie von jedem dritten Besitzer abzufordern, die Befugniss ihr rechtliches Schicksal zu bestimmen (Verlussersbefugniss). Aber man darf nicht sagen, dass das Eigenthum aus einer Summe einzelner Befugnisse bestehe, dass es eine Verbindung einzelner Befugnisse sei. Das Eigenthum ist die Fülle des Rechts an der Sache, und die einzelnen in ihm zu unterscheidenden Befugnisse sind nur Ausserungen und Manifestationen dieser Fülle".


72 Van der Walt 1993 THRHR 569 at 575.

73 See Demburg Pandecten vol 1 part 2 chapter 1 par 192 at 437.
contributed significantly towards the creation of a fundamentally unrestricted concept of ownership.\textsuperscript{74}

Windscheid regarded ownership as conceptually (but by implication also historically) an elastic right. The Pandectists recognised the fact that ownership can be limited, but held the view that as soon as the restriction falls away, ownership returns to its former state and once again becomes full or complete.\textsuperscript{75} Restrictions are regarded as temporary and will eventually fall away. Ownership will then resume its fullness. This implies that entitlements are never separated from ownership (in the case of limited real rights), but merely that ownership is temporarily restricted. Windscheid's theory on the elasticity of ownership differs from Grotius' perception. According to Grotius ownership is diminished by restrictions or limitations - an entitlement is separated from ownership and transferred to someone else.\textsuperscript{76}

In summary it can be said that the Pandectists described ownership as the most complete real right and that it is characterised by the following:

i) Uniformity: The Pandectists rejected feudalism and recognised only one type of ownership. This characteristic reflects the Pandectists' view of the social function of ownership, namely to secure for the individual a sphere of personal freedom and autonomy.

ii) Absoluteness: This entails that ownership is fundamentally unrestricted, though it can accommodate restrictions or limitations. Absoluteness also refers to the complete right of disposal of the owner. The owner has the power to use his property as he sees fit and can enforce his right against all other people. The characteristic of absoluteness is based on the uniformity of ownership, but

\begin{itemize}
  \item \textsuperscript{74} Van den Bergh \textit{Eigendom} (1979) 5; Visser 1985 \textit{Acta Juridica} 39 at 46.
  \item \textsuperscript{75} Windscheid \textit{Lehrbuch des Pandektenrechts} vol 1 book 3 par 167 at 758: "Fällt die Eigentumsbeschränkung weg, so enfaltet des Eigenthum sofort wieder seine ganze Fülle".
  \item \textsuperscript{76} See 3.3 above.
\end{itemize}
translated into a conceptual and institutional theory.

iii) Exclusivity: The owner has the right to exclude all other people from disposal of the object and from interference with the owner's own disposal of the thing. This characteristic also stems from uniformity, but constitutes a expansion on that idea.

iv) Abstractness: Ownership is described as abstract in that it will always amount to more than the sum total of the different entitlements.

v) Elasticity: This means that ownership will automatically resume its natural fullness as soon as a limitation falls away.

In essence the Pandectists did the same as what was achieved by Grotius and the French Revolution, in the sense that ownership was divorced from feudalism, reduced to a unitary individual right and distinguished from limited real rights. In the case of the Pandectists, however, these two results were combined in one coherent, scientific system of concepts with a basis in moral philosophy.

5.6 The move towards a German civil code

The natural law codes of the late eighteenth century never enjoyed general acceptance. The positivist reaction against the natural law and the rise of the Historical School thwarted the acceptance of these codes and it never had any significant influence. These codes, especially the Code Civil in France, elicited strong reaction against codification in Germany. The Historical School, especially Savigny, was vehemently opposed to the idea that a code should take the place of legal scholarship, and when Thibaut suggested in 1814 that Germany should codify its legal system, he enjoyed very little support.77

77 Wieacker A history of private law in Europe 363 et seq; Van Zyl Geskiedenis van die Romeins-Hollandise reg 263 et seq. For a detailed discussion of Thibaut's plea for a national German code in Über die Nothwendigkeit eines allgemeines bürgerlichen Rechts für Deutschland and Savigny's
The ideal of a code for Germany never died, but it was only after Savigny's death in 1861 that the movement really gained momentum. The move towards codification was helped along by the enactment of codes for specific fields of law, such as the *Allgemeine Deutsche Wechselordnung* in 1848 and the *Allgemeines Deutsches Handelsgesetzbuch* in 1861, and civil codes for specific states, such as the *Bürgerliches Gesetzbuzech für das Königreich Sachsen* in 1863. Positivism of enactments began to take the place of the positivism of scholarship. This shift was perceived as progressive in terms of civic and national politics. The move toward a national civil code was also strengthened by the belief on the continent of Europe that a modern nation must organise its legal life on a codified rational plan.78

On 18 August 1896 the *Bürgerliches Gesetzbuzech für das Deutsche Reich* was promulgated, but for symbolical reasons the code only came into force on 1 January 1900.79

5.7 Conclusion

It is pointed out in the next chapter that elements of the Pandectist perception of ownership, especially that of Windscheid, form the basis of the standard or traditional

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Wieacker *A history of private law in Europe* 364; Van Zyl *Geskiedenis van die Romeins-Hollandse reg* 263.

The first commission to prepare the way for a civil code for Germany started work in 1874. This commission, under the chairmanship of Pape also included Windscheid. Windscheid's *Pandekten* had a strong influence on the spirit of the final product. When the commission tabled the first draft (and five volumes of *Motiven*) in 1887 it was met with a lot of resistance. It was said that the commission did not consult other jurists or business people and that the commission and the country were not at one. The first draft was criticised because it was doctrinal and asocial and did not reflect a German culture. A second commission was established in 1890. This commission consulted as wide as possible and when the second draft was submitted in 1895 its reception was much more favourable. The second draft was discussed during 1895 and 1896 and after a few adjustments it was promulgated as the *Bürgerliches Gesetzbuzech für das Deutsche Reich*. See Wieacker *A history of private law in Europe* 371 et seq; Lokin and Zwalve *Hoofstukken uit de Europese codificatiegeschiedenis* 226 et seq; Van Zyl *Geskiedenis van die Romeins-Hollandse reg* 263; De Vos *Repgeskiedenis* 123.
civilist concept of ownership in South Africa. The Pandectist view that ownership is the most complete real right and that it is characterised by uniformity, absoluteness, exclusivity, abstractness and elasticity was received in South African law in the twentieth century and has since dominated the private law perception of property law.

Although it is commonly thought that the Pandectist and Roman law views of ownership are basically the same, with the important difference that the Pandectists organised and arranged property law into a scientific structure, it must be emphasised here that the Pandectist view of ownership is separated from classical and Justinian Roman law by a few dramatic and fundamental discontinuities. These discontinuities include the impact of the vulgar Roman law, the implementation and abolition of the feudal system, the influence of Grotius' structure and hierarchy of rights and the scientification of property law in the nineteenth century on the basis of Grotius' work. The Pandectist view of ownership was thus not so much the result of a logical process of development, but rather the creation of a society in which individual freedom and the idea of a conceptual legal science played a central role.
6.1 Introduction

The aim of this chapter is to determine exactly what the South African law of ownership entailed prior to the implementation of the Interim Constitution in 1994. Since the democratisation of the South African society property law has undergone a number of fundamental changes, and it is important for this study to know what the perception of property (and in a narrow sense ownership) was prior to this event and exactly how it has changed since then.¹

This chapter concentrates on the development of South African property law since the late nineteenth century. Early textbooks and case law are consulted in this regard.

It is often contended that the concept of ownership in (white) South Africa prior to the implementation of the first democratic constitution was characterised by absoluteness, exclusivity and individualism. The law of ownership prior to the implementation of the interim Constitution is analysed in an effort to determine the nature and content of the right. Finally suggestions of leading property lawyers on the direction of future development of property law are discussed briefly.

6.2 Developments since the late 1800's

6.2.1 Early South African legal textbooks

In most of the early South African legal textbooks the description of ownership...

¹ The influence of the Interim Constitution and the final Constitution is discussed in chapter 11.
resembles the description of the Roman-Dutch authors. Josson\(^2\) (1897) defines ownership, with reference to Van der Linden,\(^3\) as the right to dispose of a thing in the most comprehensive way. This entails that the right of disposal includes the *ius utendi*, *ius fruendi* and the *ius abutendi* and is exercised so as to exclude all other people. Josson's definition provides for expropriation against compensation in certain circumstances and expressly states that the owner's right of free disposal is limited by statute and the rights of others.

Maasdorp's\(^4\) description of ownership in 1903 also refers to Roman-Dutch authors.\(^5\) He defines ownership as

"... 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)."

According to Maasdorp ownership includes the right of possession, the right of use and enjoyment and the right of disposition. He states that although these factors are essential to ownership they need not all be present in an equal degree at the same time. However, Maasdorp\(^6\) proceeds to give a second definition of ownership in which he emphasises the right of alienation:

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2 Josson Schets van het recht van de Zuid-Afrikaansche Republiek 407: "Eigendom is het recht om over eene zaak, bij uitsluiting van alle anderen, op de volstrekste wijze te beschikken, mits men er gebruik van make, strijende tegen de wetten (quatenus juris ratio patitur) en mits men aan de rechten van anderen geen hinder toebrengt."

3 Van der Linden Regtsgeleerd, practicaal en koopmans handboek 1.6.1.

4 Maasdorp The Institutes of Cape law 31 et seq.

5 Maasdorp refers to Voet Commentarius ad Pandectas, Grotius Inleidinge tot de Hollandsche Rechts-geleerdheid and Van der Linden Regtsgeleerd, practicaal en koopmans handboek. The latter is often referred to in South Africa as The Institutes of the laws of Holland.

6 Maasdorp The Institutes of Cape law 32.
"perhaps a more correct definition of ownership would be that it is the exclusive right of disposing of a corporeal thing combined with the legal means of alienating the same and coupled with the right to claim the possession and enjoyment thereof."

Wessels\(^7\) (1908) voices the opinion that the South African law of ownership differs very little from that of the *Corpus juris*. Grotius is seen as the nexus between Roman law and South African law. According to Wessels,\(^8\)

"Grotius followed the Roman law when he defined ownership as that attribute of a thing whereby a person, though not actually in possession of it, may acquire the same by legal process, and that it consists in the right to recover lost possession."

Roos and Reitz\(^10\) (1909) repeat Maasdorp's definition\(^11\) and proceeds to say 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*."

According to Lee\(^12\) (1915) ownership entails the right to possess, use and enjoy, and

\(^7\) Wessels *History of the Roman-Dutch law* 485.

\(^8\) Wessels *History of the Roman-Dutch law* 484. Here Wessels refers to Grotius *Inleidinge tot de Hollandsche Rechts-geleerdheid* II.3.1 and 4 and D 6.1.23.

\(^9\) See in this regard Grotius *Inleidinge* II.3.1 and II.3.4. See also 3.2 above.

\(^10\) Roos and Reitz *Principles of Roman-Dutch law* 39.

\(^11\) This is done without any reference to Maasdorp's definition in *The Institutes of Cape law*.

\(^12\) Lee *An introduction to Roman-Dutch law* 111 et seq.
alienate a thing. He states that the right to possess includes the right to vindicate, and he refers to Grotius for authority for his statement that the right to vindicate is the signal quality of ownership. Up to this point Lee's description of ownership resembles that of his predecessors, but he continues to make an interesting distinction that bears close resemblance to Grotius' exposition of full and incomplete ownership. He states that whenever all these rights (to possess, use, enjoy and alienate) are exclusive and vest in one person, it amounts to full ownership. As soon as one of these rights vests in one person and all the others in another person, the ownership of both such persons is restricted or qualified. With reference to the latter instance, he states that it would be misleading to regard both persons as owner and in order to determine who the real owner is, one must determine where the residue of rights remains after the deduction from full ownership of some specific right or rights of greater or less extent. Neither the extent of the right nor the profit derived from it is decisive in this regard. Lee concludes that even when ownership is stripped of its most valuable incidents and is reduced to a mere shadow (this is referred to as bare ownership or nuda proprietas), it is still regarded as a right of property and is as such protected by appropriate remedies against all the world.

Wille's definition of ownership in 1937 reminds one of Maasdorp's definition:

"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."

However, Wille places ownership within the context of real rights. A real right,

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13 Grotius Inleidinge tot de Hollandsche Rechts-geleerdheid II.3 and 33. See 3.3 above.
14 Wille Principles of South African law 121.
15 Wille refers to Voet on D 6.1.1 and Van der Linden Regtsgeleerd, practicaal en koopmans handboek 1.7.1.
according to Wille,\textsuperscript{16} is a right in a thing that confers a benefit, which is indefeasible by any other person, on the holder of the right. Ownership is described as the most comprehensive real right and is contrasted with all other real rights (limited real rights).

The conclusion can be drawn that the description of ownership and limited real rights in the early South African textbooks bears close resemblance to the description of ownership and limited real rights in the Roman Dutch law of the seventeenth and eighteenth centuries rather than either classical or Justinian Roman law or Pandectism. This is not surprising in view of the fact that Roman-Dutch law was prevalent in South African case law of the time. The influence of the German Pandectists on South African law was only to be felt later in this century.

\textbf{6.2.2 Early South African case law}

South African case law at the turn of the century did not attempt to give an exact description of ownership, but concerned itself with the question of the exclusivity and the individuality of ownership. The main issue at this point was whether or not the existence of more than one type of ownership should be recognised in South African law.

In 1903 the Cape court in \textit{Estate Thomas v Kerr}\textsuperscript{17} expressed the view that a lease of more than ten years is sometimes seen as an alienation in that the \textit{dominium utile} is transferred to the lessee. This view was, however, mentioned \textit{en passant} and the implications thereof were not discussed by the court. The Transvaal court dealt with the same problem in 1905 in the case of \textit{Lucas' Trustee v Ismail and Amod}.\textsuperscript{18} Council for the plaintiff argued that his client had the real or beneficial ownership, while the respondent had no more than bare \textit{dominium} or naked ownership - Lucas merely had

\begin{itemize}
  \item \textsuperscript{16} Wille \textit{Principles of South African law} 117.
  \item \textsuperscript{17} (1903) 20 SC 354 at 374.
  \item \textsuperscript{18} 1905 TS 239.
\end{itemize}
the shell and the plaintiffs had the substance. This argument equates *dominium directum* with *nuda proprietas* and *dominium utile* with beneficial ownership. The court rejected this argument as being of English origin and not consistent with our law:  

"For to hold that Lucas was the bare *dominus*, and that the plaintiffs were beneficial owners, would, it appear to me, be subversive of the well established principles of our law regarding the ownership of immovable property; it would recognise that *dominium* in immovable property could be separated into two parts, into a legal estate, as it is called in England, and an equitable or a beneficial estate. Now I do not see how, consistently with the principles of our law, we can support such a contention, because it appears to me that that is one of the essential differences between the English law regarding the ownership of immovable property and our law. The English law holds that there can be two estates in land, the legal estate and the equitable or beneficial estate, and these two estates can be vested in different persons at the same time... Our law, as I understand it, does not recognise that there can be any such division of the *dominium*, or that there can be two estates in landed property, but that the person who is registered in the Deeds Office as the owner of the landed property is the one *dominus* of such property."

The Cape court took the opposite view in 1906 in *Municipality of Indwe v The Indwe Railway Collieries and Land Co,* when it stated that the company may still be the *dominus directus* of the land in the same way as the Crown is the *dominus directus* of the land granted by the Governor on perpetual quitrent tenure, but the practical ownership has passed to the lessee.

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19 1905 TS 239 at 247.

20 1906 SC 219 at 229.
In 1910 the Transvaal court explicitly rejected this decision in *Johannesburg Municipal Council v Rand Township Registrar & others*\(^1\) on the basis of the result reached in the *Lucas' Trustee* case. The court held that there is only one owner and that a long-term lease does not amount to a separate form of ownership apart from the ownership of the lessor. The court accepted Savigny's definition of an individual and exclusive concept of ownership: \(^2\)

"Savigny's definition may be accepted as of high authority. *Dominium* is the unrestricted and exclusive control which a person has over a thing.' Inasmuch 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."

It is interesting to note that the court does not refer to Roman-Dutch law as authority for its decision. The court rejected divided ownership because they viewed it as an English phenomenon, while it is trite that this kind of ownership was part and parcel of Roman-Dutch law. On the other hand they accepted the unrestricted, individual and exclusive view of ownership on the authority of the German Pandectists, specifically Savigny, while this view of ownership was also part of Roman-Dutch law. \(^2\) Van der Walt and Kleyn\(^2\) point out that the reason for choosing a concept of absolute, exclusive ownership over the concept of divided ownership probably lies in the fact that it was in line with philosophical approach which was at the order of the day in the late eighteenth and early nineteenth century. The continued acceptance of divided ownership would have been untenable in an era where the social, economical and political spheres of

\(^1\) 1910 TPD 1314.

\(^2\) 1910 TPD 1314 at 1319.

\(^3\) See 3.3 above.

\(^4\) Van der Walt and Kleyn in Visser *Essays on the history of law* 213 at 248 et seq. See also Visser 1985 *Acta Juridica* 39 at 43 et seq.
life were dominated by liberalist capitalism and individualism.

The owner's entitlement to use his property was another point of contention in early South African case law. The English law concept of nuisance exerted some influence on early case law in this regard. The principles of the English law of nuisance differs from that of Roman-Dutch law in that the duties of the owner are emphasised in English law, whereas the Roman-Dutch law concerns itself with the rights of the owner to use his property. Although the law of nuisance is not the same in the two systems, it was stated in Bloemfontein Town Council v Richter that

"... the counterpart of an English statement of claim founded on nuisance would, in our law, be a declaration by the plaintiff that he is the owner (or occupier) of land and that his legal rights of enjoyment of it are being infringed by another."

The Roman-Dutch law approach to the law of nuisance was confirmed in Prinsloo v Shaw where it was held that

"... a resident in a town, and more particularly in a residential neighbourhood, is entitled to the ordinary comfort and convenience of his home."

According to Hahlo and Kahn *The Union of South Africa, The development of its laws and constitution* 557 the English law of nuisance denotes any unreasonable use of land which injuriously affects the use or enjoyment of neighbouring land. The English law approach was applied in Holland v Scott (1882) 2 EDC 307 and Van der Westhuizen v Du Toit 1912 CPD 184.

1938 AD 195 at 229.

1938 AD 570 at 575. The confirmation of the Roman-Dutch law principle of nuisance in Prinsloo v Shaw was preceded by a number of earlier cases in which the civil law approach, according to which the owner's rights and not his duties are accentuated, was put to the fore. See in this regard Union Government v Marais 1920 AD 240; Levin v Vogelstruis Estates and Co 1921 WLD 66; Kirsch v Pincus 1927 TPD 199; Leith v Port Elizabeth Museum Trustees 1934 ELD 211.
In *Regal v African Superslate (Pty) Ltd* the Appellate Division confirmed that the English law doctrine of nuisance did not replace our own law (Roman-Dutch law) in this regard. Problems concerning the owner’s entitlement to use his property is thus approached by emphasising the owner’s rights, rather than his duties, as is the case in English law.

The South African case law of the early 1900’s does not provide an exact description or definition of ownership. The most important achievement of this period is the fact that the courts rejected divided ownership in favour of exclusive and individual ownership. This decision was in line with the existing social, economic and political trends of the time where capitalism and individualism were emphasised, and it prepared the way for the introduction and acceptance of the Pandectist concept of absolute ownership in South African law.

The position with regard to limited real rights up to this point in South African law remained essentially the same as in Roman-Dutch law.

6.3 Ownership in South Africa during the second half of the twentieth century

Statements about the concept of ownership are not very common in South African case law, but the statements that do exist describe ownership mainly in terms of its absoluteness and exclusivity. Visser pointed out that the acceptance of the concept of an absolute, exclusive and in principle unrestricted ownership in South Africa is due, not to the influence of the Roman-Dutch law of the seventeenth and eighteenth centuries, but rather to the influence of the German Pandectists of the nineteenth

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28 1963 (1) SA 102 (A).

29 Visser 1985 *Acta Juridica* 39. See also Feenstra 1976 RMT 248 at 273; Van der Walt and Kleyn in Visser *Essays on the history of law* 213 at 247 et seq; Van der Walt in Feenstra and Zimmermann *Das römisch-holländische Recht* 486 et seq; Van der Walt 1993 *THRHR* 569 et seq; Van der Walt 1991 *R&K* 329 at 353; Van der Walt 1987 *SALJ* 469 at 475; Van den Bergh *Eigendom* 31 et seq; Van den Bergh 1987 *R&K* 327 et seq; Pienaar 1988 *TSAR* 184 at 192.
century. According to Visser\(^{30}\) there was a tendency - especially during the first half of
the twentieth century - to quote the views of the Pandectists and read them as if they
counted among our institutional writers. As a result of this the Pandectists' perception
of ownership as an absolute and exclusive right found its way into South African
property law. This formed part of our own process of scientification in which Roman-
Dutch law was replaced by Pandectist theory. It should, however, be mentioned that
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 owner's right exists within the limits of the law.\(^{31}\)

Mention was made of the statement in *Johannesburg Municipal Council v Rand
Township Registrar*\(^{32}\) where ownership was defined, with reference to Savigny, as the
unrestricted and exclusive control which a person has over a thing. Steyn CJ referred
to Dernburg\(^{33}\) for his statement in *Regal v African Superslate (Pty) Ltd*\(^{34}\) that:

"As algemene beginsel kan iedereen met sy eiendom doen wat hy wil, al
strek dit tot nadeel of misnoë van 'n ander, maar by aangrensende

\(^{30}\) Visser 1985 *Acta Juridica* 39 at 47.

\(^{31}\) It is generally accepted that ownership has always been subject to restrictions and limitation, but
this does not mean that ownership was never regarded as absolute and in principle unrestricted.
See Visser 1985 *Acta Juridica* 39; Van der Walt in Feenstra and Zimmermann *Das römisch-
holländische Recht* 486; Feenstra 1976 RMT 248. It must be noted that the mere existence of
restrictions on or the limitation of ownership does not imply that ownership is not absolute and in
principle unrestricted. To determine whether or not the concept of ownership is regarded as
absolute and in principle unrestricted one must determine whether restrictions or limitations are
viewed as an intrinsic part of the concept or whether it is seen as exceptions. Van der Merwe's
statement must be seen against this background. See Van der Merwe *Sakereg* 111: "Uit die
voorafgaande moet nie afgelei word dat eiendom in enige stadium van sy ontwikkeling as absolút
of onbeperk beskou is nie. Selfs in die laissez faire periode is privaat- en publiekregtelike
beperkings ten aansien van eiendom erken. Omskrywings wat absoluutheid, onbeperktheid of
volstrektheid as primère kenmerk aandui, is dus onsuwer." Van der Merwe seems to imply that
the description "absolute and unrestricted" means that no restriction what so ever is recognised
or allowed.

\(^{32}\) 1910 TPD 1314 at 1319. See 6.2.2 above.

\(^{33}\) Dernburg *System* 1 par 162.

\(^{34}\) 1963 (1) SA 102 (A) at 106 et seq.
In Chetty v Naidoo\(^{36}\) Jansen JA said:

"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."

In Gien v Gien\(^{37}\) it was declared that our law's point of departure is the so-called absoluteness of ownership, although it recognises the fact that ownership can be restricted. It was said, with reference to *Regal v African Superslate (Pty) Ltd*, that:

"Eiendomsreg is die mees volledige saaklike reg wat 'n persoon ten opsigte van 'n saak kan hé. Die uitgangspunt is dat 'n persoon, wat 'n onroerende saak aanbetref, met en op sy eiendom kan maak wat hy wil. Hierdie op die oog at ongebonde vryheid is egter 'n halwe waarheid. Die absolute beskikkingsbevoegdheid van 'n eienaar bestaan binne die perke wat die reg daarop plaas."

\(^{35}\) As a general principle everyone can do with his property what he likes, even if it is detrimental to others, but where neighbouring immovable are concerned, it is obvious that there exists less freedom for the unlimited exercise of one's rights.

\(^{36}\) 1974 (3) SA 13 (A) at 20.

\(^{37}\) 1979 (2) SA 1113 (T) at 1120.

\(^{38}\) Ownership is the most complete real right that a person can have with regard to a thing. The point of departure is that a person, as far as an immovable is concerned, can do with and on his property as he likes. However, this apparent unlimited freedom is a half-truth. The absolute entitlements of
It can thus be said that the general starting point in South African case law is to describe ownership with reference to the comprehensiveness of the owner's right to use his property and, although the existence of restrictions is recognised, according to case law ownership can nevertheless be described as fundamentally unrestricted and absolute.\(^{39}\)

The importance of the absolute concept of ownership in our law is stressed by the declaration of Holmes JA in *Oakland Nominess v Gelria Mining & Investment Co (Pty) Ltd.*\(^{40}\)

"Our law jealously protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner."  

Ownership is described in different ways in legal textbooks. The first method of defining ownership is to draw up a catalogue of the different entitlements of the owner. According to Erasmus, Van der Merwe and Van Wyk the list of entitlements includes the *ius utendi, ius fruendi, ius abutendi, ius disponendi, ius vindicandi* and the *ius negandi*.\(^{41}\) While some jurists provide only a catalogue of entitlements or incidents of ownership,\(^ {42}\) others provide a description of ownership in conjunction with such an owner exists within the boundaries of the law.

\(^{39}\) Van der Walt 1986 *THRHR* 305 at 320; Van der Walt 1991 *R&K* 329 at 353; Visser 1985 *Acta Juridica* 39 at 47; Kroeze 1993 *De Jure* 42 at 47.

\(^{40}\) 1976 (1) SA 441 (A) at 452.

\(^{41}\) Erasmus, Van der Merwe and Van Wyk *Lee and Honéré - Family, things and succession* 260.

\(^{42}\) The list of entitlements or incidents of ownership often also includes some responsibilities. See Lewis 1985 *Acta Juridica* 241 et seq where the following incidents of ownership are listed: the right to use the property, the right to manage the property, the right to the income from the property, the right to capital which includes the right to destroy the property and the right to dispose of the property, the right to security, the incident of absence of term, the incident of transmissibility, the prohibition against harmful use of the property, liability to execution, the right to possess the property and lastly mention is made of the residuary character of ownership. See also Honéré in Guest *Oxford essays in jurisprudence* 107 et seq and Gibson *Wille's principles of South African law* 198 et seq.
catalogue. The method of only drawing a catalogue of the different entitlements of ownership is rejected by most jurists because it is felt that ownership is an abstract concept and it is impossible to compile a comprehensive list of entitlements. The view according to which ownership is regarded as a "bundle of rights" or a "composite right consisting of a conglomerate of rights, powers and liberties" is also rejected. The prevailing view in this regard is that ownership will always amount to more than the sum total of the different entitlements.

Van der Walt regards Van der Merwe's definition, according to which ownership is defined with reference to the comprehensiveness of the owner's right, as representative and authoritative in the South African law:

"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

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43 See in this regard Van der Merwe Sakereg 112 et seq; Silberberg The law of property 37 and 226; Delport and Olivier Sakereg vonnisbundel 135 et seq; Erasmus, Van der Merwe and Van Wyk Lee and Honoré - Family, things and succession 260; Oosthuizen The law of property 27; Hahlo and Kahn The Union of South Africa - The developments of its laws and constitution 578; Sonnekus Sakereg vonnisbundel 130.

44 Kleyn and Boraine Silberberg and Schoeman's The law of property 162; Van der Walt 1988 De Jure 16 at 18; Van der Merwe Sakereg 112; Van der Merwe Sakereg (1989) 174; Schoeman Silberberg and Schoeman - The law of property 162; Sonnekus and Neels Sakereg vonnisbundel 249; Kroeze 1993 De Jure 42 at 47.

45 Silberberg The law of property 37 et seq. According to Silberberg "the creation of a limited real right thus amounts to a reduction of the sum total of the real rights which are said to make up the universal right of ownership or to the removal of one or more of the powers of the owner over a thing if one prefers to regard the right of ownership as a 'bundle of powers'."

46 Hahlo and Kahn The Union of South Africa - The development of its laws and constitution 578.

47 Van der Merwe Sakereg 112; Schoeman Silberberg and Schoeman - The law of property 162; Van der Walt 1988 De Jure 16 at 18; Olivier, Pienaar and Van der Walt Law of property - Students' handbook 32; Sonnekus and Neels Sakereg vonnisbundel 249; Kroeze 1993 De Jure 42 at 47.

48 Van der Walt 1988 De Jure 16 at 19.

49 Van der Merwe Sakereg 110.
Van der Merwe\textsuperscript{51} states that his definition is in accordance with Grotius' definition of full ownership.\textsuperscript{52}

It is pointed out by Van der Walt\textsuperscript{53} that the words "omvangrykste heerskappy" or most comprehensive sovereignty, as used by Van der Merwe in his definition, have a dual meaning. Firstly it signifies the most comprehensive collection of entitlements with regard to the thing, and secondly it indicates that ownership provides the owner with the widest possible scope within which these entitlements with regard to the thing can be exercised. The first meaning, which is referred to as the identity aspect of the absolutist concept of ownership, says something about the content of the right (the different entitlements of the owner) and the way in which the right is structured, while the second meaning gives an indication of how ownership is exercised. This is referred to as the exercise aspect of the absolutist concept of ownership.

6.3.1 The identity aspect of ownership

With reference to the identity aspect of ownership, Van der Walt\textsuperscript{54} points out that the majority of definitions in this category describes ownership in such a way as to

\textsuperscript{50} 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.

\textsuperscript{51} Van der Merwe Sakereg 110.

\textsuperscript{52} Van der Merwe quotes Grotius \textit{Inleidinge} II.3.10 (1952) 54: "Volle is den eigendom waer door iemand met de zake alles mag doen nae sijn geliefde ende t'sijnen bate dat by de wetten onverboden is". He also refers to Van Leeuwen Cencura Forensis, theoretico-practica 1.2.13.1, Van der Keessel \textit{Praelectiones iuris hodiemi ad Hugonis Grotii Intoductionem ad iurisprudentiam Hollandicam} II.3.10, Lee and Honoré \textit{The South African law of property, family relations and succession} par 29 and \textit{Johannesburg Municipal Council v Rand Townships Registrar & others} 1910 TPD 1314 at 1319.

\textsuperscript{53} Van der Walt 1988 \textit{De Jure} 16 at 19. See also Kroeze 1993 \textit{De Jure} 42 at 47.

\textsuperscript{54} Van der Walt 1988 \textit{De Jure} 16 at 19.
distinguish it from limited real rights. A distinction is made here between the distinguishing characteristics and the distinguishing entitlements.

(i) Characteristics that distinguish ownership from limited real rights

The following characteristics of the South African concept of ownership can be listed as characteristics that distinguish ownership from limited real rights:

(a) Ownership is described as the mother right, because all limited real rights are derived from ownership.\(^{55}\)

(b) Ownership is an abstract right. Ownership is described as such, because the exact content of the right is indeterminable and ownership will always remain with the owner no matter how many entitlements are disposed of by transferring it to others as limited real rights.\(^{56}\)

(c) Ownership has a residuary character - this is also referred to as the elasticity of ownership. This implies that all limited real rights are regarded as unnatural, temporary encumberments on ownership and once the limited real rights are extinguished it will automatically revert back to the owner and ownership will resume its natural fullness and become unencumbered again. The owner thus retains a reversionary right with regard to the entitlements he disposes of as limited real rights.\(^{57}\)

\(^{55}\) Van der Merwe \textit{Sakereg} 113; Van der Merwe \textit{Sakereg} (1989) 175; Kleyn and Boraine \textit{Silberberg and Schoeman's The law of property} 162; Van der Walt 1988 \textit{De Jure} 16 at 20; Sonnekus and Neels \textit{Sakereg vonnisbundel} 249.

\(^{56}\) Van der Merwe \textit{Sakereg} 112 refers to this characteristic as the indefiniteness of ownership. Also see Van der Merwe \textit{Sakereg} (1989) 174; Van der Walt 1992 \textit{SAJHR} 431 at 433; Van der Walt 1988 \textit{De Jure} 16 at 20; Sonnekus \textit{Sakereg vonnisbundel} 130; Sonnekus and Neels \textit{Sakereg vonnisbundel} 249; Schoeman \textit{Silberberg and Schoeman - The law of property} 162.

\(^{57}\) Van der Walt 1988 \textit{De Jure} 16 at 20; Kleyn and Boraine \textit{Silberberg and Schoeman's The law of property} 163. Lewis 1985 \textit{Acta Juridica} 241 at 257 states that "this is the characteristic of ownership that distinguishes it from all other rights which one may have in a thing." \textit{Contra} Van der Merwe \textit{Sakereg} (1989) 175; Van der Merwe \textit{Sakereg} 113; Sonnekus and Neels \textit{Sakereg vonnisbundel} 249.
(d) Ownership is a comprehensive right in the sense that it confers on the owner the most comprehensive control over a thing.\textsuperscript{58} This is also referred to as the totality of ownership. Van der Walt\textsuperscript{59} points out that the characteristic of comprehensiveness not only implies that ownership constitutes the most comprehensive collection of entitlements, but also that ownership will always amount to something more than such a collection.

(e) Ownership is an exclusive or individualistic right. This implies firstly that there can be only one owner and secondly that the owner can exclude all others from interfering with his right.\textsuperscript{60}

(f) Ownership is an independent right in that it is neither dependent on nor derived from any other right.\textsuperscript{61}

(g) Ownership is unlimited in duration and not subject to a time limit.\textsuperscript{62}

(h) Ownership is an absolute right. The absoluteness of ownership implies

vonnisbundel 249.

\textsuperscript{58} Kleyn and Boraine Silberberg and Schoeman's The law of property 162; Schoeman Silberberg and Schoeman -The law of property 162; Van der Merwe Sakereg (1989) 171 et seq; Van der Merwe Sakereg 110; Oosthuizen The law of property 27; Sonnekus and Neels Sakereg vonnisbundel 249; Sonnekus Sakereg vonnisbundel 130; Erasmus, Van der Merwe and Van Wyk Lee and Honoré Family, things and succession 260; Hahlo and Kahn The Union of South Africa - The development of its laws and constitution 578. See also Gien v Gien 1979 (2) SA 1113 (T) at 1120C.

\textsuperscript{59} Van der Walt 1988 De Jure 16 at 20.

\textsuperscript{60} Van der Merwe Sakereg 110; Van der Merwe Sakereg (1989) 171; Van der Walt 1988 De Jure 16 at 21; Kleyn and Boraine Silberberg and Schoeman's The law of property 162.

\textsuperscript{61} According to Van der Merwe Sakereg (1989) 176 the independence of ownership can be regarded as the distinguishing characteristic of ownership. See also Kleyn and Boraine Silberberg and Schoeman's The law of property 163; Van der Walt 1988 De Jure 16 at 21.

\textsuperscript{62} Kleyn and Boraine Silberberg and Schoeman's The law of property 163. Van der Merwe Sakereg (1989) 175 points out that there are exceptional cases where ownership will be subject to a time limit (eg the fideicommissum).
that it is an (in principle) unrestricted right and that restrictions, no matter how many or how exhaustive they are,\textsuperscript{63} are seen as exceptions to the rule.\textsuperscript{64} It has been suggested that the severity of the restrictions has led to the erosion or limitation of the traditional concept of ownership so that ownership can no longer be described as absolute.\textsuperscript{65} It is however pointed out by Van der Walt and Kleyn\textsuperscript{66} that ownership has always been subject to limitation and that even if the limitations have increased in number, it is not necessarily true that ownership is now a more limited right. Ownership is thus still perceived as a right which is in principle unrestricted and therefore absolute.

(ii) Entitlements that distinguish ownership from limited real rights

According to Van der Walt\textsuperscript{67} the premise of this category is also the fact that ownership will always amount to something more than the mere sum-total of the different entitlements of the owner. The entitlements that are listed in this category are peculiar

\textsuperscript{63} For a discussion on how ownership has been limited by legislation see Cowen \textit{New patterns of landownership: the transformation of the concept of ownership as plena in re potestas} Paper read at the University of the Witwatersrand on 26 April 1984 and Pienaar 1986 TSAR 295 with regard to new forms of land ownership and ownership of air space, Lewis 1985 \textit{Acta Juridica} 241 with regard to mining and mineral laws and political land legislation, Milton 1985 \textit{Acta Juridica} 267 with regard to town planning, Rabe 1985 \textit{Acta Juridica} 289 with regard to nature conservation and Van der Walt 1987 SALJ 469 and Van der Walt 1987 CILSA 209 with regard to conservation of the cultural environment.

\textsuperscript{64} Visser 1985 \textit{Acta Juridica} 39 \textit{et seq}; Kleyn and Boraine Silberberg and Schoeman's \textit{The law of property} 163; Van der Walt and Kleyn in Visser \textit{Essays on the history of law} 213 at 258 \textit{et seq}; Van der Walt 1991 \textit{R&K} 329 at 353; Van der Walt 1988 \textit{De Jure} 16 at 24; Sonnekus and Neels \textit{Sakereg vonnisbundel} 249; Oosthuizen \textit{The law of property} 27; Hahlo and Kahn \textit{The Union of South Africa - The development of its laws and constitution} 578; Kroeze 1993 \textit{De Jure} 42 at 47.

\textsuperscript{65} See in this regard Lewis 1985 \textit{Acta Juridica} 241; Cowen \textit{New patterns of landownership: the transformation of the concept of ownership as plena in re potestas} Paper read at the University of the Witwatersrand on 26 April 1984; Pienaar 1986 TSAR 295.

\textsuperscript{66} Van der Walt and Kleyn in Visser \textit{Essays on the history of law} 213 at 259. See also Van Maanen \textit{Eigendomschijnbewegingen} 26 \textit{et seq}, Derine \textit{Grenzen van het eigendomsrecht in de negentiende eeuw}.

\textsuperscript{67} Van der Walt 1988 \textit{De Jure} 16 at 21.
to ownership and as such it cannot be alienated or transferred to someone who has a limited real right. Since these entitlements cannot be alienated and will always remain with the owner, it serves as distinguishing entitlements.

(a) The right to dispose of the property. Although this entitlement may be interpreted to include the right to use and enjoy the property or the right to alienate the property, it is used here only to indicate the owner's right to decide how and by whom the property shall be used. The owner thus has the power to grant limited real rights to others. This entitlement is also referred to as the power to manage.

(b) The right to alienate the property. Since only the owner may manage the property it follows that only the owner may alienate the property.

(c) The right to vindicate. The owner will always have the power to claim his property from any unlawful possessor. It follows that no-one may withhold property from the rightful owner, unless he is vested with some enforceable right against the owner.

(d) The right to use and enjoy the property. Van der Walt points out that

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68 Van Zyl and Van der Vyver Inleiding tot die regswetenskap 422.

69 Sonnekus Sakereg vonnisbundel 130; Sonnekus and Neels Sakereg vonnisbundel 248.

70 Lewis 1985 Acta Juridica 241 at 250. See also Honoré in Guest Oxford essays in jurisprudence 107 at 116; Van der Walt 1988 De Jure 16 at 21 et seq.

71 Van der Walt 1988 De Jure 16 at 22; Kleyn and Boraine Silberberg and Schoeman's The law of property 162; Van der Merwe Sakereg (1989) 173; Sonnekus and Neels Sakereg vonnisbundel 248; Lewis 1985 Acta Juridica 241 at 250; Oosthuizen The law of Property 27.

72 Van der Walt 1988 De Jure 16 at 22; Kleyn and Boraine Silberberg and Schoeman's The law of property 162; Van der Merwe Sakereg (1989) 173; Erasmus, Van der Merwe and Van Wyk Lee and Honoré - Family, things and succession 260; Lewis 1985 Acta Juridica 241 at 254. See also Chetty v Naidoo 1974 (3) SA 13 at 20B; Vasco Dry Cleaners v Twycross 1979 (1) SA 603 (A) at 615H; Oakland Nominees v Gelria Mining and Investment Co 1976 (1) SA 441 at 452A.

73 Van der Walt 1988 De Jure 16 at 22.
while some authors include the right to use and enjoy the property in this
category of untransferable entitlements,\textsuperscript{74} this is pre-eminently an
entitlement that can be transferred to others as a limited real right.

6.3.2 The exercise aspect of ownership

According to Van der Walt\textsuperscript{75} this approach to describing ownership emphasises the
possibilities for the exercise of the owner's entitlements, rather than the entitlements
itself. Most jurists who describe ownership in this way qualify the exercise aspect of
ownership by stating that the scope of the owner's right to do with his property as he
deems fit is always subject to limitation by law.\textsuperscript{76} The best known example of a
description where the exercise aspect of ownership is emphasised is to be found in
\textit{Gien v Gien:}\textsuperscript{77}

"Die uitgangspunt is dat 'n persoon, wat 'n onroerende saak aanbetref,
met en op sy eiendom kan maak wat hy wil. Hierdie op die oog af
ongebonde vryheid is egter 'n halwe waarheid. Die absolute
beskikkingsbevoegdheid van die eiener bestaan binne die perke wat die

\textsuperscript{74} See in this regard Van Zyl and Van der Vyver \textit{Inleiding tot die regswetenskap} 422. According to
these authors the right to use and enjoy the property can be used to distinguish between ownership
and limited real rights in that the thing directly qualifies as the object of ownership, while it only
indirectly qualifies as the object of a limited real right.

\textsuperscript{75} Van der Walt 1988 \textit{De Jure} 16 at 22.

\textsuperscript{76} Van der Walt 1988 \textit{De Jure} 16 at 23; Van der Merwe \textit{Sakereg} (1989) 171; Kleyn and Boraine
\textit{Silberberg and Schoeman's The law of property} 161; Sonnekus and Neels \textit{Sakereg vonnisbundel}
249; Hahlo and Kahn \textit{The Union of South Africa - The development of its laws and constitution}
578; Oosthuizen \textit{The law of property} 27; Erasmus, Van der Merwe and Van Wyk \textit{Lee and Honoré - Family, things and succession} 260; Schoeman \textit{Silberberg and Schoeman - The law of property} 162. See also \textit{Gien v Gien} 1979 (2) SA 1113 at 1120; \textit{Regal v African Super Slate (Pty) Ltd} 1963
(1) SA 102 at 106.

\textsuperscript{77} 1979 (2) SA 1113 at 1120C. See also in this regard \textit{Regal v African Super Slate (Pty) Ltd} 1963
(1) SA 102 at 106; Van der Merwe \textit{Sakereg} (1989) 171; Kleyn and Boraine \textit{Silberberg and Schoeman's The law of property} 161; Sonnekus and Neels \textit{Sakereg vonnisbundel} 249; Hahlo and
Kahn \textit{The Union of South Africa - The development of its laws and constitution} 578; Oosthuizen
\textit{The law of property} 27; Erasmus, Van der Merwe and Van Wyk \textit{Lee and Honoré - Family, things and succession} 260; Schoeman \textit{Silberberg and Schoeman - The law of property} 162.

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reg daarop plaas... Ons reg gaan ook uit van die standpunt van die sogenaamde absoluutheid van eiendomsreg maar terselfdertyd met erkenning van die beperking daarvan."

The premise of this type of description is that the owner has total freedom to do with his property as he wishes. Ownership is regarded as an absolute right in the sense that it is in principle unrestricted, although it tolerates restrictions. Restrictions are regarded as unnatural and exceptional. The fact that ownership can be limited by public and private law to such an extent that very little of the right remains, does not infringe upon the principle of an absolute ownership.

In discussing or describing the exercise aspect of ownership, reference is often made to the *ius abutendi*. The exact content and meaning of the *ius abutendi* in South African law is uncertain. While some jurists think that the *ius abutendi* merely entails the right to consume one’s property, others contend that it also confers on the owner.

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78 The point of departure is that a person, as far as an immovable is concerned, can do with and on his property as he likes. However, this apparent unlimited freedom is a half-truth. The absolute entitlements of an owner exists within the boundaries of the law... Our law's point of departure is also the so-called absoluteness of ownership, but at the same time it recognises the limitation thereof.

79 Visser 1985 Acta Juridica 39 et seq; Kleyn and Boraine Silberberg and Schoeman's *The law of property* 163; Van der Walt and Kleyn in Visser Essays on the history of law 213 at 258 et seq; Van der Walt 1991 R&K 329 at 353; Van der Walt 1988 De Jure 16 at 24; Sonnekus and Neels Sakereg vonnisbundel 249; Oosthuizen *The law of property* 27; Hahlo and Kahn *The Union of South Africa - The development of its laws and constitution* 578; Kroeze 1993 De Jure 42 at 47.


82 Van der Walt 1988 De Jure 16 at 23.

83 Hahlo and Kahn *The Union of South Africa - The development of its laws and constitution* 578; Schoeman Silberberg and Schoeman *The law of property* 178.
the right to abuse his property.\textsuperscript{84} According to Kleyn and Boraine the \textit{ius abutendi} includes the right to destroy one's property.\textsuperscript{85}

Prior to the implementation of the interim Constitution in 1994 ownership was therefore perceived as an absolute, exclusive, individualistic, in principle unlimited right that confers on the owner the most comprehensive right to dispose of his property. The autonomy of the owner is central to the concept of ownership in this period and is emphasised by the exclusivity and absoluteness ascribed to ownership. The owner's consent fulfills a central role in both the notions of exclusivity and absoluteness. As was stated above, the fact that ownership is regarded as absolute or in principle unrestricted implies that all restrictions or limitations are perceived as exceptions. The owner may, however, consent to restrict his right by granting limited real rights to others. All others may also only interfere with the owner's right if he consents to such an interference.

In South Africa all questions on property law centred around the process of scientification of property law. On the one hand the property debate in South Africa concentrated on the content of ownership and the system of real rights. The definition of these rights and their place within the hierarchical system were all institutional questions. This amounted to a 'scientific' continuation of the distinction made by Grotius and the German Pandectists between ownership and limited real rights. On the other hand South African property lawyers concerned themselves with the exercise of property rights. The exercise aspect concerned the relationship between the owner and third parties as well as the public at large.

\textsuperscript{84} Sonnekus and Neels \textit{Sakereg vonnisbundel} 249; Sonnekus \textit{Sakereg vonnisbundel} 130. Although Erasmus, Van der Merwe and Van Wyk Lee and Honoré - Family, things and succession 280 state that the owner has the right to abuse his property, they also mention the view held by Hahlo and Kahn that the word \textit{abuti} does not imply the stigma of abusing or misapplying the thing. See also Van der Merwe \textit{Sakereg} (1989) 173 and Silberberg \textit{The law of property} 227 where it is pointed out that although the \textit{ius abutendi} may include the right to abuse one's property, this entitlement is curtailed to a large extent.

\textsuperscript{85} Kleyn and Boraine Silberberg and Schoeman's \textit{The law of property} 162. See also Oosthuizen \textit{The law of property} 27.
The property debate in South Africa prior to the implementation of the first democratic Constitution did not really change the direction of the development of property initiated by Grotius and the German Pandectists. In essence all questions about property rights were answered in terms of a conceptual, institutional and hierarchical system based on an abstract, scientific system of concepts, definitions and logic.

6.4 Changing the face of the concept of ownership in South Africa

Cowen set the stage for the debate on the future relevance of the traditional concept of (land)ownership in South Africa. His thought-provoking paper on new patterns of landownership and the transformation of ownership as *plena in re potestas* proved to be an incentive to many jurists to ponder the different possibilities of how this concept should change and/or adapt in order to secure its future existence. Cowen questioned the validity and future relevance of many of the traditional characteristics of ownership and the rules governing the application of this concept, and suggested that the traditional perception of ownership should be re-evaluated and, where necessary, adjusted to suit the current needs of the entire South African society. What is suggested here is not that South African property law break with tradition and re-think and re-evaluate the application, social function and role of property within society, but merely that the system of concepts be amended to suit the needs of the particular situation in South Africa. In this sense Cowen still perceives ownership (and other property rights) as a flexible concept that is able to change and adapt to new circumstances. However, at this point in history property law in South Africa was on the doorstep of another discontinuity in its development. What was needed was a total break with the traditional view of property rights as concepts within a hierarchical system. The political role of these rights had to be recognised and the rights themselves were in need of fundamental change to be able to cater for the specific needs of South African society.

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86 Cowen *New patterns of landownership: the transformation of the concept of ownership as plena in re potestas* Paper read at the University of the Witwatersrand on 26 April 1984.
Cowen points out that the introduction of the *Sectional Titles Act*[^7] effectively amended some of the common law principles regarding ownership of immovables. The principle of accession, as expressed in the Roman maxim *superficies solo cedit*, was repealed in the case of sectional titles in that the co-owners of the land (or common property) are not owners of everything that is attached to the land, but each of these co-owners is owner of a part (his section) of the building.[^8] Likewise the *cuius est solum*-rule was repealed in the case of sectional titles. The owner of a section in a sectional title scheme will not be owner of everything under and above his property, but only of the specific section. This was achieved by describing the section not only in terms of vertical boundaries (as is usually the case), but also in terms of horizontal boundaries.[^8]

The common law concept of co-ownership was also adapted by the introduction of the *Sectional Title Act* in that the co-owner in a sectional title scheme does not have the freedom to use or dispose of his undivided co-ownership share as he deems fit. The exercise of this right is limited by the rules governing sectional titles and linked to the rights of the other co-owners. According to Cowen[^9] the individualistic character of common law co-ownership was changed in the case of sectional title schemes by

[^7]: 66 of 1971. Cowen’s arguments also apply to the new *Sectional Title Act* 95 of 1986 and the *Property Timesharing Control Act* 75 of 1983 and ownership of airspace. Also see Pienaar 1988 *TSAR* 184 at 192 et seq; Pienaar 1989 *THRHR* 216; Pienaar 1986 *TRW* 1; Pienaar 1987 *CILSA* 94; Van der Walt 1990 *De Jure* 1 at 38; Van der Walt and Pienaar *Introduction to the law of property* 79 et seq.

[^8]: Cowen *New patterns of landownership* 57 et seq. See also Cowen 1973 *CILSA* 1 at 19 et seq; Pienaar 1988 *TSAR* 184 at 193; Pienaar 1983 *THRHR* 62 at 70; Van der Merwe 1974 *THRHR* 113 at 115 et seq; Van der Merwe Sakereg (1989) 396; Kleyn and Boraine *Silberberg and Schoeman’s The law of property* 323 et seq; Van der Walt and Pienaar *Introduction to the law of property* 81.

[^9]: Cowen *New patterns of landownership* 54 et seq. See also Cowen 1985 *Acta Juridica* 333; Pienaar 1989 *THRHR* 216; Pienaar 1987 *CILSA* 94; Kleyn and Boraine *Silberberg and Schoeman’s The law of property* 325 et seq; Van der Walt and Pienaar *Introduction to the law of property* 81.

[^10]: Cowen *New patterns of landownership* 63 et seq. Van der Merwe Sakereg (1989) 407 et seq states that the *Sectional Title Act* has created a new type of common ownership (*gemeenskaplike eiendom*) that differs from the traditional co-ownership (*mede-eiendom*). Whereas co-ownership has an individualistic character, the *Sectional Title Act* creates a concept of common property with an universal basis according to which the rights of the individual are managed by the body corporate. See also Van der Merwe 1974 *THRHR* 113 at 120 et seq; Pienaar 1983 *THRHR* 62 at 72 et seq.
eliminating the right of any of the co-owners to terminate the relationship at will by means of the actio communi dividundo. The control, management and administration of the common property under a sectional title scheme is entrusted to a statutory body corporate, and is no longer in the hands of the co-owners themselves.

Lastly, and most importantly, Cowen91 points out that ownership as plena in re potestas is obviated in the case of sectional title schemes by the joint exercise by the sectional owners of the entitlements of use and control regarding the common property.

Cowen voices the opinion that the perception of ownership as plena in re potestas has become obsolete and that it is in dire need of change in view of the needs of the modern South African society. He makes three submissions in this regard:

(i) The traditional concept fails to distinguish, as it should, between what attributes are appropriate for different objects of ownership.92

(ii) The idea of plena in re potestas is incompatible with the fragmentation of ownership; but such fragmentation is a need of our time.93

(iii) The fact that the idea of ownership as plena in re potestas is unsatisfactory from the point of view of general jurisprudence.94

Cowen does not discuss his firsts two submissions in any detail, but merely provides

91 Cowen New patterns of landownership 67 et seq. De Wet 1972 De Rebus 205, however, severely criticised the Sectional Titles Act. According to him, the rights of the sectional owner cannot be described as common law ownership. He states that: "Die man wat 'eienaar' is van 'n woonstel is nie werklik 'eienaar' van die grond nie, ... maar indertwyse het hy slegs 'n newelagtige iets onderworpe aan die gebreke waarmee hierdie Wet ryk bedeeld is." Van der Merwe Sakereg (1989) 406 et seq, however, points out that De Wet's arguments are untenable in view of the development of the concept of ownership in modern times. Social realities necessitate the limitation of ownership, and as such ownership should be utilised for the benefit of society. See also Van der Merwe 1974 THRHR 113 at 123 et seq; Pienaar 1986 TSAR 184 at 193; Pienaar 1986 TRW 1 at 3.

92 Cowen New patterns of landownership 70 et seq.

93 Cowen New patterns of landownership 71 et seq.

94 Cowen New patterns of landownership 72 et seq.
examples to explain what is meant by each. With reference to the third submission Cowen mentions three points of criticism against the method of analysing ownership according to the different rights, privileges, powers and immunities. According to him this method is unsatisfactory and potentially misleading. He firstly states that\

"... analyses which stress the fact that ownership is as extensive as the possibility of use and enjoyment boils down to the proposition that ownership consists of the maximum combination of rights, powers, privileges and immunities in respect of the object owned that are legally possible from time to time in a given system of law, a one-sided proposition which leaves what is legally possible unexplained."

Secondly, he contends that while the different attributes of ownership are often listed as essentialia of ownership, they are at best naturalia. He concludes in this regard that amongst the naturalia, the elasticity of ownership can be regarded as its distinguishing characteristic. Cowen's third and last point of criticism is the fact that the second part of the traditional definition of ownership, which deals with the limitation of ownership, is often negated or at least not emphasised enough. Cowen suggests that the limitation of ownership should be regarded as an integral part of the concept, and that the imposition of social duties and responsibilities should be considered. This would not mean that the traditional concept of ownership, which emphasised individualism, should be abolished in toto, but rather that a balance should be struck between individual self-assertiveness and social responsibility. According to Cowen this will result in

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95 Cowen New patterns of landownership 74.
96 Such as the ius utendi, possidendi, abutendi etc.
97 Cowen New patterns of landownership 74 et seq.
98 Cowen New patterns of landownership 77.
99 Cowen New patterns of landownership 77 et seq.
100 Cowen New patterns of landownership 80.
"a concept of ownership suited to our day and age; specifically adapted, in all cases, to the nature of what is owned; and adapted also to the overriding fact that every owner of a thing is at the same time a member of a community, or of several communities."

Cowen thus did not advocate a break with the traditional view of property rights as concepts within a hierarchical system of rights, but merely suggested that the concept of ownership should be adapted so as to meet the needs of South African society. He therefore accepts the conceptualist premise that property law can be seen as flexible enough to adapt to new social and political circumstances.

Cowen's work was the catalyst for many property lawyers to re-think and re-evaluate the future existence and role of the concept of absolute, exclusive and individualistic ownership that was still in existence in the 1980's and early 1990's.\(^{101}\) This perception of ownership had become untenable in a society characterised by social injustice and racially based land tenure.\(^{102}\) The civilist concept of ownership contributed to the existing problems and made land reform virtually impossible in a time when the majority of the South African population was without land - 85% of the land was owned by whites (13% of the population). Ownership was used as a tool in the hands of the apartheid government to enforce and entrench racial segregation. The reduction of property law to a scientific system of rights and concepts contributed to the problems relating to property rights and land in South Africa. On the one hand the scientific approach to property rights negated questions relating to the social function of property rights and the relevance of reasonableness within an abstract, scientific system. Moral issues were kept out of the debate on property rights. On the other hand the hierarchy of stronger and weaker property rights enabled the government to manipulate the

\(^{101}\) See 6.3 above.

\(^{102}\) For an exposition of the history of black land tenure and the apartheid legislation in respect to land see Van der Merwe 1989 TSAR 663; Olivier, Du Plessis and Pienaar 1990 SAPL 266, Van der Walt 1990 Stell LR 26; Van der Walt 1990 De Jure 1; Davenport 1985 Acta Juridica 53; Schoombee 1985 Acta Juridica 77; Van der Post 1985 Acta Juridica 213; Kleyn and Boraine Silberberg and Schoeman's The law of property 493 et seq.
situation by degrading certain rights (for instance the property rights of some groups were degraded to permits). The problem was that the scientific and non-political approach to ownership and other property rights completely negated the debate on the social function of these rights. However, property rights (and land) are essentially political issues and as such ownership specifically, and property rights in general, needed to be evaluated and adapted in view of their social role and function in order to create a property regime that would be acceptable to the South African society as a whole.\textsuperscript{103}

In order to appease the immense land hunger, property law had to adapt in order to enable it to cater for the pressing needs of society. It became clear at this time that the \textit{apartheid} system would not survive for long, and this prompted many jurists to consider different possibilities to change property rights so that they can effectively deal with the needs of a \textit{post-apartheid} society. Some of these jurists saw the political nature and the social function of property rights behind the pretence of scientific concepts and extended the property debate to include these issues. They did not aim to change the concepts, but rather to change the nature of the property debate and to return to the debate on the social function of property rights in society (as it existed before Grotius). Cowen did not go this far. He still concentrated on the concepts and their place within the system of property rights. He did, however, provide the impetus for many jurists to re-think the whole property question by looking beyond the scientific concepts and extending the property debate to look at the social function of property.

Most of the initial debate on the transformation of the concept of ownership centred around the issues mentioned by Cowen. Cowen's thesis that the concept of ownership as \textit{plena in re potestas} is being transformed into a socially responsible and limited right was the theme of many subsequent papers. On the one hand there are a few

\textsuperscript{103} Van der Walt 1990 \textit{Stell LR} 26; Van der Walt 1990 \textit{De Jure} 1; Van der Merwe 1989 \textit{TSAR} 663; Van der Merwe 1990 \textit{Stell LR} 321; Marcus 1990 \textit{SAJHR} 178; Skweyiya 1990 \textit{SAJHR} 195; Sachs in Sachs \textit{Protecting human rights in a new South Africa} 104; Davis 1991 \textit{SALJ} 453 at 468.
publications which picked up on the technical aspects of Cowen's paper. It is pointed out in these publications that the common law concept of ownership was not always perceived as absolute or unlimited, but that it acquired this characteristic due to the influence in South African law of the German Pandectists of the nineteenth century. On the other hand there are publications in which the political implications of Cowen's paper are emphasised. These publications suggested that the debate on ownership should take cognisance of the social and political environment in which it functions. It is argued that ownership should be socialised. In doing so, a socially responsible perception of ownership will be created - a perception that recognises the fact that the definition, nature, content, characteristics and protection of ownership are influenced by the social and political function and implications of individual ownership. A socialised concept of ownership necessarily recognises the fact that ownership not only entails rights and entitlements that accrue to the owner, but also that duties, limitations and responsibilities towards society form an inherent part of ownership.

Cowen's submission that attention should be given to the possible fragmentation of ownership was mooted and explored in subsequent publications. Although some authors hinted at the possibility of a move backwards to divided ownership, the fragmentation of ownership was never worked out in any detail. It was, amongst others, suggested that divided ownership be implemented with regard to individual and communal title, movables and immovables, objects used for consumption and production, and so on.

104 Birks 1985 Acta Juridica 1; Visser 1985 Acta Juridica 39. These papers were followed up by a number of publications that concentrated on the origins of the South African concept of ownership. See Van der Walt 1986 THRHR 305; Pienaar 1986 TSAR 295; Van der Walt 1988 De Jure 16; Van der Walt and Kleyn in Visser Essays on the history of law 213.

105 Van der Walt 1986 THRHR 305; Van der Walt 1987 SALJ 469; Van der Walt 1990 De Jure 1; Van der Walt 1990 Stell LR 26; Van der Walt 1991 R&K 329; Van der Walt 1992 SAJHR 431; Lewis 1992 SAJHR 389; Pienaar 1986 TSAR 295; Pienaar 1988 TSAR 192; Kroeze 1993 De Jure 42; Kleyn and Boraine Silberberg and Schoeman's The law of property 163 et seq.

106 Kroeze 1993 De Jure 42; Pienaar 1986 TSAR 295 at 306; Van der Walt 1987 SALJ 469; Van der Walt 1988 De Jure 16; Van der Walt 1990 De Jure 1 at 36 et seq; Van der Walt 1990 Stell LR 26 at 42 et seq; Van der Walt in Van der Walt Land Reform 21; Van der Walt 1992 TSAR 40; Van der Walt and Kleyn in Visser Essays on the history of law 213; Domanski 1989 THRHR 433; Marcus 1990 SAJHR 178; Budlender and Latsky 1990 SAJHR 155; Skweyiya 1990 SAJHR 195; Robertson
6.5 Conclusion

In brief it could be said that the South African law pertaining to ownership early this century corresponded with Roman-Dutch law. In the second half of the nineteenth century South African property law underwent a process of scientification on the basis of Pandectism. Divided ownership was finally rejected and a unitary concept of ownership was accepted. Property law was treated in terms of a scientific, hierarchical system of abstract concepts, largely uninfluenced by social and political realities. The personal freedom and autonomy of the individual was accentuated and ownership was consequently described as an absolute, in principle unrestricted right.

Cowen’s article on the new patterns of landownership in South Africa raised interesting questions concerning the future viability and continued acceptance of the common law concept of absolute, individual ownership, and the 1980’s and early 1990’s were consequently characterised by numerous publications in which the unjust property regime and the influence of the common law and of the modern civilist concept of ownership on this regime were criticised and suggestions were made for ways in which the political questions raised by Cowen could be answered.

Although the concept of absolute, exclusive and individual ownership was still accepted as the law of the day in the early 1990’s, dramatic change regarding the way in which ownership is perceived and applied was inevitable.

The lack of a debate on the social and political function of property rights and the continued acceptance and application of the concept of absolute, individual ownership became untenable in a society characterised by racial segregation and an unjust distribution of land and rights to land. It was pointed out in the previous chapters that the modern civilist concept of ownership is associated with absoluteness, individuality and exclusiveness due to the influence of the nineteenth century German Pandectists.

1990 SAJHR 215; Olivier, Du Plessis and Pienaar 1990 SAPL 266 at 275 et seq; Van der Merwe 1989 TSAR 663; Van der Merwe 1990 Stell LR 321; Davis 1991 SALJ 453 at 468.
In terms of the traditional view property rights developed in an uninterrupted line from Roman law. As a result of the influence of the German Pandectists South African property law was characterised by an abstract, hierarchical system of stronger and weaker rights, and ownership was regarded as an absolute, exclusive and individual right. The scientification of property law meant that the property debate was dominated by conceptualism and questions on the social function of property were negated. The abstract concepts were seen as flexible enough to adapt to different social and political circumstances. However, it is pointed out that the abstract, conceptual approach to property law is not the result of the logical, uninterrupted development of Roman, medieval or Roman-Dutch law, and as such a strong case can be made for discarding the strong emphasis on conceptualism in favour of socialised property rights. It is pointed out that South African property law was characterised by many inequalities, and although property rights were seen as abstract, socially and politically neutral concepts, these inequalities were the result of changes to property law for social and political reasons. These changes were technical in nature and fitted into the abstract, scientific system of rights. The inequalities emphasised the need for change, and it was pointed out that socialised property rights would be able to cater for the needs of a non-racial, post-apartheid society. The implementation of the first truly democratic Constitution, which includes a Charter of Fundamental Rights, provided the ideal backdrop against which change could be effected.\(^{107}\)

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\(^{107}\) For a discussion of the influence of the interim Constitution and the final Constitution on the common law concept of ownership see chapter 11 below.
OWNERSHIP IN MODERN DUTCH LAW

1 Introduction

The development of ownership in modern Dutch law provides a very interesting example of recent developments in a legal system in which judicial review is not recognised in the constitution. Although a variety of rights, including ownership, are protected by the Dutch Constitution, parliament has the power to determine the extent of these rights and may limit the rights as they see fit. The idea of an entrenched institutional property right is therefore unknown in this system and the private-law concept of ownership dominates the treatment and nature of property rights. On the other hand judicial review does exist with regard to international treaties. This provides the Dutch owner with wider protection because *eigendom* or ownership is interpreted much wider in this context than in private law and includes limited real rights as well as personal rights.

A broad discussion of ownership in private law is necessitated by the fact that the Dutch theorists tried to accomplish certain socializing developments in private law itself, rather than through constitutional law. Before the NBW was finalised the nature and role of ownership in society was the topic of a lively debate. It was contended that the nature of ownership should reflect the character and the needs of Dutch society and that, in order to achieve this, a concept of pluriform ownership had to replace the then current concept of absolute, exclusive and individual ownership. The different suggestions as to how ownership should be functionalised and the criticism of these suggestions are discussed in this chapter.

Finally the constitutional protection of ownership is analysed and compared to the private-law development.
7.2 Ownership in the Dutch legal system

According to Dutch theory ownership can be described as a basic institution of law. This means that the true meaning of ownership cannot be derived from positive law. Positive law can determine who the owner is and it can limit ownership, but it cannot determine the exact meaning of the concept of ownership.\(^1\) The ownership clause in the NBW has been described as very conservative. Ownership is central within the system of law and is characterised by absoluteness, totality and abstractness.\(^2\) The starting point still is that the owner has the freedom to use his property, within the limits of law, as he sees fit.\(^3\) No positive obligation is placed on the owner,\(^4\) no provision has been made for the extension of ownership to incorporeals (or the so-called new property) and no specific social philosophy has been adopted or incorporated by 5.1.1 NBW.\(^5\)

Ownership is described by Beekhuis et al as the most comprehensive right a person can have with regard to a thing, and as such it is said to be the mother right from which all limited real rights - as daughter rights - are derived. It can also be said that all limited real rights are contained within ownership.\(^6\) Rights such as usufruct, quitrent, servitudes, hypothec, are, in a manner of speaking, present within the seed of ownership.

Ownership is described as a relation between a person and a thing on the one hand,

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\(^{1}\) Beekhuis et al Asser 13.

\(^{2}\) Van den Bergh 1987 R&K 327 at 337 et seq; Grosheide Eigendom in de overgang? 62.

\(^{3}\) Beekhuis et al Asser 20.

\(^{4}\) Slagter 1976 RMT 276 at 291.

\(^{5}\) Grosheide Eigendom in de overgang? 55 et seq.

\(^{6}\) Beekhuis et al Asser 16; Reehuis et al Pitto 274.

\(^{7}\) Reehuis et al Pitto 274.
and the relation between one person and other persons on the other hand. It is also
described as an absolute right in the sense that it is enforceable against all third
parties, as opposed to personal or relative rights that are enforceable only against
certain third parties. Ownership is said to be characterised by exclusivity, elasticity, uniformity, abstractness and absoluteness. In principle it is of undetermined duration, and it normally lasts for an indefinite time, although it can be subjected to a resolutive condition. Ownership can be transferred and vindicated.

Ownership contains all possible entitlements - with regard to the thing that is the object of the right - that are recognised by the existing legal order. The power of the owner to exercise these entitlements is relative in the sense that it is limited by the protected

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8 Beekhuis et al Asser 17.
9 Reehuis et al Pitlo 275 and 281.
10 The power of the owner to exclude all third parties from interfering with his ownership. See Reehuis et al Pitlo 282; Grosheide Eigendom in de overgang? 62; Reehuis and Slob Parlementaire geschiedenis van het Nieuw Burgerlijk Wetboek 1218.
11 With this is meant that as soon as a limited real right expires, that right falls back to the owner and ownership is automatically extended. See Beekhuis et al Asser 16 who point out that this is not an essential characteristic of ownership since this phenomenon is inherent to all mother rights.
12 Uniformity entails that there is only one type of ownership. This is also described as the totality of ownership. See Van den Bergh 1987 R&K 327 at 338; Slagter in Hondius Quad licet 357 at 365; Reehuis et al Pitlo 276; Grosheide Eigendom in de overgang? 62.
13 The entitlements of the owner are not defined, need not be justified and do not relate to social goals. See Van den Bergh 1987 R&K 327 at 338.
14 With the absoluteness of ownership is meant that ownership is unlimited in principle and the owner can exercise his entitlements as he sees fit. All limitations are regarded as exceptions. See Van den Bergh 1987 R&K 327 at 338.
15 Beekhuis et al Asser 18.
16 Section 3.83 NBW. Also see Reehuis et al Pitlo 280.
17 Section 5.2 NBW. Also see Reehuis et al Pitlo 280 that points out that revindication means that the owner demands the thing - the object of ownership - back, and not the right as such.
interests of society and others. According to 5.1.1 NBW ownership can be limited by rights of others, statutory provisions and the rules of unwritten law.

The owner's free use of his property can be limited by limited real rights\textsuperscript{18} and certain personal rights\textsuperscript{19} that he grants to third parties. If the owner violates someone else's right and this violation amounts to a wrongful act, this will also result in a limitation of ownership.\textsuperscript{20}

Ownership can be limited in different ways by statutory provisions. The Dutch Constitution determines that the owner can be expropriated in the public interest and that ownership can be destroyed or made unusable by an authorised authority, against compensation.\textsuperscript{21} It is also possible that property is not expropriated or taken from the owner, but that his rights are violated by a state authority and he is expected to endure this violation of his rights.\textsuperscript{22} The owner's freedom to use his property as he sees fit can also be limited.\textsuperscript{23} Ownership can furthermore be limited by lower legislatures that are authorised by the Constitution. These legislatures do not have the same powers as the national legislature, and seeing that their acts can be tested against the Constitution

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\textsuperscript{18} This can include usufruct, quitrent and servitudes. See Reehuis \textit{et al} Pitlo 283; Nieuwenhuis, Stolker and Valk \textit{Nieuw Burgerlijk Wetboek text en commentaar} 287; Beekhuis \textit{et al} Asser 27.

\textsuperscript{19} Such as rent and lease. See Reehuis \textit{et al} Pitlo 283; Nieuwenhuis, Stolker and Valk \textit{Nieuw Burgerlijk Wetboek text en commentaar} 289; Beekhuis \textit{et al} Asser 27.

\textsuperscript{20} Nieuwenhuis, Stolker and Valk \textit{Nieuw Burgerlijk Wetboek text en commentaar} 289.

\textsuperscript{21} Section 14. Property can also be expropriated in terms of the \textit{Onteigeningswet}, the \textit{Deltawet} of 8 May 1958, Stb. 246 and the \textit{Landinrichtingswet} 1985.

\textsuperscript{22} This can be done in accordance with the \textit{Belemmeringenwet} of 13 May 1927, Stb 159, the \textit{Wet Militaire Innuddaten} of 15 April 1894, the \textit{Waterstaatwet} of 10 November 1900, Stb 176, the \textit{Rivierenwet} of 9 November 1908, Stb 339, the \textit{Telegraaf- en Telefoonwet} of 31 January 1930, Stb 342, the \textit{Leegstandwet} of 21 May 1981, Stb 337, the \textit{Wegenwet} of 31 January 1930, Stb 342, and the \textit{Grondwet} of 22 May 1981, Stb 392.

\textsuperscript{23} See the \textit{Monumentenwet} of 22 June 1966, Stb 200, the \textit{Wet op Ruimtelijke Ordening} of 5 July 1962, Stb 286, the \textit{Boswet} of 20 July 1961, Stb 256 and the \textit{Wet Voorkeursrecht Gemeenten} of 22 April 1981, Stb 236.
by the courts, they are only given limited authority.  

The owner's rights can also be limited by the rules of unwritten law. According to section 3:14 NBW a right that stems from private law can be limited by an unwritten public law principle. Limitations can also result from unwritten private law in terms of section 6:162 NBW.  

7.3 The argument for a concept of pluriform ownership in the Netherlands  

7.3.1 Ownership and its social context  

As a result of the influence of the work of Grotius and the German Pandectists, ownership is traditionally regarded in most western European countries as an absolute, individualistic and abstract right. Ownership is approached conceptually and little attention is paid to the social context or function of ownership. However, after World War II the whole of western Europe was characterised by a greater social consciousness and as such the social function of ownership and the social context within which it is applied now enjoys more attention. This tendency to emphasise the social function of property was especially strong in the Netherlands in the first three

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24 Beekhuis et al Asser 25; Reehuis et al Pitto 283; Nieuwenhuis, Stolker and Valk Nieuw Burgerlijk Wetboek text en commentaar 289; Van Oven 1975 WPNR 85 at 87.

25 Beekhuis et al Asser 27; Reehuis et al Pitto 283; Nieuwenhuis, Stolker and Valk Nieuw Burgerlijk Wetboek text en commentaar 290.

26 3:14 NBW: "Een bevoegdheid die iemand krachtens het burgerlijk recht toekomt, mag niet worden uitgeoefend in strijd met geschreven of ongeschreven regels van publiekrecht." (A right which a person has pursuant to private law, may not be exercised contrary to the written or unwritten rules of public law. (Translation according to Haanappel and Mackaay Nieuw Nederlands Burgerlijk Wetboek - Het vermogensrecht 6)).

27 6:162 -2 NBW: "Als onrechtmatige daad worden aangemerkt een inbreuk op een recht en een doen of laten in strijd met een wettelijke plicht of met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer beaamt, een en ander behoudens de aanwezigheid van een rechtvaardigingsgrond." (Except where there is a ground of justification, the following acts are deemed to be unlawful: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct. (Translation according to Haanappel and Mackaay Nieuw Nederlands Burgerlijk Wetboek - Het vermogensrecht 298)).
decades after World War II.

It has been argued in Dutch legal literature that, although the description of ownership has not changed much over the last few centuries, the social order in which ownership functions today is visibly different from that of previous centuries. According to this argument, the modern concept of ownership is subjected to more limitations than was the case in the nineteenth century. This is known as the socialisation or erosion (vermaatschappelijking or uitholling) of ownership, and is regarded as a reaction against the pretence of political neutrality as a result of the influence of Pandectism and legalism in Dutch private law.

Slagter has shown that the social function of ownership has changed since the beginning of this century. The modern function of ownership is (a) to preserve value, (b) to provide creditworthiness, (c) to act as instrument for the decentralisation of decision making, (d) to serve as instrument of power and (e) to protect privacy. According to him these functions of modern ownership distinguish ownership from limited real rights and from ownership in earlier periods (including Roman-Dutch law of the seventeenth and eighteenth centuries).

No provision has been included in the NBW to compel the owner to exercise his rights in such a way as to promote social interests. It must, however, be kept in mind that the nature and extent of ownership are determined by the legal and social order within which it functions. The Dutch form of government since World War II is based on a

28 Valkhoff Een eeuw rechtsontwikkeling; Valkhoff 1957 RMT 21 at 22; Couwenberg 1982 Economisch statistische berichten 38; Van Goch 1982 R&K 82 at 83; Grosheide Eigendom in de overgang? 45; Schut 1981 RMT 329 at 330; Van Maanen Eigendomschijnbewegingen 26. But see Deline Grenzen van het eigendomsrecht in de negentiende eeuw who shows that ownership has always been subjected to numerous limitations.

29 See in general Kop Legisme en Privaatrechtswetenschap 5 et seq and 29 et seq.

30 Slagter 1976 RMT 276 at 282.

31 Van den Bergh 1987 R&K 327 at 335 et seq; Slagter in Hondius Quod licet 357 at 364; Van Maanen 1981 R&K 5 at 16; Van Goch 1982 R&K 82 at 83.
verzorgingstaat or welfare state. This implies that the state guarantees certain basic material and immaterial benefits to the citizens. In order to achieve this, the state often has to limit the owner's right to use, enjoy and control his property. Thus the Dutch courts found it necessary in the past to place extraordinary limitations on the owner, in the social interest, by balancing the rights of the owner with public interest. Within the context of the verzorgingstaat or welfare state in the Netherlands, ownership is subjected to numerous limitations which are foreign to most other jurisdictions. The Leegstandwet provides a good example of the influence of the social interest on the nature and extent of ownership. This act determines that whenever a building is left unused or empty by its owner, the state may use that building to house the homeless. The existing needs of society acts as the incentive to change the owner's entitlements - in this instance the owner's entitlement to use his property as he sees fit. The fact that no positive duty is imposed on the owner in the final text of the NBW to exercise his right so as to serve the public interest does not mean that such a duty cannot be implied tacitly. The code does not provide the final word on the nature and extent of ownership or any other right. It is rather determined by the complete legal fabric of the society in which it functions. In the Netherlands, as in numerous other jurisdictions, the legal fabric consists not only of the civil code, but also of case law and statutes. By emphasising the social function of ownership, Dutch private law moves away form Pandectism and legalism.

32 Van Goch 1982 R&K 82 at 83; Meijs and Jansen 1990 R&K 115.
33 See Arrest Rechtbank Amsterdam, 9-3-1978 and Hof Amsterdam 26-10-1978, N.J. 1980 no 70 and 71. This is the case of the so-called "Batco-affaire". In this case the court said that the business had all the financial reasons to want to close itself down. It nevertheless held that social factors had to be taken into account - such as the fact that many people may lose their jobs - and therefore the business could not close down. The power of disposal of the owner is limited in favour of the public interest. According to the court social factors had to play a definite role in the decision making process of any business. Also see arrest Rechtbank Amsterdam, 7-7-1981. Kort Geding 1981, no 95. In this case Ford-Nederland wanted to retrench 1225 workers because the company was running at a loss. The court held that the company could not do this and had to continue employing the said workers until certain procedures were completed. This decision was overturned on appeal, but not on the ground of the reasoning of the court a quo.
As has been pointed out,\textsuperscript{35} the concept of absolute, individualistic and abstract ownership is the creation of a society that emphasised individualism and freedom. The rights of the owner are accentuated and the needs and interests of society are hardly ever taken into account when the extent of the owner’s rights are determined. This, however, changed in the post-World War II society. Common interest and the needs of society started to play a more important role in the determination of the nature and extent of the concept of ownership. Most modern western constitutions emphasise and value the common interest, equality and democracy. The social function of ownership was increasingly accentuated as a result of a reaction against the emphasis placed on the absolute character of ownership in the nineteenth century. The traditional perception of ownership now has to be balanced with the newly acquired political and social dimension.\textsuperscript{36} This is true throughout most of western Europe after World War II, and it is particularly strong in the Netherlands.

A lively debate has developed during the 1970’s and 1980’s in the Netherlands regarding the nature of the concept of ownership in modern Dutch law. This debate reached a crescendo shortly before the \textit{Nieuwe Burgerlijk Wetboek} (NBW) came into operation in 1992. It was contended by some authors\textsuperscript{37} that the concept of ownership - as it existed in the \textit{Burgerlijk Wetboek} (BW) and as it was formulated in the suggestions for the ownership clause in the NBW - does not reflect the needs of the modern Dutch society and that the concept of ownership needed to reflect the pluriform nature of ownership to fulfil these needs.

\textsuperscript{35} Chapter 4.

\textsuperscript{36} Couwenberg 1982 \textit{Economisch statistische berichten} 38.

According to Van Maanen\textsuperscript{38} the traditional approach towards ownership as an absolute, individual and abstract right\textsuperscript{39} should be replaced by a more refined and differentiated concept of ownership that provides for and reflect the complicated social reality in which ownership functions today. The social purpose of different objects of ownership necessitates a different treatment of these objects. A concept of pluriform ownership would be much more suitable to treat different objects according to their different social functions.

The different suggestions of Dutch authors on how the concept of ownership should be adapted or changed to fulfill the needs of modern society will now be scrutinised. Although not everyone agrees that ownership needs to be differentiated, there is consensus on two aspects.\textsuperscript{40} Firstly, there is consensus about the plurality of ownership. Plurality is recognised - although not formally - within the existing ownership construction with reference to the distinction between different subjects,\textsuperscript{41} objects\textsuperscript{42} and functions\textsuperscript{43} of ownership. Secondly, most authors agree that the concept of ownership is flexible or adaptable, and because of this flexibility many authors contend that the current concept of ownership is able to adapt and to accommodate the challenges of modern society.

7.3.2 Arguments for a concept of pluriform ownership

The arguments for a concept of pluriform ownership are all conceptually based. The first approach regarding the differentiation of the concept of ownership suggests that

\textsuperscript{38} Van Maanen 1981 \textit{R&K} 5 at 14; Van Maanen \textit{Eigendomschijnbewegingen} 151.

\textsuperscript{39} Van den Bergh \textit{Eigendom} 34; Feenstra 1976 \textit{RMT} 248.

\textsuperscript{40} See Van der Ven 1976 \textit{RMT} 237 at 241. Van der Ven makes this statement with reference to the authors that contributed to the 1976 edition of \textit{RMT} with the theme \textit{Eigendom als rechtsinstituut}.

\textsuperscript{41} Natural and juristic persons.

\textsuperscript{42} Movable and immovable things; corporeal and incorporeal things.

\textsuperscript{43} Personal or public benefit.
the definition of ownership must be changed in order to bring it in line with the understanding and application of ownership in practice. This includes a differentiation between different objects of ownership and between limitation of the owner’s entitlements with regard to the different objects.

Van Maanen suggests two reasons why there is a need for a concept of pluriform ownership. He firstly argues that there are factual differences in the legal reality regarding the treatment of different objects of ownership (companies, houses, consumer goods) and to make provision for this in the concept of ownership would lead to legal clarity. A concept of pluriform ownership would contribute to a better and clearer description and analysis of the legal reality. Secondly a concept of pluriform ownership would contribute to legal reform. Not only would it give recognition to the fact that consumer goods and housing facilities are and should be treated differently from personal property, but it would also stimulate further reform. Van Maanen states that he cannot see how fundamental social reform can take place without redefining ownership. By introducing a concept of pluriform ownership the courts would be able to adopt a much more flexible approach in decisions regarding kraken (squatting), the power of and the power within big corporations and the use of nature reserves and wildlife areas.

Van Maanen suggests the following definition of ownership:

1. Eigendom is de door de rechtsorde erkende bevoegdheid van één of meer persone om, met inachtneming van de wettelijke en maatschappelijke beperkingen, een zaak uit eigen macht te bezitten, te gebruiken en erover te beschikken.

2. Er zijn drie soorten van eigendom:

44 Van Maanen Eigendomschijnbewegingen 154.

45 Also see Meijs and Jansen 1990 R&K 115; Meijs and Jansen Eigendom tussen politiek en economie 147.

46 Van Maanen Eigendomschijnbewegingen 157.
According to Van Goch the traditional concept of ownership is outdated because it does not take cognisance of the interdependence of personal and public interests and no longer provides for the specific needs of the society. Ownership cannot be separated from the needs of the community and should always be judged and interpreted in a social context. The absolute power of disposal of the owner should be kept in check and the limits of ownership should be determined according to the damage caused to society - this includes social, economic and ecological damage. According to Van Goch a distinction should be made between (a) ownership of means of production and (b) ownership of the results or products of (a). Means of production would inevitably have a social function. With reference to (b), Van Goch states that this

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1. Ownership is the power, recognised by the legal order, of one or more persons, with due consideration of statutory and social restrictions, to possess, use and dispose of a thing out of own accord.
2. There are three types of ownership:
   - social ownership, is ownership of means of production, general conditions of production, means of communication, land, air and water. The use hereof must be in accordance with the interests of society.
   - housing ownership, is ownership of housing facilities. The use hereof is subject to the limitations set out by law and by the equitable distribution of housing facilities.
   - personal ownership, is ownership of things that are used to satisfy material and cultural needs. The use hereof is free in principle. (Own translation).

Van Goch 1982 R&K 82.
would mainly include consumer goods and the owner of such goods would in principle have absolute power of disposal, subject to the limits mentioned above. Van Goch does not make special or separate provision in his definition for housing facilities, but states that the extent of ownership of housing should be determined socially - the power of disposal of the owner should be limited in order to accommodate the existing demand for housing.

Van Neste\textsuperscript{49} states that ownership has two functions: on the one hand it must provide for personal needs, and on the other it has a social function. For this reason he draws a distinction between personal or individual ownership and social ownership. Personal ownership corresponds with the traditional approach to ownership and the owner is able to use, dispose of and control personal property as he sees fit. Personal ownership applies to, among others, personal income, other money, an own house and so on. Social ownership should be expressly limited by statute, and although social ownership ultimately provide for personal needs, it would also have a social function.

Valkhoff\textsuperscript{50} also shares the opinion that a distinction should be made between means of production and consumer goods. According to him this distinction is necessary because the purpose, function and importance of these categories of things differ economically, socially, ethically and psychologically.

Schut\textsuperscript{51} advocates a different approach. He voices the opinion that a distinction should be made between ownership of movables and immovables. He bases this argument on the fact that, according to him, this distinction has been made throughout the history of the development of the concept of ownership and stems from the treatment of ownership in primitive societies. Even today a distinction is made between real and personal property in Anglo-American systems. Schut also points out that this distinction

\textsuperscript{49} Van Neste 1983 \textit{Tijdschrift voor privaatrecht} 479.

\textsuperscript{50} Valkhoff 1957 \textit{RMT} 21.

\textsuperscript{51} Schut 1981 \textit{RMT} 329. Also see Grosheide \textit{Eigendom in de overgang?} 44.
is implied by the treatment of ownership in the NBW.\textsuperscript{52}

According to Meijs and Jansen\textsuperscript{53} ownership has a dual meaning: it includes both the right to exclude and the right not to be excluded. The right to exclude refers to personal property and the right not to be excluded refers to the use of (part of) common property. The right to use a thing (not to be excluded) plays an increasingly important part in modern property relations and it often happens that, when exclusive ownership and the right to use are weighed against each other, ownership has to make way for the right to use. This happens as a result of state intervention and because of such intervention, social relations - both ownership and power relations - are interfered with. Thus, according to Meijs and Jansen, the concept of ownership needs to be differentiated in order to reflect the true nature and practical application of the modern concept. A distinction needs to be drawn between ownership on the one hand and the right to use on the other. Furthermore, Meijs and Jansen suggest that the power of disposal should be defined according to the function of the object.

A further distinction is that between the power to use or control property and the power of disposal. The authors that advocate this distinction do not suggest a definite differentiation of the concept of ownership, but they propose that the way in which the concept of ownership is approached and treated should be changed.\textsuperscript{54} They point to the fact that in practice an owner does not always control his own property: in a company the shareholders are the true owners, but the company is controlled by its managers. In principle the general assembly of shareholders has sovereignty and the executive board of managers are the representatives of the general assembly. But in practice, the policy of the company is determined by management, who has a definite task and responsibility - determined by law or statute - and they are accountable to the

\textsuperscript{52} Title 1 deals with ownership in general, but titles 2 and 3 deal with ownership of movables and immovables respectively.

\textsuperscript{53} Meijs and Jansen Eigendom tussen politiek en economie; Meijs and Jansen 1990 R&K 115.

\textsuperscript{54} Grosheide Eigendom in de overgang? 47 et seq; Couwenberg 1982 Economisch statistische berichten 38 et seq; Valkhoff 1957 RMT 21 at 34; Schut 1981 RMT 329 at 331.
general assembly of shareholders for their actions. This situation implies that management has an autonomous economic position of power. Because of their expertise and skill, management is able to manipulate the general assembly. Modern industrial society is increasingly dominated by management instead of the owner. The power and enjoyment aspects of property have become divorced. Ownership is no longer decisive for power - authority is often separated from ownership.

Grosheide states that the modern concept of ownership is as pluriform as it is uniform. Ownership is uniform, because in theory we know only one type of ownership - an absolute, abstract and individual ownership. On the other hand ownership is pluriform because a distinction is made between the power to dispose of and the power to control or manage the property. As was pointed out above, the manager of property can often have a far greater and more direct influence on society as a whole than the owner (who has the power of disposal). This leads to a hierarchy in property relations. The position in the hierarchy is determined by the optimal exercise of all ownership functions in the social sphere. At the top of the hierarchy one finds ownership, which has the greatest impact on society. The private or individual owner of consumer goods is at the bottom of the hierarchy. The way in which the owner is perceived, the extent of the limitations placed on ownership and the extent of the power of disposal are determined by the position of the owner in the hierarchy.

Couwenberg follows more or less the same line of thinking. He points out that the need for a distinction between the power to use and the power of disposal is recognised by neo-marxists, but they have also recognised the fact that this distinction would not have an impact on the capitalist system. Couwenberg alleges that consensus

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55 Couwenberg 1982 *Economisch statistische berichten* 38 at 40; Grosheide *Eigendom in de overgang?* 48; Valkhoff 1957 *RMT* 21 at 34.

56 Friedmann *Changes in property relations* 177; Valkhoff 1957 *RMT* 21 at 35; Couwenberg 1982 *Economisch statistische berichten* 38 at 40.

57 Grosheide *Eigendom in de overgang?* 47.

58 Couwenberg 1982 *Economisch statistische berichten* 38.
has been reached by supporters of the socialist and liberal property models on the desirability of a plural ownership system. Forms of ownership in this system would include personal ownership, corporate ownership, private individual foundations, mixed enterprises with a measure of government participation, and public ownership. Public interest is used as a criterium to determine the mutual relations between the different forms of ownership within the plural ownership system. When this is interpreted in a political sense, it gives rise to different approaches: the socialists place the emphasis on public ownership, while the liberals prefer to emphasise private ownership.

Another approach to the problem at hand is the suggestion that a clear definition and explanation of the different entitlements of the owner should be given.\textsuperscript{59} The power to use, control or dispose of property should be defined with reference to the nature of the specific object it concerns. By doing this many uncertainties concerning the content and extent of ownership would be clarified. Schut\textsuperscript{60} points out that the function and purpose of ownership should be kept in mind when the entitlements of ownership are split up. The content of the entitlements differ when a thing is used to provide in personal needs or when it is used as an investment, when it is used for consumption or for commercial purposes, or when it has a personal or a public function, and specific provision should be made for each case. This would help to determine the limits of ownership and its protection.

A theme that runs throughout the discussion of the differentiation of ownership, is that the needs of society and the social context in which ownership functions should always be kept in mind when evaluating the way in which the owner exercises his right and the protection of that right.\textsuperscript{61} Public interest determines the extent of the owner's rights, and

\textsuperscript{59} Valkhoff 1957 \textit{RMT} 21 at 27; Meijs and Jansen \textit{Eigendom tussen politiek en economie} 147 et seq; Schut 1981 \textit{RMT} 21 at 331; Van Neste 1983 \textit{Tijdschrift voor privaatrecht} 479 at 487.

\textsuperscript{60} Schut 1981 \textit{RMT} 329 at 331. Also see Van Goch 1981 \textit{R&K} 82 et seq; Van Neste 1983 \textit{Tijdschrift voor privaatrecht} 479 et seq.

\textsuperscript{61} Van Goch 1982 \textit{R&K} 82 at 86; Schut 1981 \textit{RMT} 329 at 331; Van der Neste 1983 \textit{Tijdschrift voor privaatrecht} 479 at 486; Meijs and Jansen 1990 \textit{R&K} 115 at 134; Couwenberg 1982 \textit{Economisch statistische berichten} 38 at 39; Van Maanen \textit{Eigendomschijnbewegingen} 151 et seq; Van der Ven
when the owner exercises these rights, he should always take cognisance of the existing social circumstances and the effect that his actions would have on the community. The purpose of ownership is not only to satisfy personal needs, but also to satisfy the needs of society. Van den Bergh\textsuperscript{62} criticises this approach. According to him the public interest never was and never should place a burden on the owner. An owner may exercise his rights as he sees fit within the limits of the law. If someone alleges that the owner acted to the detriment of society, the onus of proof is on that person.

The arguments for a concept of pluriform ownership are mainly based on suggestions for a new definition of ownership where provision is made for different objects of ownership and a distinction is made with regard to the owner's power to use and enjoy those objects. The arguments are all formulated within the confinements of the conceptual approach to property law, and amount to no more that attempts to formulate the definition of the concept of ownership in such a manner that it reflects and accommodates the social context within which ownership functions.

7.3.3 Balancing of private law interests

Another, related development in modern Dutch property law that also attempted to provide for the social function of ownership has to do with the weighing (balancing) of the rights and/or interests of the different parties concerned \textit{(belangenafweging)}\textsuperscript{63}. The balancing of interests and rights can occur whenever the interests of other parties concerned are in conflict with the rights of the owner, and when the enforcement of the latter's rights will amount to abuse of law. In the case of the \textit{grensoverschrijdende}
the court held that the limits to rights of the owner are determined on the basis of a proportional weighing of the interests of the owner against the interests of other parties concerned. This is a new development in the approach to ownership. Ownership has always been seen as the most comprehensive right a person could have with regard to a thing and that the whole world (all third parties) had to be respect this right.

Van Maanen pleads for the implementation of the concept of belangenafwegingen in cases where the rights of the owner are in conflict with the interests of the unlawful kraker (squatter). He contends that the active use of this concept would lead to the equitable treatment of the kraker. This concept can be used to keep the absolute right of the owner in check and would ensure a socially equitable and justifiable concept of ownership.

No provision was made for a belangenafweging in the definition of ownership in the NBW. Meijers points out that the owner has the freedom to use his property as he sees fit within the limits of the law. According to section 5.1.1 NBW the freedom of the owner is the rule, and limits to this freedom are seen as exceptions. Snijders, the government commissioner, said during the debate on the new ownership section in the Dutch parliament, that the limits to the right of the owner cannot be determined by the proportional weighing of the owner's rights against the rights of others. De Gaay

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65 Van Maanen 1981 R&K 5 at 16.

66 Also see Van Goch 1982 R&K 82 at 84.

67 Section 5.1.1 NBW.

68 Meijers De algemene begrippen van het burgerlijk recht 73. Also see Van den Bergh 1987 R&K 327 at 337.

69 Quoted by Van Zeben Parlementaire geschiedenis van het nieuwe Burgerlijk wetboek - Boek 5 Zakelijke rechten 30.
Fortman, however, suggests that it would be in the owner's (and society's) best interest if the owner always keeps the public interest in mind when exercising his rights. This, however, is only a suggestion and there is no legal obligation to do so.

Slagter agrees that the concept of *belangenafweging* cannot be used to determine the extent of the owner's right. According to Slagter there is no place for a balancing of interest where it is clear that ownership has been infringed and that abuse of the right is out of the question, just as there is no place for a balancing of interests when it is certain that a breach of a competition clause has occurred. A balancing of interests can only occur in the answer to the question whether a claim for prohibition or injunction after an unlawful act can be substituted by a claim for damages, if according to section 6:168 NBW "such a cause of action should be allowed on grounds of important social interests".

There seems to be general agreement in Dutch law that the concept of *belangenafweging* cannot be used to determine the extent of the owner's right. The owner has the freedom to use his property as he deems fit. No legal obligation was placed on the owner in the NBW to take public interest into account when he exercises his right. It does, however, seem strange that the Dutch government did not - in light of the principles governing the welfare state - use the new code to implement a more restricted approach to the concept of ownership.

It is interesting to note that the idea of the weighing of interests was nevertheless introduced into Dutch private law. This idea is usually part of public law where constitutionally protected fundamental rights are concerned. The public interest is taken into account when the extent of the protection afforded by the specific right is determined. Although the application of this principle is criticised by Dutch authors, it is nevertheless interesting that the balancing of interests came into play where private-


71 Slagter in Hondius *Quod licet* 357 at 364.
law rights are concerned. The drive amongst some Dutch authors to introduce a concept of pluriform ownership had some purpose in this regard. It drew attention to the fact that whenever ownership is interpreted, the focus should be on the interpretation within a new (social) context. The idea throughout is to interpret and apply private law in such a way so as to get the same results that are reached via constitutional law in other jurisdictions (for example in Germany\textsuperscript{72}), namely to create a balance between the private and public interest in the use and limitation of property.

**7.3.4 Criticism against the idea of pluriform ownership**

The "new definition" of ownership in the NBW does not provide for a pluriform concept or approach to ownership. The different pleas for a new differentiated concept of ownership were not heeded. Perhaps the reason for this is the fact that the recodification was not seen as a renewal, but as a technical improvement.\textsuperscript{73}

The ownership clause in the NBW can be regarded as very conservative. With the confirmation of the Bartolian orthodoxy any possibility of further development has been mooted. This decision is regarded as commendable by, amongst others, Slagter and Van den Bergh.\textsuperscript{74} Van den Bergh points out that if a concept of pluriform ownership is to be introduced or implemented in Dutch law, this would have to be done by way of statute.

\textsuperscript{72} See chapter 8 in this regard.

\textsuperscript{73} Van den Bergh 1987 R&K 327 at 338. According to Van Zeben Parlementaire geschiedenis van het nieuwe Burgerlijk wetboek. Algemene deel - voorgeschiedenis en algemene inleiding 39 Zeelenberg remarked that: "het nieuwe Burgerlijk wetboek [heeft] geen revolterende tendenties. Het gaat uit van dezelfde maatschappijvorm als die van 1838 en waarin wij nog leven, een maatschappijvorm met eigendom en vererving, met contractenrecht en ouderlijke macht. Het zou ook niet van een andere maatschappijvorm kunnen uitgaan, want die heeft zich niet, of nog niet voldoende gemanifesteerd". (The new code has no revolutionary tendencies. It starts out from the same type of society than the one that was in existence in 1838 and in which we still live, the type of society with ownership and inheritance, with the law of contract and parental control. It cannot start out from any other type of society, because that we do not have, or it has not been manifested sufficiently).

\textsuperscript{74} Slagter in Hondius Quod licet 357 at 363; Van den Bergh 1987 R&K 327 et seq.
Van den Bergh\textsuperscript{75} criticises the idea of pluriform ownership. According to him the idea has no or at least insufficient historical backing. He does not deny the fact that the society in which ownership functions today is different from the society of the nineteenth century, or that there are changes to the way in which ownership is perceived, but according to Van den Bergh these changes are not of such a magnitude that the definition of ownership needs to be changed. He argues that the first definition of ownership, that of Bartolus de Saxoferrato,\textsuperscript{76} and various subsequent definitions,\textsuperscript{77} were formulated in such a way that they make provision for changes in society. The qualification that ownership must be exercised subject to the limits and constraints place on it by law, ensures that the needs of society will always be taken into account when the extent of the ownership is determined. Van den Bergh thus advocates the retention of the scientific, politically neutral definition of ownership. According to Meijers\textsuperscript{78} it is virtually impossible to formulate a definition of ownership that once and for all determines the exact content and limits of ownership. It is better to formulate the definition in such a way that the content and limits, as it is required by a specific society, can be determined by statute or existing positive law. In this way the content and limits can be changed if society so requires. Van den Bergh\textsuperscript{79} points out that the concept of ownership, as the right to use and dispose of property freely within the limits of the law, withstood much bigger challenges than those put to it in the twentieth century, and there is thus no need to formulate a different definition. It is possible that the purpose and function of a right can change without changing the form of the right.

\textsuperscript{75} Van den Bergh 1987 R&K 327 et seq.

\textsuperscript{76} Bartolus on D 41.2.17.1 no 4.

\textsuperscript{77} Section 544 Code Civil; section 625 BW; section 439 Wetboek Napoleon voor het Koningrijk Holland (1809); section II.1.1.1 Ontwerp- van der Linden (1807); section I.8.26 Pruisische Allegemeine Landrecht (1794).

\textsuperscript{78} Meijers Verzamelde privaatrechtelijke opstellen 179 et seq.

\textsuperscript{79} Van den Bergh 1987 R&K 327 at 340.
Van den Bergh\textsuperscript{80} also points out that the majority of proposals for a concept of pluriform ownership are politically inspired. He criticises this approach to law. According to him jurists should not translate political ideologies into law. The law, especially private law, should be and should remain apolitical.

Van Maanen's proposal for a definition of a concept of pluriform ownership is also criticised by Slagter.\textsuperscript{81} He points out that Van Maanen's definition does not amount to the differentiation of the concept of ownership, but rather a recognition of the fact that the limitations with respect to ownership are pluriform. According to Kottenhagen\textsuperscript{82} the differences in the quantitative limitations on ownership do not and should not influence the qualitative determination of ownership.

It is pointed out in the previous chapters that the process of scientification of property law had the effect that the social function of property was negated. The movement in the 1970's and 1980's in the Netherlands was inspired by the desire to 'reintroduce' the importance of the social function of property, but the different authors of this movement approached this question within the framework of conceptualism. They attempted to redefine ownership so as to reflect the importance of its social function. In order to effect radical change a totally different approach is needed. This approach should take cognisance of the social function of property, but should not be dependent on the idea of the concept of ownership within a hierarchical system of rights.

7.4 Constitutional protection of ownership

The constitutional validity of Dutch statutes or treaties is not subject to judicial review.\textsuperscript{83}

\begin{itemize}
  \item Van den Bergh 1987 \textit{R&K} 327 at 339.
  \item Slagter in Hondius \textit{Quod licet} 357 at 361.
  \item Kottenhagen 1990 \textit{Kwartaalbericht Nieuw BW} 86 et seq.
  \item Section 120 Dutch Constitution: "De rechter treedt niet in de beoordeling van de grondwettigheid van wetten en verdragen".
\end{itemize}

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The 1983 Constitution adheres to the principle of the dominant role of legislation in a formal sense. The Netherlands, unlike most other European countries, does not have a constitutional court and judges do not have the authority to test the constitutionality of legislation. It is left to the legislature to test its own legislation against the Constitution. The Constitution authorises the legislature to determine the extent of the basic rights, but prohibits judicial review of these acts. This means that, whereas in most other countries the courts play an integral part in the development and determination of the nature and extent of the fundamental rights, the Dutch courts can play no active role in this regard and therefore section 14 does not provide a constitutional or fundamental property guarantee.

Judicial review does, however, exist regarding the compatibility of statutes or laws to international treaties. The Dutch Constitution stipulates that the state is bound by all international treaties and that it must abide by and implement the provisions of these treaties. Among others, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Universal Declaration of Human Rights provide

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84 Such as France, Italy, Spain and Germany.
85 Kortmann Constitutioneel recht 82.
86 Alkema 1995 HNV 5 at 99; Prakke et al 1992 HNV 3 et seq.
87 Jeukens Grondrechten en rechterlijke toetsing 66 et seq.
88 Section 94 Dutch Constitution: "Binnen het Koninkrijk geldende wettelijke voorschriften vinden geen toepassing, indien deze toepassing niet verenigbaar is met eenieder verbindende bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties." Also see Slagter in Hondius Quod licet 357 at 365; Slagter 1976 RMT 276 at 279; Beekhuis et al Asser 14; Reehuis et al Pitlo 278. Kortmann De Grondwetsherziening 1983 258 points out that no judicial review exists regarding unwritten public international law.
89 Section 93 Dutch Constitution: "Bepalingen van verdragen en van besluiten van volkenrechtelijke organisaties, die naar haar inhoud eenieder kunnen verbinden, hebben verbindende kracht nadat zij zijn bekendgemaakt".
90 Protocol no. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms section 1: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to
an entrenched guarantee of ownership, and this provides the Dutch citizen with stronger protection than the protection in terms of the Constitution, because these provisions are subject to judicial review. These provisions are, however, formulated widely and are subject to limitations - the entitled person can be deprived of property in the public interest and the protection is subject to the provisions of national and international law. The assertion of international treaties and European Union law rest partly with national and partly with international judges. The result of this judicial control is that the constitutional interpretation by the government and the Dutch parliament competes with and is limited by the judicial interpretation of the said international law.

The Dutch Constitution contains a negative guarantee of ownership in the sense that it prohibits the irregular expropriation of property. Section 14 of the Constitution states:

"1. Onteigening kan alleen geschieden in het algemeen belang en ten tegen vooraf verzekerde schadeloosstelling, een en ander naar bij of secure the payment of taxes or other contributions or penalties." It was determined by the European Court for Human Rights that "civil right" - as the term is used in section 6 European Convention for the Protection of Human Rights and Fundamental Freedoms - amounts to ownership. See European Court for Human Rights 23 September 1982, NJ 1988, 290.

91 Section 17: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property".

92 Slagter 1976 RMT276 at 279; Slagter in Hondius Quod licet 357 at 365; Beekhuis et al Asser 14; Alkema 1995 HNJV 5 at 99; Reehuis et al Pitlo 278; Couwenberg Liberale democratie als eerste emancipatiemodel 69 et seq.

93 Public interest is interpreted widely by the European Court of Human Rights so as to provide the national legislature with as much freedom as possible to determine what falls within the ambit of public interest. See Snijders In het nu, wat worden zal 260 et seq; Reehuis et al Pitlo 278.

94 Kortmann Constitutioneel recht 368 and 419.

95 Kortmann Constitutioneel recht 82.

96 Reehuis et al Pitlo 278; Couwenberg 1982 Economisch statistische berichten 38 at 44. During the debate on the ownership clause - when the Constitution was revised - a proposal for the inclusion of a positive guarantee was rejected by the second chamber because it was felt that such a provision would create expectations that were impossible to meet. See Slagter in Hondius Quod licet 357 at 365 in this regard.
Algemeen belang or public interest is a very wide term. This, however, does not mean that the owner can be deprived of his property whenever government sees fit. Exactly what falls within the ambit of algemeen belang should be determined in accordance with the principle of the prohibition against arbitrariness. Schadeloosstelling (compensation) is usually interpreted to mean market-value, but it can also be interpreted to mean use-value.

It should be noted that the protection of eigendom as a basic norm includes much more than the limited to corporeals only interpretation of 5.1.1 NBW. All property rights - including limited real rights and personal rights - are included in the term eigendom as it is used in the Dutch Constitution and the international treaties.

7.5 Conclusion

The concept of ownership within Dutch law is affected by the strict division between private and public law. Ownership is guaranteed and protected by the Dutch Constitution, but because judicial review is not recognised by the Constitution this has no bearing or influence on the private-law concept of ownership as it is set out in the civil code. Within the context of Dutch private law, ownership is limited to corporeal things and is characterised by absoluteness, exclusivity and individualism. The description of ownership in 5.1.1 NBW does not embody a socially bound concept of ownership and places no positive duty on the owner to exercise his rights in such a way as to promote or serve the public interest. However, although the NBW does not contain any goal or obligation to serve the public interest, certain authors argue that

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97 HR 25-04-1988, NJ 927. Also see Kortmann Constitutioneel recht 418.
98 Kortmann De Grondwetsherziening 1983 101; Kortmann Constitutioneel recht 418. But see Donner Handboek van het Nederlandse staatsrecht 496.
99 Kortmann Constitutioneel recht 418; Reehuis et al Pitlo 278; Slagter 1976 RMT 276 at 279; Van Maanen 1993 R&K 298 et seq.
such a goal can be inferred when one considers that the nature and extent of ownership is inevitably determined by the existing social and legal order in which it functions. Thus, although the NBW does not mention any specific social responsibility on the owner, the mere fact that the NBW is interpreted and applied within the context of the verzorgingstaat is regarded as an indication that ownership has a definite pro-social character. It is said, therefore, that the characteristics of ownership - absoluteness, exclusivity and individualism - must be judged against this background.

It is interesting to note that, notwithstanding the absence of a specific social responsibility on the owner in the civil code, ownership is nevertheless interpreted in such a way that a balance is struck between the protection of the individual owner's rights and the interests of the society in which these rights are exercised.

The public law perception of eigendom differs from the private-law perception in that it is interpreted to mean "property", rather than ownership, and it thus includes much more than merely corporeal things, as is the case in private law. Although statutes are not subject to judicial review, the power of the state to determine the extent of the owner's rights is toned down by the fact that statutes are subject to judicial review in terms of international treaties. This provides the individual owner with the necessary protection against unfair interference by the state.

Since the 1970's the treatment and interpretation of ownership in the Dutch legal system is characterised by continued attempts to subject the private law tradition to social control. Within private law itself it is contended that ownership should be interpreted in view of the goals of the welfare state and that the interests of society at large should form an integral part of the interpretation process when the nature and extent of ownership are determined. This view is strengthened by the fact that the code determines that the rules of unwritten law forms part of the nisi lege prohibeat provision in 5.1.1.

100 The limitations on ownership in the Netherlands proves that the nature and extent of ownership is determined socially.
The endeavours of the functionalists to create a concept of pluriform ownership can be described as an attempt to subject the private law traditions to social control. Each and every different model proposed by the functionalists is aimed at incorporating the social interests in the concept of ownership. The very essence of the concept of pluriform ownership is the fact that ownership is differentiated according to the importance of the social interests for different objects of the right. The functionalists attempted to effect these changes by changing the private law definition of ownership.

The \textit{belangenafweging} or balancing of interests when the extent of ownership is determined is yet another attempt to subject ownership to some form of social control. It was pointed out earlier that the balancing of interests usually forms part of public law and is applied to determine the extent of constitutionally protected fundamental rights, but that it was applied in a private-law context in the Netherlands.

The move towards recognition of a concept of pluriform ownership was not supported by all academics and lawyers in the Netherlands. Van den Bergh and Slagter, amongst others, criticised the functionalists. These authors recognise the fact that society has changed since Bartolus defined ownership as \textit{dominium est ius de re corporali perfecte disponendi nisi lege prohibeatur},\textsuperscript{101} but they hold that Bartolus' definition (as it was received in the \textit{Code Civil}, the BW and the NBW) withstood much bigger changes in the course of its development without having to change. They also hold that the description of ownership in the BW (and NBW) is wide and flexible enough to accommodate current demands. According to these authors the interests of society should be catered for in terms of the \textit{nisi lege prohibeatur} provision, and that there exists no need to redefine ownership in order to provide for the public interest.

The reason for the different attempts to subjects the private law tradition to social control lies in the fact that the Dutch Constitution does not provide for judicial review of statutes. Social control can thus not be effected through the Constitution, and lawyers had to devise a different method of ensuring that the public interest is served.

\textsuperscript{101} Bartolus on D 41.2.17.1 no 4.
when the extent of different rights is determined. The route chosen by the functionalists to achieve this goal was to subject the private law tradition to social control. Various attempts were thus made to redefine ownership so as to ensure that the owner takes cognisance of the public interests whenever he exercises his rights. As ought to be clear from the above, these attempts were not nearly as successful as it might have been if social control was effected via the constitutional route as was done in various other jurisdictions.
In this section an attempt is made to prove that the current private law perception of property is not the result of the continuous, uninterrupted and logical development of Roman law in one line. The development of property rights, as well as the private law approach to property, was influenced by numerous discontinuities and modern property law is not the product of a logical or linear development. Each of the discontinuities had the effect that the nature of property rights or the social function of property underwent dramatic change in order to be able to cater for societal needs and the new circumstances under which it had to function. It can thus be said that the current private law perception of property did not evolve logically from *dominium* in Roman law. The abstract, scientific, conceptual approach to property and the concept of absolute or in principle unrestricted ownership, which were prevalent in South Africa prior to the implementation of the first democratic Constitution, had its origin in the nineteenth century with the German Pandectists. An attempt is also made to refute the assumption that the concept of absolute ownership and the abstract, scientific approach to property originated in Roman law, and that it is flexible enough to adapt to new social and political circumstances. In view of the fact that the current perception of and approach to property rights did not develop in an uninterrupted line from Roman law, and are therefore not of Roman origin, there seems to be no valid reason why the traditional private law perception of property may not be abandoned in favour of a new debate on the social role and political function of property.

In summary it can be said that the *dominium* in Roman law changed throughout the history of the Roman law and although it might be true that the same terminology is sometimes used to describe some of the characteristics of Roman and South African law, it cannot be said that the two concepts are identical. The concept of absolute, uniform and exclusive ownership as we know it in South Africa today was never part of Roman law or any other subsequent period in its development. The abstract,
conceptual approach to property according to which property law is dealt with in terms of objective, socially and politically neutral concepts and definitions is not founded on Roman law either. This view of property was only created in the nineteenth century by the German Pandectists.

It is pointed out that vulgar law constituted a break in the natural development of Roman law *dominium*. *Dominium* in vulgar law had a completely different meaning than in classical Roman law. In vulgar law the distinction between *dominium*, possession and other proprietary rights became blurred and only one proprietary right was recognised.

The middle ages is important for the fact that it was during this period that two major discontinuities in the development of *dominium* (later property rights in general) occurred. The implementation, as well as the abolition of the feudal system of land ownership, had a dramatic influence on the direction of the development of property. In view of the social and political circumstances in the middle ages divided ownership developed to deal with the practical and social distinction between the feudal lord and the vassal. This distinction, as well as the social function of property in view of this distinction, constitutes a fundamental break with Roman law. Although this notion was described in Roman terms, it cannot be said that it is based on Roman law *dominium* or that it originated in Roman law. It was also during this period that the first definition of *dominium* was formulated. Although it is sometimes said that Bartolus' definition indicates that ownership is absolute, Bartolus never regarded ownership as such. The nature of the concept of divided ownership, which was in existence at the time when Bartolus formulated his definition, indicates that neither the *dominus directus* nor the *dominus indirectus* could have absolute or exclusive ownership.

Divided ownership was initially received in Roman-Dutch law, but it was later abandoned in view of Grotius' work. Grotius used the Roman distinction between *volle* and *gebreckellicke eigendom*. He differentiated between different forms of *gebreckellicke eigendom*. In terms of this distinction the value of the right held by the different holders
of *gebreckelicke eigendom* was used to distinguish between the different forms of
*gebreckelicke eigendom*. The more valuable one was called *eigendom* or ownership
and the less valuable one was referred to as a *gerechtigheid* or a right. This distinction
practically destroyed divided ownership, because the position of the vassal was
degraded from ownership (*dominium utile*) to a mere (limited real) right. Grotius' work
is important for the creation of a hierarchical system of rights and the foundation for the
distinction between ownership and limited real rights.

It is common cause that the French Revolution and the political, social and economic
developments that accompanied it had a significant effect on the social function of
property rights. Although the French Revolution had an influence on the nature of
property rights as such, the importance of the Revolution must not be over-emphasised
in this regard. The liberation of land from feudal bondage was a strong incentive for the
shift in land ownership with its concomitant political effect on equality and freedom. The
result was that the functional fragmentation that was recognised throughout the middle
ages was rejected and replaced by a more individualistic view of the relationship
between man and land, but the notion that ownership acquired its absolute character
as a direct result of the Revolution, seems to be unsubstantiated. The abolition of
feudal law and divided ownership constituted another discontinuity in the development
of ownership (and also other property rights). It was during this period that the
emphasis shifted from social relations to the individual, and consequently ownership
acquired an individualistic character.

The German Pandectists, under the influence of Kant's theory according to which
individual freedom and personal autonomy is emphasised, described ownership as the
most complete real right. According to this school ownership is characterised by
absoluteness, uniformity, exclusivity, abstractness and elasticity. Property law
underwent a process of scientification in terms of which a hierarchical system of
rationally related rights, concepts and definitions was created. The debate on the social
function of property was eliminated by the scientific, conceptual approach to property
law. The abolition of feudal divided ownership and the distinction between ownership

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and limited real rights were combined in a single theory of property with the concept of freedom and autonomy of the individual as its moral basis.

In the latter half of twentieth century the South African courts treated the Pandectists as if they were institutional writers and as such their views became part of the South African law through case law. Although the conceptual approach to property and the recognition of a concept of absolute, in principle unrestricted ownership were criticised for perpetuating the unjust social policy of apartheid, this perception of property was accepted as law until the early 1990's. It was, however, clear that this concept of ownership and the abstract, scientific approach to property were untenable in a society characterised by social injustice and it was in dire need of change. The implementation of the first democratic Constitution provided the perfect impetus for such change and placed South African property law on the doorstep of another discontinuity or fundamental break.

The development of ownership is characterised by numerous discontinuities which had a direct influence on the concept as we know it today. These discontinuities include the impact of the vulgar Roman law, the implementation and abolition of the feudal system, the influence of Grotius' structure and hierarchy of rights and the scientification of property law in the nineteenth century on the basis of Grotius' work. Pandectism replaced the Roman and Roman-Dutch traditions to a large extent when the South African law underwent a process of scientification in the twentieth century and it can thus be concluded that we no longer have a true Roman or Roman-Dutch tradition. The discontinuities also refute the assumption that concept of ownership (or property rights in general) developed in an uninterrupted line and is flexible enough to adapt to new social and political circumstances. These discontinuities amounted to much more than mere adaptations of Roman law dominium. Property rights were rather changed completely to cater for the needs of the particular society in which it had to function, and there is no reason why it cannot be changed again to cater for the needs of post-apartheid South Africa.
Attempts in modern Dutch law to change the concept of absolute and exclusive ownership to take cognisance of the social function of property proved to be unsuccessful. These attempts were all made within the confinements of the conceptual framework, and indicate the need for South African property law to abandon the abstract, scientific approach to property in order to ensure that the use, distribution and exploitation of property reflect its social role and function.

The introduction of the democratic Constitution in South Africa provided the ideal opportunity to break with the traditional, conceptual, private law approach to property law, and for a completely new debate on the role and function of property within society to supersede the conceptual approach.
This section deals with the interpretation and protection of property in a constitutional context. It is pointed out that, in contrast to the situation in private law where property rights are approached conceptually, the social function of property has always been emphasised in the constitutional context and the focus on and importance of the private law concepts are diminished. The private law concept of property rights is not amended to comply with the requirements set in the constitutional context, but property rights are rather interpreted and protected within a new context. This approach to property constitutes another fundamental break or discontinuity in the logical development of property rights. The traditional private law perception of abstract, scientific and objective concepts which are unaffected by social and political realities, is replaced by a new perception of property. Unlike the situation in terms of private law, the social role and political function of property fulfill a central role in the constitutional context. In the constitutional context recognition is given to the fact that property rights are creatures of their socio-political context and are therefore themselves political in nature. Each property decision (whether to create, reinforce or protect a right) is a political question that has to be taken and justified for each case with full recognition of the context within which the decision is made and the implications of the decision. The social function of property plays an essential role when the court has to determine whether a particular right should be afforded constitutional protection, and exactly what the extent of the protection should be. In a constitutional context individual freedom and autonomy are not emphasised to the exclusion of the common interest, but an equitable balance has to be established between the interests of the individual and the public interest.

The emphasis in this section is on the interpretation, the scope, and the limitation of constitutional property. The different aspects are investigated with reference to the situation in Germany, the United States of America, the Council of Europe and South Africa. The comparative analysis in this section is limited to the positions in German
law, US law and the protection and limitation of constitutional property in terms of the
European Convention, because the protection and limitation of constitutional property
in these jurisdictions provide an extensive overview of the treatment of constitutional
property in most foreign jurisdictions. The treatment of constitutional property in
Germany is of special importance to the South African situation, because property
rights these two systems shared the same historical development, and prior to the
introduction of the national constitutions the emphasis in both systems was on the
concept of property and the place of the different property rights within a scientific,
hierarchical system of rights. The interpretation and protection of constitutional property
in the US provide an example of the nature and extent of constitutional property in an
Anglo-American system. To some extent the protection and limitation of property in the
US differ from the position in other Anglo-American jurisdictions. The meaning of the
wide term 'takings', the essentially ad hoc approach to takings cases and the
recognition of so-called 'per se' takings make the position in US law unique. In terms
of section 39 of the 1996 South African Constitution the courts have to consider
international law when interpreting the bill of rights. The position in terms of the
European Convention is discussed as a representative example of the treatment of
property by international institutions. In the Council of Europe the property guarantee
is interpreted in such a manner that an equitable balance is struck between the
interests of the individual property holder and the public interest. The exact
phraseology of the property clause is negated to some extent and it is rather interpreted
to provide the individual with the strongest possible protection while still protecting the
common interest.

The comparative analysis of the interpretation and protection of property in a
constitutional context is necessitated by the fact that the introduction of the
constitutional order in most jurisdictions (including Germany, the Council of Europe and
South Africa) has emphasised the need for a social-sensitive approach to property, and
consequently it brought an end to the private law tradition in terms of which property
rights are reduced to abstract, scientific and context-neutral concepts.
8.1 Introduction

The German legal system serves as an example of a civil law system where property is protected separately in an entrenched constitutional property clause. In contrast with the Dutch legal system, where property law is dictated by civil law (in the *Nieuw Burgerlijk Wetboek*) and the influence of the Dutch Constitution is minimised by the absence of judicial review,¹ a distinction is made in German law between the nature and protection of ownership in the German civil code (*Bürgerliches Gesetzbuch - BGB* 1900) and the function of the *Grundgesetz für die Bundesrepublik Deutschland*² (GG - 1949) in controlling the nature and effect of property.

Due to the influence of German Pandectism, the face of German private-law property bears substantial resemblance to its South African and Dutch counterparts. In both systems private-law property is based on the distinction between ownership and limited real rights. Ownership is regarded as the most complete real right that enables the owner to use his/her property as he/she sees fit. Ownership is furthermore regarded as a fundamentally unrestricted right and restrictions or limitations are viewed as exceptions. As in Dutch law and South African law, German private law did not move fundamentally away from the traditional view of property. However, in German law the *Grundgesetz* embodies a different spirit and, unlike the Netherlands, the unchanged private-law tradition is influenced by the Constitution and judicial review. The effect of the Constitution and the constitutional guarantee of property on the traditional view of property is looked at in this chapter.

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¹ See chapter 7 in this regard.
² Basic Law for the Federal Republic of Germany.
8.2 Interpretation of the Grundgesetz

Before the nature and implications of the property guarantee can be evaluated, brief mention has to be made of the principles that underlie constitutional interpretation in German law.³

The Grundgesetz contains a set of constitutional principles that have to be taken into account whenever meaning is given to its content. The principles of the German state are enumerated in articles 20 and 28 Grundgesetz.⁴ According to article 20:

"(1) The Federal Republic of Germany shall be a democratic and social state."

Article 28 states:

"(1) The constitutional order in the Länder shall conform to the principles of the republican, democratic and social state governed by the rule of law within the meaning of this Basic Law."

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³ Although the normal principles of statutory interpretation apply in Germany, the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG) has developed rules that apply specifically to the interpretation of the Grundgesetz. Certainly the most important of these is that the Basic Law must be interpreted as a whole. The Bundesverfassungsgericht states emphatically that no constitutional provision may be taken out of context and interpreted on its own. Every constitutional provision must be interpreted in such a way that it remains compatible with the fundamental principles of the Grundgesetz. Fundamental rights must thus not be judged in isolation, but must be interpreted against the background of the Basic Law as a whole with specific reference to the underlying constitutional principles and the place which a particular right takes with regard to other fundamental rights. See BVerfGE 1, 14 at 32. For a discussion see Kommers The Constitutional Jurisprudence of the Federal Republic of Germany 45; Kleyn 1996 SAPL 402 at 405. Whenever a conflict of rights exists, the meaning of these rights should be harmonised in order to offer each the greatest possible relative protection. See Blauw-Wolf and Wolf 1996 SALJ 267 at 274; Kleyn 1996 SAPL 402 at 405. It must, however, be kept in mind that the general idea is not merely to limit the meaning and protection of the fundamental rights, but rather to provide for the widest possible scope of application.

⁴ All quotations are from Basic Law for the Federal Republic of Germany, the official translation published in June 1994 by the Press and Information Office of the Federal Government, Bonn.
These principles, namely republicanism, democracy, social state, federalism and Rechtsstaat, form the foundation of the Basic Law and as such they play an integral part in the everyday workings of all parts of government. According to Foster they influence the direction of all state tasks and give legitimacy to the use of state power and the exercise of government on a daily basis. For the purposes of this study it is important to note that the principles of state must be taken into account when the meaning and the scope of the protection afforded by the fundamental rights are determined. These principles assure that no right is negated or overshadowed by any other right in the process of harmonisation of conflicting rights, and all of these principles work towards the social state principle.

All these principles enjoy equal status in the interpretation process, but for the purposes of this study republicanism, democracy and federalism need not be discussed. It is, however, necessary to provide a brief discussion of the idea of a Rechtsstaat and the social state principle.

The idea of a Rechtsstaat (Rechtsstaatprinzip) is based on the premise that all state authority derives from the people, and that no action taken by the state my exceed the boundaries of this authority. A Rechtsstaat can be described as a state where the state derives its authority form statutes that are in line with the constitutional principles and where the state strives to protect freedom, justice and legal certainty. Various principles have been derived from the Rechtsstaat idea. Amongst these is, firstly, the

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5 The terms Rechtsstaat and rule of law do not carry the exact same meaning and for this reason the term Rechtsstaat will be used in this chapter. See in this regard Currie The Constitution of the Federal Republic of Germany 18 et seq; De Waal 1995 SAJHR 1 et seq; Kruger 1994 Stell LR 15 at 16.

6 Foster German legal system and laws 146.

7 For a discussion see Foster German legal system and laws 146 et seq.

8 Stern Das Staatsrecht der Bundesrepublik Deutscheland vol 1 615. Also see Blaauw-Wolf and Wolf 1996 SALJ 267 at 268 et seq.

9 See in general Foster German legal system and laws 149 et seq; Currie The Constitution of the Federal Republic of Germany 309 et seq; Kleyn 1996 SAPL 402 at 406 et seq; Blaauw-Wolf and Wolf 1996 SALJ 267 at 268 et seq.
separation of powers. Secondly, the *Rechtsstaat* principle determines that the Basic Law is supreme and that it is binding on all three branches of the state. Thirdly, it implies legal certainty (*Rechtssicherheit* or *Bestimmtheit*). Legal rules and measures must be clear and applied consistently. This principle also includes the ban on retroactive or retrospective laws. Fourthly the existence of a *Rechtsstaat* encompasses the trust principle (*Vertrauensschutzprinzip*). This principle bears close resemblance to the principles of legitimate expectation or estoppel. In the last place proportionality (*Verhältnismäßigkeit*) is regarded as an integral part of the *Rechtsstaat*. Proportionality requires that an equitable balance be struck between the interests of an individual and the social interest. According to Foster\(^{10}\) the principle of proportionality implies that laws, actions and measures of public bodies must not go beyond those strictly required to achieve the legal purpose or objective. Although the principle of proportionality is not specifically mentioned in the *Grundgesetz*, the *Bundesverfassungsgericht* has derived it from the Basic Law and regards it as an indispensable part of a *Rechtsstaat*.\(^{11}\) Foster\(^{12}\) summarises the characteristics and principles of a *Rechtsstaat* eloquently when he states:

"... a *Rechtsstaat* is a state which has a fixed and certain hierarchy of laws binding on all and respected by all organs, the separation of powers, and the provision of accessible courts which are independent and seek to protect the citizen. Notions of legal clarity and security of law are also within the guarantee of the *Rechtsstaat*, that government action must be predictable and measurable. It encompasses the provision and protection of basic rights."

Articles 20(1) and 28(1) *Grundgesetz* commit Germany to the social state principle

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\(^{10}\) Foster *German legal system and laws* 150. Also see Van der Walt *The constitutional property clause* 88 et seq; Van der Walt *Constitutional property clauses: a comparative analysis* chapter on Germany; Blaauw-Wolf and Wolf 1996 *SALJ* 267 at 268 et seq.

\(^{11}\) *BVerfGE* 19, 342 at 348. Also see K"ommers *The constitutional jurisprudence of the Federal Republic of Germany* 46.

\(^{12}\) Foster *German legal system and laws* 151.
(Sozialstaatprinzip). This principle is founded on the premise that the state should not only protect citizens from one another and from the state, but that it should also be required to promote the public interest. By doing so the state is obliged to provide an element of social balance in society and to correct the unfortunate effects of the market economy. According to De Waal\(^\text{13}\) the social state principle entails that the state is obliged to guarantee a dignified existence for all and to control or eliminate relationships of dependence in society. Although the social state principle has as yet never been used to invalidate government action, it is understood to impose a duty on the state to affirmatively promote the public welfare and social justice. The effect of the Sozialstaatprinzip is clearly seen in social security provisions with regard to unemployment, illness, old age insurance and benefits and legal aid.

The different principles that underlie constitutional interpretation in German law create a framework for property law which relativises the traditional view of property law.

8.3 The property guarantee

Article 14 of the Grundgesetz states:

"(1) Property and the right of inheritance shall be guaranteed. Their substance and limits shall be determined by law.
(2) Property entails obligations. Its use should also serve the public interest.
(3) Expropriation shall only be permissible in the public interest. It may only be ordered by or pursuant to a law which determines the nature and extent of compensation. Compensation shall reflect a fair balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation recourse may be had to

\(^{13}\) De Waal 1995 SAJHR 1 at 8. Also see Currie The Constitution of the Federal Republic of Germany 20 et seq; Foster German legal system and laws 151; Kleyn 1996 SAPL 402 at 407; Koomers The constitutional jurisprudence of the Federal Republic of Germany 35.
The property guarantee in the Grundgesetz raises a few issues that will be discussed in this section. These include, firstly, the tension between the freedom of the individual and the interests of society (or the social function of property), secondly the interaction between and scope of the individual and institutional guarantees, and thirdly the meaning and scope of property in a constitutional context.

8.3.1 The tension between personal liberty and the social interest

It is apparent from the wording of article 14 that the property clause embodies both the guarantee of the individual's right to property and the notion that property has a social function and has to serve (or at least be compatible with) the public interest. Article 14(1) states that property (and the right of inheritance) shall be guaranteed. Property may, however, be limited according to article 14(1) and may be expropriated (against compensation) according to article 14(3). The social function of property is set out in article 14(2), which states that property entails duties (or obligations) and that its use must serve the public interest. According to Van der Walt the tension between the rights of the individual and the social function of property forms the backbone of the article as it is interpreted by the courts.

Kleyn points out that this tension reflects the tension that exists between the

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14 "(1) Das Eigentum und das Erbrecht werden gewährleistet. Inhalt und Schranken werden durch die Gesetze bestimmt.
(2) Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen.

15 Van der Walt Constitutional property clauses: a comparative analysis chapter on Germany. Also see Currie The constitution of the Federal Republic of Germany 290; Schuppert in Karpen The constitution of the Federal Republic of Germany 108.

16 Kleyn 1996 SAPL 402 at 409. See also De Waal 1995 SAJHR 1 at 8.
principles of the *Rechtsstaat* and the social state. The protection of the individual's rights against interference by the state corresponds with the principle of the *Rechtsstaat*, according to which personal freedom is to be protected. On the other hand the social function of property ties in with the aim of the social state, namely the advancement of equality. It was pointed out earlier that the courts attempt to harmonise the tension between the *Rechtsstaat* and the social state by interpreting the Basic Law as a whole, and the same principle applies as far as the property clause is concerned.

The *Bundesverfassungsgericht*\(^\text{17}\) has stated that there is a close relationship between the property guarantee and the guarantee of personal liberty in article 2 of the *Grundgesetz*.\(^\text{18}\) The court stated that property is a fundamental right which is meant to secure, for the holder, an area of personal liberty in the patrimonial sphere, to enable him/her to take responsibility for the free development and organisation of his/her own life within the larger social context. The protection of property serves to secure personal liberty and enables the individual to lead a self-governing life by protecting the individual from unwarranted state interference with his/her property. This creates a sphere in which the individual can have and hold property, which in turn ensures the free exercise of autonomy and self-realisation. As such property is associated with liberty and personhood and thus enables the individual to engage in responsible, self-defining activity and to realise his/her own life and personality. The property guarantee is thus not primarily a material guarantee, but rather a personal guarantee.\(^\text{19}\)

The implications and application of the property guarantee should, however, not be distorted by a one-dimensional approach to article 14 by focusing only on the personal

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\(^{17}\) *BVerfGE* 24, 367 at 389; *BVerfGE* 68, 193 at 222; *BVerfGE* 78, 58 at 73; *BVerfGE* 79, 292 at 303; *BVerfGE* 83, 201 at 208.

\(^{18}\) Article 2 *Grundgesetz*: "Rights of liberty (1) Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offends against the constitutional order or the moral law."

\(^{19}\) For a discussion see Kommers *The constitutional jurisprudence of the Federal Republic of Germany* 252; Currie *The constitution of the Federal Republic of Germany* 290; Van der Walt *Constitutional property clauses: a comparative analysis* chapter on Germany; Kleyn 1996 *SAPL* 402 at 410; Schuppert in Karpen *The constitution of the Federal Republic of Germany* 108.
liberty aspect. The Bundesverfassungsgericht\textsuperscript{20} stated very clearly that the property guarantee creates an area of personal liberty in the patrimonial sphere within which the individual can take responsibility for free development and self-realisation, but that the exercise of this freedom always has to take place within the larger social context. The property guarantee does not create an island for the individual to exist apart from the rest of society. Article 14(2) clearly states that property entails obligations and that its use must serve the public interest. The personal space of freedom created by the guarantee must be utilised to assist in the formation of the whole social and economic order. The guarantee entrenches private-law rights which must also further the interests of society at large. The individual has an active role to play in society and must, while pursuing the realisation of personal autonomy, work towards the building of a social, legal and economic order. The principles of personal liberty and the social state are therefore reconcilable and not mutually exclusive.\textsuperscript{21} The Bundesverfassungsgericht\textsuperscript{22} placed personal liberty within a social context when it stated that the property guarantee in a social state should also serve the poor, because they are the ones that are most in need of protection to ensure their freedom. The mere fact that the property clause guarantees property on the one hand while allowing for the limitation of property in the public interest on the other hand illustrates the fact that property rights do not exist in a vacuum and have to be applied and exercised within a social context.\textsuperscript{23} Limitations in the public interest form an inherent part of property.\textsuperscript{24}

\section*{8.3.2 The personal and institutional guarantee of property}

Article 14 of the Grundgesetz guarantees property and the right of inheritance. Two

\begin{footnote}
\textsuperscript{20} BVerfGE 24, 367 at 389; BVerfGE 68, 193 at 222; BVerfGE 78, 58 at 73; BVerfGE 79, 292 at 303; BVerfGE 83, 201 at 208.

\textsuperscript{21} Kleyn 1996 SAPL 402 at 412.

\textsuperscript{22} BVerfGE 42, 64 at 77.

\textsuperscript{23} The social function of property is, among others, illustrated by BVerfGE 24, 367 (Deichordnung case) BVerfGE 87, 114 (Kleingarten case) and BVerfGE 58, 300 (Naßauskiesung case).

\textsuperscript{24} Kleyn 1996 SAPL 402 at 412.
\end{footnote}
separate but related guarantees are derived from this provision. The first is a subjective, material or personal guarantee that secures individual property rights (Bestandsgarantie or Individualgarantie) and the other an institutional guarantee that secures the institution of property (Institutionsgarantie or Einrichtungsgarantie) against the abolition of the institution of private property.

The Bestandsgarantie\textsuperscript{25} enables the individual to be the holder of property rights and protects the individual's property from undue or improper interference by the state. The individual may have and hold property and has the power to use the different objects as he/she sees fit. He/she also has the power to dispose of and alienate his/her property.\textsuperscript{26} The Bestandsgarantie guarantees personal freedom within the economic order. This freedom does, however, have a social dimension which limits both the individual's power to use his/her property as he/she sees fit and the power of the state to interfere with the individual's rights. The individual must always use his/her property to serve the public interest. Any use of the property that is to the detriment of society is not included in the personal guarantee.

Although the Bestandsgarantie protects the individual against interference from the state, the social dimension of the guarantee determines that the protection is not absolute. The guarantee does not imply that the state may never interfere with personal property rights - it merely lays down the requirements for valid interferences. The state may only interfere with the individual's rights, through either regulation or expropriation, if the interference is justified by the public interest. And even if an interference is in the

\textsuperscript{25} See in general Kommers \textit{The constitutional jurisprudence of the Federal Republic of Germany} 250 et seq; Currie \textit{The constitution of the Federal Republic of Germany} 291; Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Germany; Kleyn 1996 SAPL 402 at 413 et seq. Also see BVerfGE 24, 367; BVerfGE 58, 300.

\textsuperscript{26} It is unclear whether article 14 also includes the power to obtain property. It is generally held that article 14 only protects existing property and that the power to obtain property is derived from article 2. See Kleyn 1995 SAPL 402 at 414 in this regard. The power to obtain property must not be understood as being the same as a positive claim right against the state to provide property. No such a positive claim right is recognised in German law. See Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Germany.
public interest, the interference will only be valid if the public purpose is more important than the individual's guaranteed property rights.

It is important to note that, although article 14 guarantees the payment of compensation in the case of expropriation, this does not mean that the guarantee of property is replaced by a guarantee of the value of the property in question (Wertgarantie). The guarantee of the exchange value of property in the expropriation clause (article 14(3)) is lower in status than the Bestandsgarantie and does not replace the guarantee of the property.\(^{27}\) According to the Bundesverfassungsgericht article 14 guarantees property itself and not just its value.\(^{28}\) Because of the fact that article 14 guarantees property itself, and not merely the value thereof, property that was expropriated for a specific public purpose that was never realised should be returned to the original property holder, even if compensation was paid.\(^{29}\)

The institutional guarantee, on the other hand, protects property as a human right in the objective sense. It protects the core of norms that ensure the existence of private property and not any individual's rights as such. The purpose of the institutional guarantee is to ensure that the state does not eliminate or reduce the potential sphere of personal liberty which is guaranteed by article 14. The institutional guarantee entails that the state may not remove whole categories of property from the sphere of private property and in doing so suspend or curtail substantial areas of the protected sphere of liberty protected by this fundamental right.\(^{30}\)

\(^{27}\) Van der Walt *Constitutional property clauses: a comparative analysis* chapter on Germany points out that the guarantee of value should not be identified with the Bestandsgarantie, because the guarantee of value does not justify an expropriation. An expropriation must be valid in terms of the Bestandsgarantie before the guarantee of value comes into play. Also see Kleyn 1996 SAPL 402 at 414.

\(^{28}\) *BVerfGE* 38, 175 at 1884; *BVerfGE* 56, 249 at 260; *BVerfGE* 58, 300 at 323; *BVerfGE* 78, 58 at 75.

\(^{29}\) See *BVerfGE* 38, 175.

\(^{30}\) Kommers *The constitutional jurisprudence of the Federal Republic of Germany* 251 et seq; Van der Walt *Constitutional property clauses: a comparative analysis* chapter on Germany; Kleyn 1996 SAPL 402 at 414 et seq. Also see *BVerfGE* 24, 367; *BVerfGE* 58, 300; *BVerfGE* 42, 263.
Kleyn\textsuperscript{31} points out that, although article 14 does not create a positive claim right against the state to provide individuals with property, the institutional guarantee imposes a duty on the state actively to promote the creation of wealth. The equal distribution of private property will protect the constitutional and societal order in general.

The regulation of property may, however, be adjusted to social and economic conditions. The state is thus not completely prevented from interfering with the system of private property and may remove specific categories of property if doing so is compatible with the public interest. The Bundesverfassungsgericht\textsuperscript{32} holds the view that the nature and social function of certain categories of property is such that exclusive individual rights in that property are irreconcilable with the importance and potential dangers which the private use and exploitation of that property might have for society as a whole. In these cases the removal of certain categories of property from the sphere of private rights, or the transformation of a category of rights into public-law rather than private-law rights, is justified by the social importance and function of that category of property. The institutional guarantee, therefore, legitimises state action to prevent harmful concentrations of private property. In the Deichordnung case,\textsuperscript{33} the Bundesverfassungsgericht found a federal statute that removed dyke land from the sphere of private-law rights, in order to create a more effective system of flooding control, to be constitutional. The court reiterated that the protection of property ensures the protection of personal liberty and that the institutional guarantee serves to secure this basic right. If lawmakers were allowed to replace private property with something no longer deserving the label "ownership", property could not be effectively protected. The institutional guarantee prohibits the legislature from changing the private legal order in such a way that fundamental categories of constitutionally protected activities relating to the area of property would be removed, which would diminish the sphere of liberty protected by this right. However, the court continued that the statute in question was constitutionally valid because the public purpose served by removing the dyke land

\textsuperscript{31} Kleyn 1996 SAPL 402 at 415.
\textsuperscript{32} BVerfGE 24, 367; BVerfGE 58, 300; BVerfGE 42, 263.
\textsuperscript{33} BVerfGE 24, 367.
from the sphere of private property for more effective flooding control was in the public interest, and in this case the public interest outweighed the interests of the individual owners.

The Contergan case\textsuperscript{34} is a good example of a case where the state transformed private rights into public-law rights for a legitimate public purpose. This case deals with the private claims for damages of German Thalidomide victims against the manufacturer of medicine (Contergan) which caused physical handicaps. The claims were created by private agreement between the victims and the manufacturer. The state, however, created a statutory foundation to manage the compensation fund for the sake of all claimants and potential beneficiaries. The private claims of the victims who had an agreement with the manufacturer were changed into public-law rights against the statutory foundation in order to provide better control over funds for the sake of all claimants. The court found that the legislature has the authority to change the nature of these constitutionally guaranteed claims and, in doing so, to realise the social function of property. Thus, although these private claims were removed from the sphere of private property by transforming them into public-law claims, the statute which effected this transformation was found not to be in conflict with the institutional guarantee because it was justified by an overpowering public interest. In the Naßauskiesung case,\textsuperscript{35} where the mining of gravel below the level of groundwater was restricted, the court stated that

"the institutional guarantee of private property does indeed bar the lawmakers from modifying or undermining the core of the right to property embedded in private law in such a way as to remove or substantially reduce the realm of freedom guaranteed by article 14. But the definition of property is not the exclusive domain of private law. The institutional guarantee is not adversely affected when public law intrudes to protect and defend aspects of property vital to the well-being of the general

\textsuperscript{34} BVerfGE 42, 263.

\textsuperscript{35} BVerfGE 58, 300.
constitutional property

Grundgesetz does not define property and consequently constitutional law as an open and flexible concept. It must, however, be noted that not of property is open, this does not mean that it is unrestricted or law property (or ownership in this instance) is viewed as an absolute right to which restrictions are seen as exceptions. The social dimension of constitutional property, it is regarded as in constitutional law.

The Bundesverfassungsgericht declared that the meaning of constitutional property must be derived from the Basic Law itself. Constitutional property cannot be interpreted in terms of legal norms, like ordinary statutes and private-law regulations, lower in rank than the Basic Law or from private law. A distinction is thus made in German law between private-law property and constitutional property. It is important in this regard to note that although the Grundgesetz uses the same term Eigentum (ownership) used for private-law ownership in the BGB, it is interpreted in the constitutional context to

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36 Translation according to Kommers The constitutional jurisprudence of the Federal Republic of Germany 259.

37 903 BGB: "Der Eigentümer einer Sache kann, soweit nicht das Gesetz oder Rechte Dritter entgegenstehen, mit der Sache nach Belieben verfahren und andere von jeder Einwirkung ausschließen". (The owner of a thing may, to the extent that it is not contrary to law or the rights of third parties, deal with the thing as he pleases and exclude others from any interference.) Also see chapter 5 in this regard.

38 Kleyn 1996 SAPL 402 at 419; Van der Walt in Van Wyk et al Rights and constitutionalism 470; Van der Walt The constitutional property clause 48; Currie The constitution of the Federal Republic of Germany 294.

39 BVerfGE 58, 300.

40 See in general Van der Walt The constitutional property clause 42 et seq; Schuppert in Karpen The constitution of the Federal Republic of Germany 108.
mean property in the wide sense.\textsuperscript{41}

The Naßauskiesing case\textsuperscript{42} is especially important in this regard. In 1976 a statute determined that any use of groundwater that influenced the quality or quantity of groundwater was subject to permission. The plaintiff in this case operated a gravel pit where he extracted gravel from beneath the groundwater level. His free use of the groundwater was restricted when a new water conservation district was declared. The plaintiff's quarry was situated within the boundaries if this water district and his permit for the use of the water beneath his property was terminated. The Bundesverfassungsgericht had to decide whether the statute effected a regulation or an expropriation and whether the statute was compatible with the guarantee of property in article 14 of the Grundgesetz. In its decision the Bundesverfassungsgericht stated that the concept of property in a constitutional sense must be derived from the Basic Law itself. The Basic Law determines that the content and limits of property have to be determined by the legislature. This has to be done in such a way that a balance is struck between the protection of the interests of the individual and the public. The legislature has to provide for private-law rules to ensure the protection of the individuals rights and public-law regulations to safeguard the interests of society as a whole. Both private and public law therefore have to contribute to the determination of the constitutional legal position of the owner. The civil code (BGB) does not define the content and limits of property exclusively. Account has to be taken of the totality of regulations regarding property to determine the rights of a property owner at any specific time. If these regulations deny the property owner of a certain control over his/her property, this control does not form part of his/her right to property. The civil code (BGB), which states that the right of an owner of a piece of land extends to the space above the surface and to the terrestrial body under the surface and that the

\begin{footnotesize}
\textsuperscript{41} The official translation of the Grundgesetz also uses the term 'property' rather than ownership. Also see Van der Walt The constitutional property clause 42 et seq; Van der Walt Constitutional property clauses: a comparative analysis chapter on Germany; Kleyn 1996 SAPL 402 at 413. The term 'property' is also used by Currie The constitution of the Federal Republic of Germany 290, Foster German legal system and laws 165 and Kommers The constitutional jurisprudence of the Federal Republic of Germany 250.

\textsuperscript{42} BVerfGE 58, 300.
\end{footnotesize}
owner may deal with his/her property as he/she pleases,\textsuperscript{43} does not take precedence over regulations of public law. The court continued to say that the water law in question does not constitute an expropriation but merely a regulation in terms of article 14(1) Grundgesetz. The statute defines the content of property with regard to groundwater. This constitutes a change in objective law and does not result in a deprivation of a concrete legal interest protected by the institutional guarantee.

Article 14(1) of the Grundgesetz states that the content and limits of property shall be determined by statute. Currie\textsuperscript{44} points out that this does not mean that the content and limits of property are placed wholly at legislative disposal. The meaning of property has to be derived from the Grundgesetz and the legislature is thus obliged to have due regard for constitutional values that have a bearing on the meaning of the entire Basic Law. These values include human dignity, personality and equality. A working balance has to be struck between the content and limits of property and these values. Furthermore, the principles of the Rechtsstaat (including proportionality) and the social state also have to be taken into account.\textsuperscript{45} The role of the Bundesverfassungsgericht in reviewing an interference with property is to determine whether the legislature took all the competing values and principles into account.\textsuperscript{46} Constitutional property consists of all the different entitlements granted to the owner by the legislature at a specific time.\textsuperscript{47}

Whereas the legislature has the task to determine the content and limits of property, the Bundesverfassungsgericht\textsuperscript{48} declared that it is the task of the courts to determine,

\textsuperscript{43} 903 and 905 BGB.
\textsuperscript{44} Currie The constitution of the Federal Republic of Germany 294. Also see Kleyn 1996 SAPL 402 at 419; Schuppert in Karpen The constitution of the Federal Republic of Germany 112 et seq.
\textsuperscript{45} Kommers The constitutional jurisprudence of the Federal Republic of Germany 254.
\textsuperscript{46} BVerfGE 52, 1; BVerfGE 37,132; BVerfGE 42, 263; BVerfGE 14, 263.
\textsuperscript{47} Van der Walt The constitutional property clause 49; Kleyn 1996 SAPL 402 at 419.
\textsuperscript{48} BVerfGE 1, 264 at 277.
with reference to developments in private law and the needs of society, which objects qualify as constitutional property (and which will be protected in terms of the property guarantee). Private law was used as a starting point to determine which objects should form part of constitutional property. Consequently, the starting point was that only rights in corporeal things were constitutionally protected, but the development of the industrial economic system necessitated the inclusion of other rights and interests in the range of constitutionally protected property. The function of the constitutional guarantee justifies the extension of the list of protected property. The protection of property in the Grundgesetz is judged from a perspective compatible with the protection of personal liberty and its function is to secure a sphere of personal liberty for the individual to take responsibility for his/her own affairs in the patrimonial sphere. The protection of other rights (not only real rights) as property is in line with this function of the property guarantee. All patrimonial rights of private law (vermögenswerte Rechte) are thus constitutionally protected. Traditional private-law rights such as servitudes, real security rights, hunting and fishing rights, mining and mineral rights and the subjective right of a lessee are all protected. Private-law rights with regard to immaterial and incorporeal property, such as shares, patent and trademark rights, copyrights, rights of first refusal, contractual rights of purchase and sale and so on are also protected in terms of the property guarantee. The rights relating to a business concern (Gewerbebetrieb) are also included in the property guarantee. Although it has not been decided by the Bundesverfassungsgericht, it is often argued that the guarantee should also include goodwill and earning possibilities based on clientele.

49 Van der Walt The constitutional property clause 32 et seq; Schuppert in Karpen The constitution of the Federal Republic of Germany 108.

50 BVerfGE 42, 263 at 293.

51 See Van der Walt Constitutional property clauses: a comparative analysis chapter on Germany; Van der Walt The constitutional property clause 43.

52 BVerfGE 31, 229 (copyright); BVerfGE 36, 281 (patent rights); BVerfGE 42, 263 (contractual money claims); BVerfGE 51, 193 (trademarks); BVerfGE 58, 193 (debts); BVerfGE 53, 257 (matrimonial property claims); BVerfGE 83, 201 (right of pre-emption). See also Van der Walt The constitutional property clause 33.
In established business. Van der Walt\textsuperscript{53} points out that benefits temporary existence of a favourable situation are not included in only those rights that the beneficiary can legally rely on, are property is restricted by the fact that only vested or acquired (and are protected).\textsuperscript{54} Interests thus have to be established and vested order to qualify for protection in terms of the property guarantee. s, chances and possible future earnings are not protected.\textsuperscript{55} Not have been acquired and exercised lawfully are protected, but also already been acquired legally but not yet exercised. The right to build part of one's property.\textsuperscript{56}

The Bundesverfassungsgericht\textsuperscript{57} recognised the fact that modern society's wealth more often than not lies in social security and as such the constitutional guarantee was interpreted to include public-law rights (\textit{subjektive öffentliche Rechte}). To determine whether a public-law right qualifies for protection in terms of article 14, that specific social security right has to serve the function of the property guarantee in the same manner that traditional private-law rights do.\textsuperscript{58} The Bundesverfassungsgericht\textsuperscript{59} has set three requirements for a public-law right to qualify as constitutionally protected property: The right in question must be separated from state control and must be

\textsuperscript{53} Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Germany. Also see Kleyn 1996 SAPL 402 at 422.

\textsuperscript{54} \textit{BVerfGE} 28, 119; \textit{BVerfGE} 45, 142.

\textsuperscript{55} Expectancies of adjustments of and increases in pension funds are not protected. \textit{BVerfGE} 36, 73.

\textsuperscript{56} Van der Walt \textit{The constitutional property clause} 34; Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Germany.

\textsuperscript{57} \textit{BVerfGE} 53,257; \textit{BVerfGE} 58,81.

\textsuperscript{58} \textit{BVerfGE} 89, 1.

\textsuperscript{59} \textit{BVerfGE} 69, 272 at 300.
acquired by the individual; it must be based on substantial contributions of the holder of the right; and it must serve to ensure the holder's survival or existence. Security provisions based only on the state's duty of social maintenance, in other words where there is no contribution from the individual, are not included in the concept of constitutional property. Thus, social benefit grants, claims of educational grants, housing subsidies and so forth are not regarded as property. Kleyn\(^60\) points out that the protected public-law rights are dependent on a relationship of exchange between the state and the individual. The state assists in creating these rights and as counterperformance for the individual's contribution the state allocates the right to the individual for private use.\(^61\)

Public-law rights are, however, regarded as weaker or more relative claims compared to private-law rights. Public-law property does not have the same binding effect on the state as private-law rights.\(^62\)

### 8.4 Limitation of property rights

The constitutional right of property is not absolute. The *Bundesverfassungsgericht*\(^63\) declared that the scope and meaning of constitutional property must be derived from

\(^{60}\) Kleyn 1996 SAPL 402 at 421. Also see Van der Walt *Constitutional property clauses: a comparative analysis* chapter on Germany.

\(^{61}\) Public-law rights that have been included in the constitutional concept of property include land-use rights of the residential lessee (note that these rights are non-proprietary rights that aim to protect the rights and interests of the lessee: BVerfGE 37, 132; BVerfGE 38, 248; BVerfGE 68, 361; BVerfGE 79, 292; BVerfGE 89, 1; BVerfGE 89, 237; BVerfGE 91, 294) and the lease of a garden allotment (BVerfGE 52, 1; BVerfGE 87, 114), participatory rights of employees in a large firm (BVerfGE 50, 290) and claims against a socially important compensation fund (BVerfGE 42, 263).

\(^{62}\) It may be argued that, whereas private-law rights serve to ensure the individual's freedom and to protect the individual against unwarranted interference by the state, public-law rights have a participatory character. These rights bind the state to the distribution of wealth it has committed itself to, and they are dependant on what is feasible in terms of financial politics. See Kleyn 1996 SAPL 402 at 421; Van der Walt *The constitutional property clause 34 et seq*; De Wet *The constitutional enforceability of economic and social rights 17 et seq*; De Wet 1995 SAPL at 73 et seq; De Wet 1995 SAJHR at 30 et seq.

\(^{63}\) BVerfGE 58, 300. See the discussion in 8.3.3 above.
the Basic Law as a whole. An absolute, inherently unrestricted concept of property is irreconcilable with the governing values and principles of the Basic Law (personal liberty and human dignity as well as the principles of the social state). Article 14 specifically determines that property has a social function and, if this aspect of the property guarantee is brought into the equation, it indicates that constitutional property is a relative concept (Sozialbindung). The limitation of property thus forms an integral part of constitutional property.

Limitations are defined by the Bundesverfassungsgericht\textsuperscript{64} as general and abstract norms, of either public- or private-law nature, that determine the rights and duties of property holders. Article 14(1) and 14(2) provide the legislature with the power and duty to limit property. Article 14(1) acts as a directive to the legislature to determine the content and limits of property. Article 14(2), moreover, indicates that property implies obligations and that its use must serve the public interest. Kleyn\textsuperscript{65} points out that article 14(2) imposes both negative duties (to refrain from any action that may be detrimental to the public interest) and positive duties (to use property so that it serves the public interest). Article 14 thus instructs the legislature to establish an equitable and just property regime that incorporates and guarantees both the individual's liberty and the social interest.\textsuperscript{66} The interaction between the guarantee of property as personal liberty and the social function of property implies that property can (and must) be limited.\textsuperscript{67} Article 14(1) and 14(2), read together, provide the legislature with the general power to limit property rights (Eigentumsbindung).\textsuperscript{68} It must, however, be kept in mind that although there is no general limitation clause in the Grundgesetz, the legislature does not have unlimited powers as far as the limitation of property is concerned. Every

\textsuperscript{64}BVerfGE 52, 1 at 27; BVerfGE 58, 300 at 330.

\textsuperscript{65}Kleyn 1996 SAPL 402 at 424.

\textsuperscript{66}BVerfGE 37, 132 at 140; BVerfGE 52, 1 at 29; BVerfGE 70, 191 at 200; BVerfGE 79, 174 at 198.

\textsuperscript{67}Currie The constitution of the federal Republic of Germany 294; Kleyn 1996 SAPL 402 at 424; Van der Walt Constitutional property clauses: a comparative analysis chapter on Germany.

\textsuperscript{68}Kleyn 1996 SAPL 402 at 424.
limitation must be judged against the background of the Basic Law as a whole and must reflect the values and principles intrinsic to the Basic Law. 69

The property guarantee is characterised by the balance that has to be struck between the interests of the individual and the public respectively. The legislature has to create an equitable and just social order in which both the interests of society and the property rights of the individual are respected. 70 The proportionality principle 71 aims at creating this balance. The principle of proportionality (Verhältnismäßigkeit), which acts as a prohibition against regulatory excess (Übermaßverbot), ensures that a restriction of the property holder’s rights does not disturb the balance between the individual and the social interest. The courts apply the proportionality principle not only to ensure that the fundamental rights of the individual are protected, but also to curb excesses of state authority. Any limitation of property must establish a proportional balance between its purpose and the restrictive means resorted to. Blaauw-Wolf and Wolf 72 point out that the proportionality principle entails three requirements for valid limitations of property: firstly the limitation must be appropriate or suitable (geeignet). Secondly, the limitation must be necessary (erforderlich) to achieve the specific purpose and lastly the limitation must be proportional (verhältnismäßig) to the importance and meaning of the protected right, or put differently, the limitation must not impose burdens disproportionate to its benefits. The third requirement, which embodies proportionality in the narrow sense, entails that even if a limitation is necessary, it would be regarded as disproportional if the burden is not in proportion to the objective pursued. The state must select the least

69 Kleyn 1996 SAPL 402 at 425.

70 BVerfGE 37, 132 at 140; BVerfGE 52,1 at 29; BVerfGE 70, 191 at 200; BVerfGE 79, 174 at 198.

71 Although the proportionality principle is not mentioned in the Grundgesetz, the BVerfG (BVerfGE 19, 342 at 348 et seq) has derived this principle directly from the Rechtsstaat principle.

72 Blaauw-Wolf and Wolf 1996 SALJ 267 at 280 et seq. Also see Kommers The constitutional jurisprudence of the Federal Republic of Germany 46; Currie The constitution of the Federal Republic of Germany 295; Van der Walt The constitutional property clause 88; Van der Walt Constitutional property clauses: a comparative analysis chapter on German; Schuppert in Karpen The constitution of the Federal Republic of Germany 114 et seq.
burdensome limitation to achieve the purpose of the limitation.

Whenever the court has to judge the legitimacy of a limitation, it has to determine whether the limitation is to be allowed with reference to the proportionality principle. Where a fundamental right, which may be restricted, has to be harmonised with a public interest that has been provided for specifically by the Basic Law (as is the case in article 14(2)), the court attempts to 'optimise' the fundamental right and the public interest by giving protection to both without sacrificing either. The extent to which both conflicting interests are affected and the importance and weight each deserves in relation to the other has to be taken into account.\textsuperscript{73}

The practical effect of the proportionality principle is the 'grading' of the social limitations of property. The grading is done with reference to the importance of different public interests and the different objects of individual rights. As far as the public interest is concerned, Kleyn\textsuperscript{74} points out that efforts to counteract harmful concentrations of economic powers, the prevention of exploitation of people and the upliftment of the poor justify limitation of a more severe nature that other public purposes of a more general nature. The gradation of objects of property rights is done with reference to the function of the property guarantee: the more an object serves to secure a sphere of personal liberty for the individual, the stronger the individual protection will be. On the other hand, the less important an object is for the securing of a sphere of personal liberty, the less protection is afforded to the individual and the more severe the limitation can be.\textsuperscript{75} However, the gradation principle does not imply that the legislature has the power to arbitrarily restrict property rights whenever the purpose of the limitation or the object in question is of specific social importance. The requirements

\begin{flushright}
\textsuperscript{73} Blauw-Wolf and Wolf 1996 SALJ 267 at 280 et seq. Also see Kleyn 1996 SAPL 402 at 425; Van der Walt Constitutional property clauses: a comparative analysis chapter on Germany.

\textsuperscript{74} Kleyn 1996 SAPL 402 at 426. Also see Schuppert in Karpen The constitution of the Federal Republic of Germany 110.

\textsuperscript{75} BVerfGE 89, 1; BVerfGE 50, 290; BVerfGE 52, 1; BVerfGE 87, 114; BVerfGE 70 191 at 201; BVerfGE 79, 292 at 302; BVerfGE 84, 382 at 385; BVerfGE 21, 73; BVerfGE 24, 367; BVerfGE 42 263.
\end{flushright}
for the proportionality principle have to be met and the conflicting interests have to be
balanced in order to achieve a just and equitable result.

The Bundesverfassungsgericht\textsuperscript{76} has stated that land, in particular, qualifies as an
object that is subject to stricter social limitation and regulation because of its social
importance. Land is a limited resource that cannot be increased or multiplied and the
restriction of the owner's power to use the land is justified by the immense social
importance of land. Not only the owner of land, but also third parties and the state are
dependent on land. Some of the severe social limitations of property rights with respect
to land include the abolition of rights to groundwater,\textsuperscript{77} rent control in terms of which the
owner is prohibited from unreasonable and unexpected rent increases or the
cancellation of the lease,\textsuperscript{78} and strict control of the trade in and ownership of forest
land.\textsuperscript{79} In the post-war era state control of the use of residential property was justified
in light of the immense public interest to solve the housing shortage.\textsuperscript{80} As was stated
above, the mere fact that an object has an important social function does not mean that
severe restriction with regard to that object is an obvious consequence. The individual
and social interests have to be balanced in order to reach a just and equitable result.
In the Kleingarten cases,\textsuperscript{81} the court found that, due to social change, the restriction of
the owner's power to terminate the lease of an allotment garden was no longer socially
justifiable and the court thus lifted the restriction.

The position of land (\textit{Situationsgebundenheit}) may also have an influence on the

\textsuperscript{76} BVerfGE 52, 1; BVerfGE 21, 73.
\textsuperscript{77} BVerfGE 58, 300.
\textsuperscript{78} BVerfGE 37, 132; BVerfGE 79, 292; BVerfGE 68, 361.
\textsuperscript{79} BVerfGE 21, 73.
\textsuperscript{80} BGHZ 6, 270. The court stated that any action in terms of the post-war housing law is
justified in terms of article 14 GG. However, if the state authority acts unlawfully (outside
the limits of the housing law) and in doing so places an unacceptable burden on the
individual, this amounts to an unlawful expropriationlike infringement (\textit{enteignungsgleicher
Eingriff}) for which compensation is payable. See 8.5 below.
\textsuperscript{81} BVerfGE 52, 1; BVerfGE 68, 361.
severity of limitations. It has been accepted in German law that the function and location of land in the environment may be a determining factor for the justification of limitation of property rights. Some landed property will thus be subject to more limitations than other. The test is whether a specific use, bearing in mind the public interest, will be unreasonable in light of the environmental position of the land.\footnote{BVerwGE (Federal Administrative Court - Bundesverwaltungsgericht) 49, 365; BVerwGE 38, 209; BVerfGE 24, 367; BVerfGE 25, 112; BVerfGE 79, 174.} The Bundesverwaltungsgericht\footnote{BVerwGE 38, 209.} found that the owner of a wholesale concern that distributes fish products in a mixed residential area cannot claim compensation when he is instructed to reduce noise levels during specified hours. The instruction to reduce noise levels does not constitute an expropriation. When the warehouse was erected the street in which the warehouse is situated was undeveloped, and the noise did not cause any disturbance. Within a few years, however, the warehouse was surrounded by houses and inhabitants complained about the noise. The court held that the owner of the business cannot rely on the fact that his business did not change materially over the years. The general situation has changed and the current use, bearing in mind the public interest, must be reasonable in light of the nature and position of his property. The fact that the business is situated within a mixed residential and industrial area implies that the owner of the factory has to exercise his rights so as not to exceed the limits set by law (in this case neighbour law) for the use of his property. The nature and situation of the property determines that the business has to be operated so as not to cause a disturbance for the neighbours. The court stated that the owner will only be able to rely on the permanent continuation of a specific use of the property if he could not reasonably have foreseen that the manner in which the property was used initially will become unreasonable in light of the nature of the area or the probable development of the area.\footnote{BVerwGE 38, 209 at 219.} In a similar case the Bundesverwaltungsgericht\footnote{BVerwGE 49, 365.} confirmed that the situation of land in the environment has an influence on the severity of the limitations on that property. In this case the owner of land in a nature area was refused permission
to mine stone on the land. The court said that any regulatory limitation which restricts
the use of the land in a conservation area merely expresses the inherent restrictions
deriving from the particular situation of the land and the social interests in the land, and
does not constitute any expropriation. The *Deichordnung*\(^{86}\) case also confirms this
principle. In this case the expropriation of dyke land was justified in light of the
*Situationsgebundenheit* of the land and the immense social importance of the purpose
for which the action was taken, namely to create a more effective dyke system.

Similarly, the right of a landowner to use roads adjacent to land (*Anliegerrecht*), as well
as limitations on the use of property that are the direct consequence of the public use
of such roads, are derived from the *Situationsgebundenheit* of the land. The owner of
the land derives advantages from the fact that his/her property is adjacent to a public
road and therefore has to endure, within reason, the disadvantages as well. The owner
is obliged to endure the reasonable burden brought about by the public use of the road.
However, if the public use of the road burdens the individual landowner
disproportionately (in other words the benefit to the public is disproportional to the
burden placed upon the landowner) the landowner is not expected to endure such a
burden without relief.\(^{87}\)

Land-use control is also justified with reference to the nature and position of land. In
the *Grundstücksverkehrsgesetz*\(^{88}\) case the *Bundesverfassungsgericht* found the refusal
of permission to a professional forester to buy forest land justified. The permission was
refused in terms a federal law of 1961 which aimed at preventing the unhealthy
distribution of land. The social importance of forest (and agricultural) land justified the
statute, as well as the actions taken in terms of the statute. The *Naßauskiesung* case,\(^{89}\)
where the use of groundwater was restricted, also illustrates the principle that land-use

\(^{86}\) *BVerfGE* 24, 367.

\(^{87}\) *BGHZ* 64, 220.

\(^{88}\) *BVerfGE* 21, 73.

\(^{89}\) *BVerfGE* 58, 300.
control is justified by the Situationsgebundenheit of the land.

8.5 Expropriation of property

The Grundgesetz determines that property may be expropriated by the state for a public purpose against the payment of just compensation. If these requirements are not met, the basic right to property is violated. Expropriation does not negate the individual's right to property, but rather serves to concretise the guarantee. If property was not guaranteed, the expropriation clause would not have been necessary and compensation for the expropriation of property would have been redundant.90

Article 14(3) of the Grundgesetz provides for and lays down the requirements for the expropriation of property. Expropriation is only permissible in the public interest and it has to be authorised by legislation. Expropriation may only be effected by or pursuant to a law that regulates the nature and extent of compensation. The validity of an expropriation is dependant on the requirements set in article 14, and it also has to be constitutional values and principles embodied in the principle and the principle of the Rechtsstaat, including

expropriation set the limits to which the property holder has/her property rights. These limits are determined by law is not empowered to change them.92

ions, must be seen against the background of the property. The partial or complete expropriation of property is a function of private property and as such it has to be for the public interest. The public purpose requirement serves

BVerfGE 24, 367. Also see Kleyn 1996 SAPL 402 at 434.

92 BVerfGE 24, 367.
both to protect the individual's rights and to limit the state's power to infringe upon the individual's rights. The public purpose for which the expropriation is undertaken has to be of such importance that it justifies the infringement of the individual's rights.\(^{93}\)

It is not exactly clear what constitutes an expropriation.\(^{94}\) The Bundesverfassungsgericht\(^{95}\) described expropriation as an appropriation of individual property by the state in the form of a total or partial expropriation or seizure of those rights that are protected by article 14. The court, however, does not always require a transfer of property to the state.\(^{96}\) Cases where rights are reduced,\(^{97}\) limited\(^{98}\) or cut back\(^{99}\) can also amount to expropriation.

Article 14(3) of the Grundgesetz determines that compensation is payable for expropriations. Expropriation is not defined in the Grundgesetz, and this has led to the question of exactly which limitations of property rights qualify for compensation. Initially expropriation entailed the transfer of land to the state. This was later extended to include the transfer of everything (also immovables and patrimonial rights) that qualified as constitutional property. The concept of expropriation was later understood to include not only the transfer of the property to the state, but also the excessive burdening and limitation thereof. These developments made it possible for a 'normal' limitation to be transformed into an expropriation in light of its intensity and the excessive sacrifice (Sonderopfer) that was expected from the holder of the property rights

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\(^{93}\) Currie The constitution of the Federal Republic of Germany 291; Kommers The constitutional jurisprudence of the Federal Republic of Germany 258; Van der Walt Constitutional property clauses: a comparative analysis chapter on Germany.

\(^{94}\) See in general Kleyn 1996 SAPL 402 at 434 et seq.

\(^{95}\) BVerfGE 58, 300 at 330; BVerfGE 79, 174 at 191; BVerfGE 70, 191 at 199; BVerfGE 74, 264 at 280; BVerfGE 52, 1 at 27; BVerfGE 83, 201 at 211.

\(^{96}\) BVerfGE 83, 201 at 211; BVerfGE 52, 1 at 27; BVerfGE 24, 367 at 394.

\(^{97}\) BVerfGE 58, 300 at 331; BVerfGE 52, 1 at 28; BVerfGE 45, 297 at 332.

\(^{98}\) BVerfGE 56, 249 at 260.

\(^{99}\) BVerfGE 52, 1 at 27.
The civil courts, which have the duty to determine the amount of compensation payable in the case of expropriation, accepted this extended concept of expropriation under article 14(3). The Federal Court of Justice in Civil Matters (Bundesgerichtshof - BGH) argued that expropriatory compensation is payable to all property holders who are expected to make an extraordinary sacrifice. This applies to both normal expropriations and excessive regulations.\textsuperscript{100} The Bundesgerichtshof thus awarded compensation to property holders in cases where there were no actual expropriation in terms of article 14(3), but where owners were forced by a regulatory limitation on the use of property to make an extraordinary sacrifice.\textsuperscript{101}

The Bundesverfassungsgericht rejected this approach of the civil courts in the Naßauskiesung case.\textsuperscript{102} According to the Bundesverfassungsgericht compensation only comes into play once it is determined that a particular limitation conforms to the requirements set for expropriations in article 14(3). Compensation is only payable for valid expropriations that meet the requirements of article 14(3). Article 14(3) states that an expropriation will only be valid if it is authorised by a law which provides for the nature and extent of compensation. This is referred to as the Junktim-Klausel (linking or tandem clause). The state has to decide beforehand whether a particular restrictive measure will amount to an expropriation. If this is indeed the case, the state has an obligation to inform the public accordingly. Any statute that proposes a restrictive measure which amounts to an expropriation but does not conform to the Junktim-Klausel will be unconstitutional and void. Regulatory laws obviously do not foresee the payment of compensation and as such they do not satisfy the Junktim-Klausel. It is thus impossible to award compensation for actions carried out under their authority. A

\textsuperscript{100} See BGHZ 83, 61 for an example where the excessive sacrifice of the property holder was caused by a lawful regulation. This is referred to as an expropriatory infringement (enteignender Eingriff). See BGHZ 6,270 for an example where the excessive sacrifice is the result of an unlawful (unauthorised) action. This is referred to as an expropriation-like infringement (enteignungsgleicher Eingriff).

\textsuperscript{101} See in general Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Germany; Kleyn 1996 SAPL 402 at 434; Schuppert in Karpen \textit{The constitution of the Federal Republic of Germany} 116 et seq.

\textsuperscript{102} BVerfGE 58, 300.
regulation that forces an extraordinary sacrifice on the property holder cannot be transformed into an expropriation and does not qualify for compensation. The Bundesverfassungsgericht holds the view that the property holder that had to make an excessive sacrifice as the result of a regulatory law cannot claim compensation, but has to attack the validity of the law.

Despite the decision of the Bundesverfassungsgericht the civil courts insist that their approach is justified.\textsuperscript{103} Decisions of both the Bundesgerichtshof and the Bundesverwaltungsgericht seem to imply that the special sacrifice required from the individual property holder is in conflict with the proportionality principle. The civil courts have subsequently made use of the notion of an equalisation right to solve the problem in at least some situations. An equalisation claim (Ausgleichsanspruch) is not based on the Grundgesetz, but rather on civil law. In these cases the amount awarded by the courts does not amount to compensation for an expropriation, but it serves as an instrument to soften the harsh effects of an excessive regulatory measure.\textsuperscript{104} The civil courts argue that the payment of a sum of money (which is not seen as compensation) might reduce the unacceptably heavy burden placed on a single individual. Despite the attempts of the civil courts to soften the burden which a regulatory taking places on the individual property holder, the official position in German law, according to the Bundesverfassungsgericht, is that no compensation is payable for regulatory expropriations.\textsuperscript{105} The Bundesverfassungsgericht regards expropriations as a limited category of limitations that satisfy the requirements of article 14(3).

All expropriations must be rooted in legislation.\textsuperscript{106} According to article 14(3)

\textsuperscript{103} BGHZ 90, 17; BGHZ 91, 20.

\textsuperscript{104} BGHZ 91, 20; BVerwGE 84, 361. Also see BGHZ 64, 220.

\textsuperscript{105} BVerfGE 58, 300. Also see Currie The constitution of the Federal Republic of Germany 293; Kommers The constitutional jurisprudence of the Federal Republic of Germany 257; Van der Walt The constitutional property clause 124 et seq; Van der Walt Constitutional property clauses: a comparative analysis chapter on Germany; Schuppert in Karpen The constitution of the Federal Republic of Germany 116 et seq.

\textsuperscript{106} Kleyn 1996 SAPL 402 at 435.
Expropriations may only be effected by or pursuant to a law. Expropriations that are effected 'by a law' are referred to as statutory expropriations (Legalenteignungen) and forms an exceptional category. This category of expropriations are only justified in extraordinary circumstances to create a new legal position (for instance the creation of new dyke system under government control). Expropriations 'pursuant to a law' are referred to as administrative expropriations (Administrativenteignungen). This category forms the rule. These expropriations are effected by an administrative act in terms of a statute.

Expropriation is only valid if undertaken in the public interest. Van der Walt\(^{108}\) points out that the public interest requirement in article 14(3) (zum Wohle der Allgemeinheit)\(^{109}\) may be interpreted narrowly so that it serves to protect the interests of the individual. This has to be distinguished from the wider interpretation in article 14(2) (Interessen der Allgemeinheit)\(^{110}\) and 14(3) (zum Wohle der Allgemeinheit)\(^{111}\) respectively. The wider interpretation serves to protect the public interest. Expropriation will only be justified (and valid) if the public purpose for which property is expropriated constitutes a public necessity (and is not merely in the public interest). It follows that expropriation has to be strictly necessary for a public duty and that not every public action which serves the public interest is strictly necessary for the public interest. The public necessity has to be such that it takes priority over the guaranteed property rights of an

\(^{107}\) See BVerfGE 24, 367 for an example.

\(^{108}\) Van der Walt The constitutional property clause 137, with reference to the separate concurring judgement of Böhmer J in BVerfGE 56, 249.

\(^{109}\) Article 14(3): "Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig". (Expropriation shall only be permissible in the public interest.) My emphasis.

\(^{110}\) Article 14(2): "Eigentum verpflichtet. Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen". (Property entails obligations. Its use should also serve the public interest.) My emphasis.

\(^{111}\) Article 14(3): "... Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen. Wegen der Höhe der Entschädigung steht im Streitfall der Rechtsweg vor den ordentlichen Gerichten offen". (Compensation shall reflect a fair balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation recourse may be had to the ordinary courts.) My emphasis.
individual. The interests of the individual have to be balanced against the public interest. The proportionality principle plays an integral part in the determination of the justifiability and validity of an expropriation. The public necessity has to be such that it justifies the disturbance of the balance between the interests of the individual and that of society, and also to justify the fact that the interests of the individual are subjected to those of society.\textsuperscript{112} The scope and intensity of the expropriation must be proportional. The expropriation must be the last resort to achieve a particular public purpose. If the purpose can be achieved through any other method, the expropriation will be invalid.\textsuperscript{113} A total expropriation will only be valid if it serves the public purpose in the long run and if the same result cannot be achieved by less restrictive measures (such as a partial expropriation).\textsuperscript{114}

The sacrifice of the individual interest must serve the public interest directly. Expropriation for improper purposes, such as the enrichment of the state, the increase of state property or for the benefit of a third party, will be invalid.\textsuperscript{115} Expropriations for private interests are in principle not allowed, but the Bundesverfassungsgericht has allowed private expropriations where the purpose of the private enterprise serves the public interest. Expropriation will, however, only be valid if it is in the public interest and serves a public necessity\textsuperscript{116} and not simply personal interests.\textsuperscript{117}

\begin{itemize}
  \item \textsuperscript{112} BVerfGE 24, 367 at 404; BVerfGE 74, 264 at 296.
  \item \textsuperscript{113} BVerfGE 19, 171 at 172; BVerfGE 45, 297 at 321.
  \item \textsuperscript{114} BVerfGE 24, 367 at 407; BVerfGE 38, 175 at 180. See in general Kleyn 1996 SAPL 402 at 436; Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Germany.
  \item \textsuperscript{115} BVerfGE 38, 175 at 180.
  \item \textsuperscript{116} Expropriation for the supply of electricity by a private company was found to be constitutional in BVerfGE 66, 248.
  \item \textsuperscript{117} Expropriations for the building of a cable car system and a testing ground for a motor car company were found to be unconstitutional because it was for personal gain only. See BVerfGE 56, 249 and BVerfGE 74, 264 respectively.
\end{itemize}
8.6 Compensation for expropriation

The purpose of compensation is not to place the affected party in the hypothetical economic position that he/she might have been in had the expropriation not taken place (in other words to award full damages as is the case with the determination of damages in private law), but rather to replace the expropriated object with the value thereof. The aim is to enable the affected individual to replace the object in question with an equivalent object.\footnote{118}

The nature and extent of compensation have to be determined by statute. Compensation can take the form of a monetary payment or it can be compensation \textit{in natura}. The \textit{Bundesverfassungsgericht}\footnote{119} pointed out that the expropriating statute need not provide a general formula for the calculation of the amount of compensation (as is the general trend), but can provide a specified measure if it is justified by the nature of the property in question.

Article 14(3) also states that the compensation must be determined by establishing an equitable balance between the public interest and the interests of those affected. The aim of the balancing instruction (Abwägungsgebot) is to reach a fair and just result. The balancing instruction provides for flexibility regarding the determination of the amount of compensation. Although market value is regarded as the ideal, the \textit{Bundesverfassungsgericht}\footnote{120} made it clear that compensation need not necessarily be market value, but may be less than market value. The balancing instruction ensures that the quantum of compensation has to reflect a fair balance between the interests of the public and the affected individual and nominal compensation will consequently

\footnote{118}{Kleyn 1996 SAPL 402 at 442.}
\footnote{119}{BVerfGE 24, 367. Also see Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Germany; Kleyn 1996 SAPL 402 at 442.}
\footnote{120}{BVerfGE 24, 367 at 421.}
be unconstitutional.\footnote{Kleyn 1996 SAPL 402 at 442 et seq; Kommers The constitutional jurisprudence of the Federal Republic of Germany 254.} Whenever the social interest is such that it outweighs the interests of the individual, compensation less than market value will be justified. Expropriation to effect land reform may qualify for compensation less than market value, provided that this reflects a just and equitable balance.

Kleyn\footnote{Kleyn 1996 SAPL 402 at 443.} points out that the equality principle also plays an integral part in the determination of compensation and the application of the balancing instruction. Because of the fact the affected party has to make a sacrifice, which is not expected from others, for the benefit of the public, his/her position has to be balanced not only with the interests of society, but also with the position of unaffected parties. The equality principle ensures that nominal compensation will not be allowed and as a general rule it does not justify compensation lower than market value.

All relevant factors have to taken into account when the amount of compensation is determined.\footnote{BVerfGE 24, 367 at 419 et seq.} As far as land is concerned, the location and use thereof can be taken into account. The extent of own contributions will also have a bearing on the quantum. Where the value of property is the result of the holder's own efforts, compensation should be set at market value, but where the state partially contributed to the value of the property, compensation may be less than market value.\footnote{Kleyn 1996 SAPL 402 at 443.}

**8.7 Conclusion**

The traditional private-law view of property as a hierarchical system of concepts, and with that the conceptual approach to property rights in general, is relativised by the Grundgesetz and the system of judicial review. Property is interpreted within a constitutional context in which the social function of property is emphasised. In this
context property is afforded a wider interpretation than in private law. Whereas corporeal things play a central role in private law, a wide range of different rights and interests are afforded constitutional protection. Within the framework of the Grundgesetz property is guaranteed as a fundamental right which is meant to secure for the individual an area of personal liberty in the patrimonial sphere, to enable him/her to take responsibility for his/her own life. This has to take place within the larger social context. The personal space and freedom created by the property guarantee must be utilised to assist in the formation of the whole social and economic order. To ensure this the Grundgesetz determines that constitutional property entails obligations and that its use must serve the public interest.

The social function of property is also accentuated whenever the individual's property rights are limited. Constitutional property is not absolute, but relative in the sense that the limitation of property forms part of the concept of constitutional property. In terms of the proportionality principle any limitation or restriction of individual property rights by the state has to reflect an equitable balance between the interest of the affected individual and the public interest.

The fact that the traditional view of property, as well as the conceptual approach to property, is relativised by the effect of the Grundgesetz and judicial review, creates the possibility for the social function of ownership to play a more prominent role in the creation and protection of individual property and property institutions.
9.1 Introduction

The Constitution of the United States of America includes the oldest written guarantee of individual property against unjustified interference by the state. It has been used as an example for the protection of private property in numerous other jurisdictions and has influenced the manner in which the property question has been dealt with in many other countries. The American property clause has been the subject of a vast number of cases, and in this chapter special attention is paid to the manner in which the Supreme Court has interpreted and applied the property clause in the Fifth and Fourteenth Amendments.

The analysis of the property clause in the Constitution of the United States of America serves as an example of how the property question is dealt with in a common law system. It is trite that, whereas the civil law resolves legal questions in terms of general principles, common law solves each individual case in terms of a casuistic approach to law. In the United States the emergence of legal realism in the early twentieth century had a decisive influence on the way in which cases are adjudicated.¹ Legal realism aimed to achieve efficiency and social justice by interpreting and understanding legal rules in terms of their social consequences. Legal rules and abstract concepts were regarded as tentative classifications of decisions reached in other cases, and as such they are of limited use in predicting judicial decisions. The legal realists wanted to make judicial decisions more predictable by focusing on both the specific facts of cases and social reality in general, rather than on legal doctrine. Singer² describes legal realism as follows:

¹ See in general Singer 1988 California LR 467; Singer 1982 Wisconsin LR 975; Grey 1989 Stanford LR 787; Fisher, Horwitz and Reed American Legal Realism i.

² Singer 1988 California LR 457 at 474.
"[t]he legal realist wanted to replace formalism with a pragmatic attitude toward law generally. This attitude treats law as made, not found. Law therefore is, and must be, based on human experience, policy and ethics, rather than formal logic. Legal principles are not inherent in some universal, timeless logical system; they are social constructs, designed by people in specific historical and social contexts for specific purposes to achieve specific ends".

Contrary to the position in South Africa, Germany and the Netherlands, the realist focus on policy and politics meant that the US law moved away from formalism and an abstract legal science to a certain extent. More attention is paid to policy and the social and political function of property.

Although general trends can be deduced from the different judgments of the Supreme Court concerning property, very few clear principles exist according to which the outcome of future cases can be predicted. Due to the influence of legal realism in US law, the different personal convictions and jurisprudential approaches to the protection and limitation of property of the Supreme Court judges had a more direct influence on the type of judgments delivered by the court than in jurisdictions where a formalist approach is followed.³

Property and the protection thereof form an integral part of the American society and the free market system. The treatment of property by the Supreme Court reflects the inherent tension which exists between the protection and the limitation of property rights.⁴ On the one hand property has to be protected as the cornerstone of the free market system, but on the other hand the limitation of property is necessitated by

³ See in this regard Radin Reinterpreting Property 120 et seq where different philosophical approaches to the protection and limitation of property are discussed.

⁴ See the discussion in 9.3 below. Underkuffler-Freund 1996 Can J Law & Jur 161 especially at 185 et seq suggests that the inconsistencies in US takings jurisprudence can be ascribed to the fact that the courts have trouble in dealing with the inherent tension between the protection of property on the one hand and the limitation thereof on the other.
policy, social programmes and other measures to ensure that property serves the common good.

In general and on the surface the treatment of property in the property clause by the American courts is similar to that of most other (Western) jurisdictions. Private property is protected and provision is made for the deprivation or regulation and expropriation of property for a public purpose. In the case of expropriation, the payment of compensation is compulsory. The distinguishing characteristic in the treatment of the property question in the United States of America is the fact that compensation is paid for all takings, and not only for expropriations. Takings is a wide category and includes not only the narrow category of expropriation or actual acquisition of property by the state, but also regulatory takings or inverse condemnations, and the destruction of property without the state acquiring the property.

In this chapter the nature an extent of the property guarantee in US law, the requirements for valid deprivations and takings, and the payment of compensation is looked at.

9.2 The property guarantee

The property guarantee in the Constitution of the United States of America (1787) is to be found in the Fifth and Fourteenth Amendments. The Fifth Amendment (1791) states that:

"[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, ... nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation".

The protection of property on a federal level was extended to the different states in 1868 in the Fourteenth Amendment:
"[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

The property clause may be divided into two separate parts: the due process clause and the takings clause. The due process clause regulates the regulation of property and ensures that no person shall be deprived of property without due process of law. The takings clause (in the Fifth Amendment) determines that the taking of property is only permissible for public use and against the payment of compensation. The takings clause in the Fifth Amendment is incorporated into the Fourteenth Amendment via the due process clause and so applied to the individual states. The guarantee of property is formulated negatively in the Fifth Amendment to ensure that the individual is protected against unwarranted interferences with his/her property by the state.\(^5\)

The fact that property is guaranteed does not imply that the state may never interfere with an individual's property. There are authors who hold the opinion that property is inviolate and that every (or any) state interference amounts to an expropriation of property,\(^6\) but this view is not generally accepted.\(^7\) It is held in general that the state has the power to interfere with private property in terms of its power of eminent domain and its police power:\(^8\) firstly the state has the authority to take property for public use (provided that the affected party is compensated) in terms of its power of eminent domain; and secondly, the state may deprive an individual of property or specific uses or entitlements thereof in terms of its regulatory police power (the state does not have

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5. See Michelman 1981 *Wash & Lee LR* 1097 at 1099.

6. See in this regard Epstein *Takings: Private property and the power of eminent domain*.

7. Radin *Reinterpreting property* 120 et seq.

8. For a general discussion on the historical development of the theory of eminent domain see Taggart in Forsyth and Hare *The golden metwand and the crooked cord* 91 et seq. Also see Van der Walt *Constitutional property clauses: a comparative analysis* chapter on the United States of America; Chaskalson 1993 *SAJHR* 388 at 396.
an obligation to compensate in the case of a deprivation\(^9\)).

Any interference by the state with private property (whether in terms of the power of eminent domain or the police power) has to comply with the requirements of the due process clause. The exact meaning of the due process clause has for many years been (and to some extent still is) a major point of contention in US law. It is generally accepted that the due process clause guarantees the adherence to procedural requirements. This position was, however, not always as clear and certain. The case of *Lochner v New York*\(^{10}\) applied the concept of substantive due process according to which the court reserved for itself the right to review the reasonableness and wisdom of the intended state action and the purpose or aim that the state wished to achieve through such action. In terms of the substantive due process test there has to be a reasonable link between the intended aim of legislation and the means employed to achieve the aim. In this case the court struck down legislation which limited the working hours of workers in bakeries, because it was felt that any limitation of the individual's right to sell his/her labour amounted to an unreasonable limitation of the individual's right to liberty. The court formulated the test for substantive due process as follows:

"[i]s this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty? ... The act must have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in

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\(^9\) The general view that the state is not obliged to compensate for a deprivation or regulation in terms of the police power was qualified in *Pennsylvania Coal Co v Mahon* 260 US 393 (1922). Also see 9.5 below. See in general Sax 1964 *Yale LJ* 36 et seq where a distinction is made between different kinds of interferences with property in terms of the state’s police power to regulate the use of property. The distinction is made between interferences in terms of the state’s ‘enterprise’ capacity (for which compensation has to be paid) and its ‘public’ power (for which no compensation is payable).

\(^{10}\) 198 US 45 (1905).
his person and in his power to contract in relation to his own labor".  

During the years after the *Lochner* decision (the era of Lochnerism) numerous laws aimed at the improvement of social and welfare conditions were struck down on the basis of substantive due process. This led to a political battle between Congress and the Supreme Court, mainly because the court frustrated Roosevelt's New Deal programme. The court eventually abandoned its stance on substantive due process in *West Coast Hotel Co v Parrish.* It has been suggested that the decisions in *Nollan v California Coastal Commission* and *Dolan v City of Tigard* reintroduced a muted form of substantive due process. However, the approach followed in these cases seems to be much more cautious and does not aim to judge the political wisdom of government action. It merely amounts to an inquiry into the proportionality between the regulations and the state interest it aims to promote.

The power of eminent domain and the police power may not be exercised without valid justification. An interference with private property will only be valid if the state exercises its power for the promotion of the common good or interests of the general public. The Fifth Amendment determines that an interference, whether it qualifies as a deprivation or a taking, has to be for a public use. The 'public use' requirement has always been interpreted widely by the Supreme Court to mean public purpose (which includes public use). It was stated in *Berman v Parker* that the concept of public welfare is broad and inclusive. In this case the owner's property (a department store in a slum area) was

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11 198 US 45 (1905) at 56 *et seq.*
14 114 S Ct 2309 (1994).
15 Alexander 1996 *J Leg Ed* 586 at 592 *et seq*; Chaskalson 1993 *SAJHR* 388 at 403; Van der Walt *The constitutional property clause* 110; Singer 1997 *SAPL* 53 at 64 *et seq*.
17 348 US 26 (1954) at 32.
condemned as part of a project to clear up a slum and redevelop the area. The property was sold to a private developer and the owner argued that this did not constitute a public use. It was held that 'public use' should be read as 'public purpose' and that Congress should be allowed a wide discretion to determine which state actions would fall within the ambit of 'public purpose'. This approach was confirmed in *Hawaii Housing Authority v Midkiff*. In this case property was taken and transferred to the lessees of the land in an effort to effect a more equitable distribution of land in Hawaii. The Supreme Court found the taking of property in this case to be in promotion of a public purpose. The concept of 'public use' is clearly interpreted wide enough to include the taking of property from one individual to transfer it to another individual.

9.3 The scope of constitutional property

Due to the fact that no sharp division is made in Anglo-American legal systems between private and public law, the scope of property has always been wider in Anglo-American jurisdictions than in Roman-Germanic jurisdictions. Property is not restricted to tangible objects, as is the case in (private law in) Roman-Germanic jurisdictions. Property in the US has always included both tangible and intangible objects, but since the 1960's the scope of property has been extended even further to include a wide range of interests against the state. The impetus for this extension was the now famous article by Charles Reich on 'new property' in which he argued that the creation of the welfare state necessitated the recognition and protection of certain interests against the state as property. According to Reich the rise of the welfare state created a situation where citizens' estates were no longer mainly dependent on ownership of physical

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18 348 US 26 (1954) at 32 et seq.
20 For a discussion see Taggart in Forsyth and Hare *The golden metwand and the crooked cord* 91 at 99 et seq. But see Rubenfeld 1993 *Yale LJ* 1077 et seq who argues that the 'public use' requirements should be interpreted strictly, so that only takings that are for a public use will require compensation.
21 For a discussion see Van der Walt *The constitutional property clause* 37 et seq.
22 Reich 1964 *Yale LJ* 733.
objects, but comprised much more of interests in state largesse in the form of licenses, pensions, jobs, benefits, contracts, subsidies, housing and so on. These new forms of property needed to be included in the notion of property and protected as such.

Welfare benefits were first recognised as property in Goldberg v Kelly. Brennan J stated in his decision that:

"[s]uch benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state action that adjudicates important rights. The constitutional challenge cannot be answered by an argument that public assistance benefits are 'a privilege' and not a 'right'".

Any interference with these benefits must comply with the due process requirement, and

"... consideration of what procedures due process may require must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action".

A wide range of participatory claims and welfare rights have since been recognised as property and have been afforded constitutional protection in US law. In order to determine whether a particular interest qualifies as property in terms of the due process clause, the court formulated the following test in Logan v Zimmermann Brush Co.

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24 397 US 254 (1970) at 262. He continues in a footnote, with reference to Reich, to stress that welfare entitlements are regarded much more like property than a gratuity. See 397 US 254 (1970) at 262 n 8. Also see Alexander 1982 Col LR 1545 at 1547 et seq; Michelman 1987 Iowa LR 1319 at 1322 et seq.
"[t]he hallmark of property, the Court has emphasized, is an individual entitlement grounded in state law, which cannot be removed except for 'just cause'. ... Once that characteristic is found, the types of interests protected as 'property' are varied and, as often as not, intangible, relating 'to the whole domain of social and economic fact'."

The interests which have been recognised as property include, amongst others, a driver's licence, state employment, medical benefits, welfare benefits, high school education, continued service by a public utility, the expectation to be granted tenure, a horse trainer's licence and a prisoner's good time credits. It is, however, important to note that all these interests were granted constitutional protection in terms of the due process clause. This does not mean that these interests necessarily qualify as property, for all interests (whether it is a property interest or not) enjoy the protection of due process. The question which remains to be answered is whether compensation will be paid where these interests in welfare rights are expropriated. It is generally accepted that a much stricter interpretation is applied as far as the takings clause is concerned, but this stricter interpretation has not yet been applied in case law.  

36 Nedelsky Private property and the limits of American constitutionalism: the Madisonian framework and its legacy 242 et seq; Van der Walt The constitutional property clause 40; Simon 1986 Stan LR 1431 et seq; Simon 1985 Maryland LR 1 et seq; Alexander 1982 Col LR 1545 et seq; Chaskalson 1993 SAJHR 388 at 406. Also compare the German situation as far as the expropriation of welfare rights are concerned. See 8.3.3. Three requirements
It is pointed out by Alexander\textsuperscript{37} that the apparent extension of the property concept to include 'new property' for constitutional purposes has the effect that the initial inquiry as to the nature of the interest in question is often not carried out. Instead of first asking whether a specific interest actually qualifies as property or not, the process is focused exclusively on the issues of due process and compensation. In terms of this approach the protectibility of an interest is dependent on its relationship to the concepts of due process and compensation. According to Alexander:\textsuperscript{38}

"...scholars in the new mode agree that an interest's protectibility is ultimately determined not by its status as property or nonproperty, but by its relation to the theory of substantive values attributed to the concepts of just compensation or due process".

Underkuffler-Freund\textsuperscript{39} points out that the threshold question (whether a specific interest qualify as property or not) is most crucial. Without answering this question it is impossible to determine whether the interest has indeed been taken. The Supreme Court, however, usually glosses over this question and immediately continues to investigate the issues of due process and compensation. No clear articulation of the shape, contours or other identifying characteristics of the constitutional concept of property is to be found in the decisions of the Supreme Court. This leads to the interesting question whether 'new property' is actually regarded as property in terms of US law. Although 'new property' has been afforded protection in terms of the due process clause, it has never been dealt with or recognised as property in terms of the takings clause, and as was pointed out above the question remains whether the courts

\textsuperscript{37} Alexander 1982 \textit{Col LR} 1545 at 1550 \textit{et seq.} Also see Van der Walt \textit{The constitutional property clause} 40 \textit{et seq}; Underkuffler-Freund 1996 \textit{The Can J Law & Jur} 161 at 165.

\textsuperscript{38} Alexander 1982 \textit{Col LR} 1545 at 1552.

\textsuperscript{39} Underkuffler-Freund 1996 \textit{The Can J Law & Jur} 161 at 165. Also see Van der Walt \textit{The constitutional property clause} 41 \textit{et seq.}
will award compensation in the case where these rights are taken. The implication of this approach is that the courts do not focus on the concept or definition of property.

Underkuffler-Freund suggests that the inconsistencies in takings jurisprudence are directly related to the fact that the courts work with two different perceptions of property, but they are not able to make a clear distinction between the nature and implications of each perception. In terms of the one perception property is that which demarcates the boundaries between the individual's sphere of autonomy and control and that of collective power, and the other is that which describes property as the way in which a particular dispute between the interests of the individual and the public has been solved at a specific moment, but which incorporates within the concept of property itself the tension between the individual and the collective as well as the possibility of change. In terms of the second perception the ever-existing tension between the individual and the collective is internal to the concept of property. The extension of the constitutional concept of property has the effect (as was pointed out above) that the actual content of the concept of property (the threshold question) is passed over and attention is mainly focused on substantive issues of the justification of particular limitations. By approaching the property question in this manner the inevitable tension between the individual and the collective is brought from outside the concept of property to inside. The tension between the individual and the collective and the attempts to create a balance between these conflicting interests thus form part of the concept of property. According to Van der Walt this characteristically constitutional perception of the concept of property has the implication that the inclusion of a particular right in the protection of the property clause will not necessarily imply that private property is privileged over the public interest. The court will also not disallow a specific right protection in terms of the property clause on the grounds of the conceptualist approach to the concept of property, but will rather proceed to look into the substantive issues which are raised in the second stage of the constitutional dispute.

40 Underkuffler-Freund 1996 Can J Law & Jur 161 especially at 185 et seq.
41 Van der Walt The constitutional property clause 41 et seq.
Another interesting characteristic of the post-Realist concept of property is the fact that property is described as a bundle of rights.\(^\text{42}\) The question arose in US case law whether the state's interference with one strand of the bundle of the property rights without destroying the property right as a whole constitutes a taking. Radin\(^\text{43}\) describes this practice as conceptual severance and explains it as follows:\(^\text{44}\)

"[t]his strategy I shall call 'conceptual severance'. To apply conceptual severance one delineates a property interest consisting of just what the government action has removed from the owner, and then asserts that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually 'severs' from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing".

Conceptual severance was initially rejected in a few cases. In Penn Central Transportation Co v New York City\(^\text{45}\) the court found that:

""[t]akings' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular

\(^{42}\) In terms of the 'bundle of rights' perception of property, the different rights and entitlements connected with a specific object are seen as separate and independent property interests. This perception of property is a move away from the notion of thing-ownership. The different entitlements are disconnected from the 'thing' and treated as individual property interests. See in general Grey in Pennock and Chapman Property 69. Although the 'bundle of rights' perception of property originated in common law, it acquired a different meaning due to the influence of the legal realists. For a discussion of the legal realism approach to property in general see Singer 1988 California LR 467; Singer 1982 Wisconsin LR 975; Grey 1989 Stanford LR 787; Fisher, Horwitz and Reed American Legal Realism i.

\(^{43}\) Radin Reinterpreting property 120 and especially at 126 et seq.

\(^{44}\) Radin Reinterpreting property 126.

governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."

Conceptual severance has, however, been accepted in a number of cases. The right to exclude, especially, has been accepted as a very important strand in the bundle of rights that make up ownership and an interference with the owner's right to exclude can constitute a taking. Conceptual severance with reference to the owner's right to exclude was applied in *Loretto v Teleprompter Manhattan CATV Corp*, 46 *Kaiser Aetna v United States*, 47 *Nollan v California Coastal Commission* 48 and *Dolan v City of Tigard*. 49 It was held in *Nollan v California Coastal Commission* 50 that:

"[t]o say that the appropriation on a public easement across the landowner's premises does not constitute the taking of a property interest but rather 'a mere restriction on its use',... is to use words in a manner that deprives them of all their ordinary meaning... We have repeatedly held that, as to property reserved by its owner for private use, 'the right to exclude [other is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'." 51

In *Loretto v Teleprompter Manhattan CATV Corp* 52 the court found that a taking of the right to exclude, by means of a permanent physical occupation of the property or a part thereof, is such a clear example of a taking that it will always be regarded as a taking.

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46 458 US 419 (1982).
49 114 S Ct 2309 (1994).
51 This statement was made with reference to *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) and *Kaiser Aetna v United States* 444 US 164 (1979).
52 458 US 419 (1982).
no matter how insignificant the invasion or how important the public purpose served by such a physical occupation. The taking of the right to exclude was also held to be a compensable taking in *Kaiser Aetna v United States.* In this case a pond on private property was dredged by the owners. They created a marina on the pond and opened it up to into a navigable bay. It was claimed by the Army Corps of Engineers that the owners could no longer exclude the public from the marina, because since it has been opened up into a navigable bay, it became part of navigable water and is subject to the navigational servitude of the United States government. The Supreme Court, however, held that the dredged pond has always been considered private property and as such it should not be treated any different from fast land adjacent to navigable water, and consequently that:

"the 'right to exclude', so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation. This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioner's private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina".\(^5^4\)

In these cases it was found that an infringement of the right to exclude may effect a taking, but it was emphasised that this will only be the case where there is no sufficient relation between the restriction of the right to exclude and the purpose served by the restriction. Conceptual severance has also been applied with reference to the best use of the land in question\(^5^5\) and the right to pass property to one's heirs.\(^5^6\)

\(^{54}\) 444 US 164 (1979) at 179 et seq.
9.4 Deprivation of property

It is generally accepted that the property guarantee does not imply that an owner has the unrestricted use of his/her property, but that the owner's rights may be limited by the state. This section deals specifically with deprivation of property by way of regulation. This category of interferences with private property do not normally amount to or constitute takings, and consequently no compensation is due to the affected individuals. Deprivations that restrict the owner's rights to such an extent that they amount to takings (for which compensation is required) are discussed in the section on takings.

It is common cause that the state may regulate the use of property in terms of its police power to promote or protect the public interest. In *Village of Euclid v Ambler Realty Co* the court explained and justified the increased necessity of regulation as follows:

"[u]ntil recent years, urban life was comparatively simple; but, with great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities... And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet new and different conditions which are constantly coming within the field of their operation. ... But although a degree of elasticity is thus imparted, not to the meaning, but to the application of constitutional principles, statutes and ordinances, which after giving due weight to the new conditions, are found clearly not to conform to the Constitution, of course, must fall...The ordinance now under review, and all similar laws and regulations, must

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57 See in general Sax 1964 *Yale LJ* 36 et seq. But see Epstein *Takings: private property and the power of eminent domain.*

58 272 US 365 (1926) at 386 et seq.
find their justification in some aspect of the police power, asserted for the public welfare. The line which in this field separates the legitimate from the illegitimate assumption of power is not capable of precise delimitation. It varies with circumstances and conditions.

There are no clear rules to indicate or determine whether a specific deprivation of property will be constitutionally valid. In general the state has to comply with the due process requirement and has to prove that the deprivation is effected in the public interest, but it was stated in *Penn Central Transportation Co v City of New York* \(^{59}\) that the determination of whether a taking of property was effected involves an essentially *ad hoc* inquiry into the circumstances and conditions of each individual case. As long as the regulation in question serves the public interest and does not impose unreasonable, arbitrary or capricious restrictions on an individual property owner, the regulation will be regarded as a valid exercise of the police power. \(^{60}\) In order to determine whether a specific regulation complies with the principles of reasonableness and fairness the court has to look at both the benefit the effect of the restriction confers on all property owners in that specific area, and the severity of the burden placed on the individual owner by such a restriction. \(^{61}\)

Although the Fifth Amendment does not specifically mention the public interest requirement in connection to deprivations of property, this requirement has been emphasised and explained in a number of cases. In general this requirement determines that any state interference with private property has to be in the public interest for it to be constitutionally valid. In *Penn Central Transportation Co v New York City* \(^{62}\) the court recognised the fact that the state has to implement laws which may negatively affect certain economic values connected with an individual's property or

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\(^{59}\) 438 US 104 (1978) at 124.

\(^{60}\) *Prune Yard Shopping Center v Robins* 447 US 74 (1980) at 84 et seq.


\(^{62}\) 438 US 104 (1978) at 124 et seq.
even destroy it, but as long as these laws act to protect the health, safety, morals or
general welfare of the public, these laws will be constitutionally valid. The public
interest requirement was also mentioned in Agins v City of Tiburon:63

"[t]he application of a general zoning law to a particular property effects
a taking if the ordinance does not substantially advance legitimate state
interests".

Regulatory measures which aim to control a public nuisance are generally not regarded
as takings. It is argued that any use of the property which causes a public nuisance
never formed part of the owner's entitlements in the first place and therefore measures
to prohibit such a use of the property do not take any property right from the owner and
consequently no compensation will be payable in such a case.64

It was stated in Prune Yard Shopping Center v Robins65 that in order for a regulation to
be constitutionally valid, it must not be unreasonable, arbitrary or capricious. In Nollan
v California Coastal Commission66 the court confirmed the principle that land use
regulation (in particular zoning and town planning) falls within the ambit of the state's
police power, as long as these regulatory measures do not deprive the owner of all
viable economic use of his/her property. The court also set out the test for a reasonable
deprivation. In the first place the court has to determine whether there is an 'essential
nexus' between the conditions imposed by the regulating body and the legitimate state
interest it sought to promote. After the 'essential nexus' is established, the court will

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63 447 US 255 (1980) at 260. Also see Village of Euclid v Ambler Realty Co 272 US 365
(1926).
64 447 US 74 (1980) at 84.
65 447 US 272 (1926); Penn Central Transportation Co v City of New York
438 US 104 (1978). Also see Alexander 1996 J Leg Ed 586 at 588; Singer Property law
rules, policies and practices 1224 et seq. But see Michelman 1967 Harvard LR 1165 at
1196 where it is argued that regulatory measures which aim to control a public nuisance
may also be viewed as conferring a public benefit, in which case compensation will be
payable.
66 483 US 825 (1987) at 837 et seq.
look into the nature of the relationship between the imposed conditions and the effects of the permission for a certain land use. In *Dolan v City of Tigard*\(^{67}\) the court had to deal mainly with the second part of the test, namely the nature of the relationship between the restriction and the proposed development. The court stated that if it can be found that there is a 'reasonable relationship' between the regulatory measure or condition and the expected effects of the development, the regulatory condition will be constitutionally valid. The court, however, explicitly stated that it prefers to refer to this test as the 'rough proportionality test', because it best describes the requirement of the Fifth Amendment. The process of determining whether a relation of rough proportionality exists between the imposed condition and the purpose which the condition aims to achieve does not require a mathematical calculation. However, the city has to make some sort of individualised determination that the required dedication is related both in nature and extent to the impact of the proposed development.

The court has, however, also indicated that the police power of the state may not be abused in order to force an individual to make some sort of sacrifice in return for a specific land use permission, even if the sacrifice is clearly beneficial to the broader public. For a regulatory measure to be valid there has to be a clear relation between the restriction or the sacrifice of certain property rights and the purpose of the restriction. After a reasonable nexus has been found, the court will continue to determine whether there is a rough proportionality between the restriction or sacrifice and the expected effect of the permission of a specific land use. An example of this principle is to be found in *Dolan v City of Tigard*.\(^{68}\) In this case the owner of a piece of property applied for permission to extend her store and to pave the adjacent parking lot. The permission was granted subject to the condition that the owner dedicate a portion of her land for a public greenway along a creek in order to minimise flooding that would be exacerbated by the proposed development, and also for a pedestrian and bicycle pathway to relieve traffic congestion in the city. The court found that there was

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\(^{67}\) 114 S Ct 2309 (1994) at 62 LW 4580.

\(^{68}\) 114 S Ct 2309 (1994). Also see *Nollan v California Coastal Commission* 483 US 825 (1987).
indeed a clear nexus between the restriction and the purpose it aims to achieve, namely to reduce the risk of flooding and the increase in traffic. The second part of the test (the rough proportionality test), however, proved to be the determining factor in this case. The court had to determine whether there was a rough proportionality between the restriction and the expected effects of the proposed development. The court found that the condition to dedicate a part of the property for the creation of a public greenway and a pathway was clearly disproportionate to the possible effects of the development. Not only would the greenway have infringed on the owner’s right to exclude the public from her property, but there was no logical reason why the flooding problem had to be addressed by the creation of such a greenway. Furthermore, there was also no clear indication that the pathway would indeed have reduced the expected increase in traffic volume. Thus, the city was not allowed to disguise some condition or sacrifice as a regulatory control over the use of property, even if the sacrifice proves to be loosely in the public interest.69

It is still uncertain whether the decisions in *Nollan v California Coastal Commission*70 and *Dolan v City of Tigard*71 introduced a new era of heightened review in US law. It has been suggested that these decisions may be seen as reintroducing a muted form of substantive due process. It is, however, a much more cautious approach than the one followed in the *Lochner* era.72 Here the court does not evaluate the wisdom of government actions, but merely requires that there should be a reasonable nexus between the measures imposed by the regulating body and the legitimate state interest it sought to promote, and a rough proportionality between the regulatory measure or condition and the expected effects of the development. An inquiry into the proportionality of a limitation is not the same as substantive due process. Although both inquiries deal with the process by with limitations are imposed, the proportionality

69 For a general discussion see Singer 1997 SAPL 53 at 66 et seq.
71 114 S Ct 2309 (1994).
72 Alexander 1996 J Leg Ed 586 at 592 et seq; Chaskalson 1993 SAJHR 388 at 403; Van der Walt *The constitutional property clause* 110; Singer 1997 SAPL 53 at 64 et seq.

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inquiry is aimed at the constitutional justifiability of the limitation and not at the political wisdom of the policy decision which motivates the imposition of the limitation.

The deprivation of property by the state in terms of its police power may have a severe effect on the individual property owner. The deprivation may even go so far as to destroy the property completely. In *Miller v Schoene* \(^73\) the court found that the destruction of one kind of property in order to save or preserve another kind of property will be constitutionally valid as long as it can be proved that the collective interest is served by such an action. In this case the owner of a number of cedar trees was ordered to cut them down to prevent the spreading of a plant disease to apple orchards in the vicinity. The court found that this set of facts did not involve a conflict between private owners, but that the public had a definite interest in this regard.

### 9.5 Expropriation of property

In terms of the Fifth Amendment the state may take private property, against compensation, for public use. This exercise of the state's power of eminent domain will only be legitimate if it is used to promote the public interest. A taking in order to advance some private interest will be illegitimate, even if it is accompanied by just compensation.

In general each takings case is approached separately and is based on an 'essentially ad hoc, factual inquiry'. \(^74\) Alexander, \(^75\) however, points out that the method of the court is not entirely without formality. In essence the court's analysis of a takings case is centred around three questions: (a) has property been taken by the state?; (b) if so, was this done to effect some public purpose?; and (c) if so, has the state provided just compensation for the property it has taken? The first of these three questions seems

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\(^73\) 276 US 272 (1928).

\(^74\) This description of the approach to takings cases is used by Brennan J in *Penn Central Transportation Co v City of New York* 438 US 104 (1978) at 124.

\(^75\) Alexander 1996 *J Leg Ed* 586 at 587.
to be the one that has been at the centre of the whole takings issue in US law.

Initially the takings clause only affected actual expropriations (acquisition of property by the state), but this situation has been complicated since the judgement in *Pennsylvania Coal Co v Mahon.* In this case Holmes J stated that an exercise of the police power to regulate the use of property becomes a taking when 'it goes too far'. A regulatory measure (deprivation of property) that 'goes too far' is described as a regulatory taking (sometimes referred to as an inverse condemnation), and in terms of the judgment in *Pennsylvania Coal Co v Mahon* compensation is due for any such excessive exercise of the police power. It was not explained exactly when a regulatory measure will be regarded as going too far, and this has been the cause of much of the debate surrounding the takings clause. In principle, this type of cases are approached as *ad hoc*, factual inquiries, and in essence the court attempts to determine whether an individual is forced by the state to carry a burden which ought to be carried by society at large. If so, the particular state action constitutes a regulatory taking and the individual will accordingly be entitled to just compensation.

In *Penn Central Transportation Co v City of New York* the court identified three factors which have to be taken into account in an attempt to determine whether the state action in question effects a taking: (a) the character of the government action; (b) the diminution of the value of the affected property; and (c) the extent of interference in reasonable, investment backed expectations. The central principle of the three-factor test is whether the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest. This inquiry will necessarily require a

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76 260 US 393 (1922).

77 *Pennsylvania Coal Co v Mahon* 260 US 393 (1922) at 415.

78 In *Penn Central Transportation Co v City of New York* 438 US 104 (1978) at 124 the court stated that: "... the economic injuries caused by public action [should] be compensated by the government, rather than remain disproportionately concentrated on a few persons".

weighing of private and public interests.\textsuperscript{80} This principle also aims to bar the state from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.\textsuperscript{81}

Since the three-factor test has been introduced in \textit{Penn Central Transportation Co v City of New York}, three distinct categories of regulations which will always qualify as takings have been identified by the courts. These so-called ‘per se’ takings will always require the payment of compensation and no case specific inquiry into the possible advancement of the public interest or the possible effect on the owner is required. The ‘per se’ takings include regulations which (a) force the owner to suffer a permanent physical invasion of his/her property; (b) deny the owner of all economically viable use of the property; or (c) extinguish one of the core property rights.\textsuperscript{82} It is interesting to note that while the court proclaims that takings cases are examined by engaging in essentially \textit{ad hoc} factual inquiries\textsuperscript{83} and that no set formula exists according to which it can determine whether a specific public action requires the payment of compensation,\textsuperscript{84} the court nevertheless searches for and identifies fixed rules and principles according to which takings cases can be adjudicated.\textsuperscript{85}

\begin{thebibliography}{9}
\bibitem{80} Agins v Tiburon 447 US 255 (1980) at 260 \textit{et seq}. Also see Singer \textit{Property law - rules, policies and practices} 1222.
\bibitem{81} Armstrong v United States 364 US 40 (1960) at 49.
\bibitem{82} This classification of the so-called ‘per se’ takings is done according to Singer \textit{Property law - rules, policies and practices} 1223 \textit{et seq}. Also see Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on the United States of America. Alexander 1996 \textit{J Leg Ed} 586 at 588 points out that regulations which aim to control a public nuisance will never be regarded as takings, because the use of property in such a manner that it causes public harm never formed part of the owner’s rights in the first place. Michelman 1967 \textit{Harvard LR} 1185 at 1196 \textit{et seq}, on the other hand indicates that regulations which are designed to abate the use of property which causes public harm, can just as easily be viewed as measures which confer a public benefit, and in these cases this ‘per se’ rule will not apply.
\bibitem{83} \textit{Penn Central Transportation Co v City of New York} 438 US 104 (1978) at 124.
\bibitem{84} \textit{Hodel v Virginia Surface Mining and Reclamation Association, Inc} 452 US 264 (1981) at 195.
\bibitem{85} Singer \textit{Property law - rules, policies and practices} 1222 \textit{et seq}.
\end{thebibliography}
The first and certainly the most well-known category of regulatory measures that qualifies as a 'per se' taking is a permanent physical invasion. In *Loretto v Teleprompter Manhattan CATV Corp*, the court held that a regulatory law which required certain landlords to permit the installation of television cables on their properties without compensation was a taking. The court recognised the fact that the intrusion on the property would be minimal and that the public interest would be served by such an installation (both educational and community interests), but the court viewed the physical invasion to be of such a serious nature that it regarded it as a taking. In fact, any permanent physical invasion of private property, no matter how insignificant, will be held to be a taking. It is pointed out in *Loretto v Teleprompter Manhattan* with reference to *Kaiser Aetna v United States*, that a physical invasion of private property actually constitutes a taking of the owner's right to exclude, a right which is regarded as one of the most essential sticks in the bundle of property rights. In fact, the court stated that a regulation which compels the owner to suffer a physical invasion actually chops right through the bundle of rights that make up property ownership, taking a slice from every strand. The court further stated that the actual size of the invasion is not determinative, because the owner cannot be expected to suffer, without compensation, an invasion and occupation of his/her property by a stranger, especially when he/she has no control over the timing, nature or extent of the invasion.

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86 See in general Singer *Property law - rules, policies and practices* 1223; Van der Walt *Constitutional property clauses: a comparative analysis* chapter on the United States of America.

87 458 US 419 (1982).

88 458 US 419 (1982) at 426. The decision in *Loretto* was based on the foundings of a number of other cases. See for instance *Penn Central Transportation Co v City of New York* 438 US 104 (1922); *Kaiser Aetna V United States* 444 US 164 (1979); *United States v Causby* 328 US 256 (1946).

89 *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) at 435. For a discussion see Radin *Reinterpreting property* 120 et seq; Van der Walt *Constitutional property clauses: a comparative analysis* chapter on the United States of America.


The rule that a permanent physical invasion of property is always to be regarded a taking for which the payment of compensation is due, was criticised in a dissenting opinion\(^2\) because it seemed to be in conflict with the principle that there is no set formula to determine whether compensation is required for a deprivation of property, and that every case should be judged individually. Physical invasions of property have nevertheless been accepted as 'per se' takings and compensation will always have to be paid in such cases.\(^3\)

The court has, however, recognised exceptions to the physical invasion principle. In *Prune Yard Shopping Center v Robins*\(^4\) the court held that a state law which compelled the owner of a shopping centre to allow the public to enter the shopping centre to exercise their right to free speech (hand out literature and collect signatures) did not effect a taking of the owner's property. Although this may resemble a physical invasion, the fact that the shopping centre was opened to the general public and the fact that the owner was free to introduce measures to control the time, place and manner of the expressive activities, the actions of the petitioners cannot be described as a physical invasion of the property.\(^5\) The owner also failed to prove that the exclusion of certain people from the shopping centre was so essential to the economic value and use of the property that the state law amounted to a taking. In *Yee v City of Escondido*\(^6\) the owner of a mobile home park claimed that the state's anti-eviction legislation constituted a taking in that the owner of such a park was not allowed to terminate the mobile home owners' rental of space. The court, however, held that:

"... where the government merely regulates the use of property,\

\(^2\) See 458 US 419 (1982) at 442 for the opinion of Blackmun J.

\(^3\) See in this regard *Penn Central Transportation Co v City of New York* 438 US 104 (1922); *Kaiser Aetna v United States* 444 US 164 (1979); *United States v Causby* 328 US 256 (1945); *Prune Yard Shopping Center v Robins* 447 US 74 (1980).

\(^4\) 447 US 74 (1980).

\(^5\) 447 US 74 (1980) at 83 et seq.

compensation is required only if considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property suggest that the regulation has unfairly singled out the property owner to bear a burden that should be borne by the public as a whole." 97

The court stated that an owner was not normally compelled to suffer a physical invasion of property, but that this principle was not threatened here because the property was rented out voluntarily. The right to exclude was thus not taken from the owner in this instance. The state law did no more than regulate the relationship between landlord and tenant. The court also reiterated the fact that the different states may enact measures to regulate the relationship between landlord and tenant without paying compensation for all economic injuries incurred as a result of such measures. 98

The second of the 'per se' takings or redline rules where a regulation will be regarded as a taking without a case specific inquiry, is those instances where the owner of property is denied all economically viable use of the property. 99 In *Lucas v South Carolina Coastal Council* 100 the court stated that:

"... the functional basis for permitting the government, by regulation, to affect property values without compensation ... does not apply to the


99 See in general Singer *Property law- rules, policies and practices* 1223; Van der Walt *Constitutional property clauses: a comparative analysis* chapter on the United States of America.

relatively rare situations where the government has deprived a landowner of all economically beneficial uses".

In this case Lucas bought two beachfront properties on which he planned to erect family homes. The adjacent properties all had similar buildings built on them already. After Lucas bought these properties, the state enacted legislation which prevented the erection of permanent structures on the property. It was argued that the legislation acts to serve the public interest by protecting the environment. The Supreme Court found that the effect of state action which denies the owner of all economically viable use of his/her property is not dissimilar to a physical invasion of property.101 Requiring that the land be left in its natural state for the benefit of the public, and thereby denying to the owner all productive and beneficial use, carries the increased risk that the private owner has to sacrifice his/her property for some public service under the guise of the prevention of public harm.102 Thus, the court found that:

"... when the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking".103

It will only be possible to deprive the owner of all economically beneficial use without compensation if it can be proved that the proscribed uses did not form part of the owner's title when he/she acquired the property104 or that the restriction of the specific uses in question was already prohibited by the law of nuisance.105
The third category of 'per se' takings involve regulations which extinguish one of the core property rights. In *Hodel v Irving*\(^{106}\) the court found that the abrogation of the right to leave a certain type of property to one's heirs amounted to a taking for which compensation is payable. The court stated that the right to leave property to one's heirs is just as essential in the bundle of rights as the right to exclude, and for this reason the right to pass on property cannot be extinguished without just compensation.\(^{107}\) Singer\(^{108}\) points out that this is probably the only 'core' property right which will be recognised by the court for the purposes of this category of 'per se' takings.

Once it is established that none of the categories of 'per se' takings (the physical invasion of property, the denial of the economically viable use of the property and the destroyal of a core property right) is applicable to a specific case, the court will continue to apply the three-factor test as set out in *Penn Central Transportation Co v City of New York*.\(^{109}\) The court will evaluate the facts of the case according to: (a) the character of the government action; (b) the diminution of the value of the affected property; and (c) the extent of interference in reasonable, investment-backed expectations. According to Singer\(^{110}\) the character of government action

"... concerns the issue of whether the regulation is more closely analogous to a physical invasion or seizure of a core property right or to a general regulatory program affecting numerous parcels and designed to protect the public from harm by adjusting the benefits and burdens of economic life to promote the common good".

The second factor is related to the second category of 'per se' takings: the greater the

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108 Singer *Property law - rules policies and practices* 1223.
110 Singer *Property law - rules policies and practices* 1228.
diminution of value of the property, the more likely the regulation is to be regarded as a taking.\textsuperscript{111} With regard to the third factor Singer\textsuperscript{112} points out that:

"[a] regulation is more likely to be held a taking if a citizen has already invested substantially in reasonable reliance on an existing statutory or regulatory scheme; it is less likely to be rules a taking if the regulation prevents the owner from realizing an expected benefit in the future".

It was pointed out in First English Evangelical Lutheran Church of Glendale v County of Los Angeles\textsuperscript{113} that a taking need not be permanent for it to qualify for the payment of compensation. The owner will be entitled to compensation where a regulation temporarily deprives him/her of all use of the property. According to the court there is no difference between permanent and temporary takings, because as long as the restriction is in place the owner experiences it as a permanent taking. In the case of temporary takings the property owner will be entitled to just compensation for the loss of the use of his/her property from the time that the regulation came into force until the time that it is rescinded.\textsuperscript{114}

In terms of the Fifth Amendment the state may only take someone's property against compensation if it is for a public use. The public use requirement is used as a formal requirement for the validity of takings, but, as is illustrated by the decision in Hawaii

\begin{itemize}
  \item \textsuperscript{111} Singer Property law - rules policies and practices 1229.
  \item \textsuperscript{112} Singer Property law - rules policies and practices 1229 et seq. Also see Michelman 1967 Harvard LR 1165 at 1223 and Kaiser Aetna v United States 444 US 164 (1979); Ruckelshaus v Minsanto Co 467 US 986 (1984). But see Powell v Pensylvania 127 US 687 (1887); Mugler v Kansas 123 US 623 (1887). In these cases the court upheld regulations which directly interfered with investment-backed expectations of the owners, but it should be noted that these cases were decided long before the Supreme Court introduced the three-factor test in Penn Central Transportation Co v City of New York 438 US 104 (1978) at 124 et seq.
  \item \textsuperscript{113} 482 US 304 (1987). Also see Van der Walt Constitutional property clauses: a comparative analysis chapter on the United States of America; Singer Property law - rules, policies and practices 1185; Alexander 1996 J Leg Ed 586 at 591; Chaskalson 1993 SAJHR 388 at 398.
  \item \textsuperscript{114} 482 US 304 (1987) at 319.
\end{itemize}
"Housing Authority v Midkiff"\textsuperscript{115} this requirement does not really restrict the state in the exercise of its power of eminent domain. According to Alexander\textsuperscript{116} the test adopted in this case provides little basis for invalidating condemnations on public use grounds. The court formulated its approach as follows:

"Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause".\textsuperscript{117}

In this case the court held that a Hawaiian statute which authorised the expropriation of land from private owners in order to transfer it in ownership to the lessees of that land, was constitutionally valid. Although the statute effected the expropriation of property from one individual and redistributed it to other individuals, the court found this to be justifiable in terms of the broader land reform programme, which in itself is in the public interest.\textsuperscript{118}

\textbf{9.6 Compensation}

The Fifth Amendment requires the state to pay 'just compensation' in the event of a taking. It is common cause that the state is not required to compensate affected parties for each and every interference with their property. As was pointed out in \textit{Keystone Bituminous Coal Association v DeBenedictis}\textsuperscript{119} the state will only be required to compensate in the case where the broader public, rather than the affected party alone,

\begin{itemize}
\item \textsuperscript{115} 467 US 229 (1984). But see Rubenfeld 1993 \textit{Yale LJ} 1077 \textit{et seq} who argues that the 'public use' requirement should be interpreted strictly, so that only takings that are for a public use will require compensation.
\item \textsuperscript{116} Alexander 1996 \textit{J Leg Ed} 586 at 587.
\item \textsuperscript{117} 467 US 229 (1984) at 241.
\item \textsuperscript{118} Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on the United States of America.
\item \textsuperscript{119} 480 US 470 (1987) at 492. Also see \textit{Agins v City of Tiburon} 447 US 255 (1980) at 260; Singer \textit{Property law - rules, policies and practices} 1224 \textit{et seq}.
\end{itemize}
should bear the burden of state's interference with private ownership in the collective interest. In Pennsylvania Coal Co v Mahon\textsuperscript{120} the court indicated that the state's obligation to compensate is based on the fact that:

"[a] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change".

It has been accepted in US law that 'just compensation' does not mean full compensation. It was pointed out in United States v Causby\textsuperscript{121} that the value of compensation is calculated with reference to the owner's loss and not the taker's gain. In Coniston Corp v Village of Hoffman Estates\textsuperscript{122} the court stated that market value is regarded as just compensation, but that market value is not necessarily full compensation:

"'[j]ust compensation' has been held to be satisfied by payment of market value ... Compensation in the constitutional sense is therefore not full compensation, for market value is not the value every owner of property attaches to his property but merely the value that the marginal owner attaches to his property".\textsuperscript{123}

Alexander\textsuperscript{124} points out that the reason for not compensating for the loss of the full personal value of property is the fact that there are too many practical difficulties in doing so.

\begin{itemize}
\item \textsuperscript{120} 260 US 393 (1922) at 416.
\item \textsuperscript{121} 328 US 256 (1946) at 261.
\item \textsuperscript{122} 844 F.2d (7th Cir) 461 (1988).
\item \textsuperscript{123} 844 F.2d (7th Cir) 461 (1988) at 464.
\item \textsuperscript{124} Alexander 1996 J Leg Ed 586 at 588. Also see United States v 564. 54 Acres of Land 441 US 506 (1979) at 511.
\end{itemize}
9.7 Conclusion

The protection and limitation of property in the US are to some extent approached differently that in other western jurisdictions. The interpretation of the wide term 'takings', to include not only actual acquisitions by the state, but also regulatory expropriations, places a heavy burden on the state to compensate individuals for state interferences with private property. The US courts approach takings cases as ad hoc factual inquiries, and in each individual case the courts have to determine whether an interference 'amount to' a taking. The strong protection afforded to individual property holders is emphasised by the recognition of the so-called 'per se' takings, and indicates that the US courts follow a conceptual approach to some extent.

However, if the recent decisions in *Prune Yard Shopping Centre v Robins*,\(^\text{125}\) *Nollan v California Coastal Commission*\(^\text{126}\) and *Dolan v City of Tigard*\(^\text{127}\) are to set a trend for future decisions, one may assume that the court is moving towards a approach not dissimilar to a general limitation test followed in other jurisdictions such as Germany,\(^\text{128}\) South Africa\(^\text{129}\) and the Council of Europe.\(^\text{130}\) In terms of this test the social function of property is recognised and limitations are evaluated with reference to all the surrounding circumstances. The interests of the affected party is weighed up against the public interest and if it is found that an individual is expected to bear an economic burden which should be borne by the public at large, such a limitation is regarded as a taking, for which compensation has to be paid.\(^\text{131}\) The test set out in these cases

\(^{125}\) 447 US 74 (1980) at 84.


\(^{127}\) 114 S Ct 2309 (1994).

\(^{128}\) See chapter 8.

\(^{129}\) See chapter 11.

\(^{130}\) See chapter 10.

\(^{131}\) *Penn Central Transportation Co v City of New York* 438 US 104 (1978) at 124. Also see *Nollan v California Coastal Commission* 483 US 825 (1987); *Hawaii Housing Authority v Midkiff* 467 US 229 (1984); *Kaiser Aetna v United States* 444 US 164 (1979); *Hodel v
furthermore requires that limitations should not be unreasonable, arbitrary or
capricious, that there should be a reasonable nexus between the limitation imposed
and the purpose served by such a measure, and that there should be a rough
proportionality between the restrictive measure and the expected results of the
proposed development. The approach followed in these decisions makes it possible
for the courts to consider the social function of property. Van der Walt, however,
points out that the growing tendency to recognise more categories of the so-called ‘per
se’ takings, seems to frustrate the move towards a contextual and proportionality­
oriented approach and to confirm the conceptual, definitional approach in terms of
which certain rights and limitations are regarded as an inherent part of the definition of
that right, without taking cognisance of the social role and function of property.


132 Dolan v City of Tigard 114 S Ct 2309 (1994) at 62 LW 4580; Nollan v California Coastal
Commission 483 US 825 (1987) at 837 et seq; Prune Yard Shopping Centre v Robins 447

133 Van der Walt Constitutional property clauses: a comparative analysis chapter on the
United States of America.
PROPERTY IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS

10.1 Introduction

The European Convention on Human Rights was drafted by the Council of Europe and adopted in 1950. It entered into force on 3 September 1953. The Convention is adjudicated by the European Court of Human Rights and the European Commission of Human Rights in Strasbourg. Member states must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and the acceptance of the Convention and the jurisdiction of the European Court of Human Rights makes this a political obligation of membership of the Council of Europe. The Convention was a direct reaction to human rights violations during World War II and the initial aim of the Convention was to act as an alarm to alert the member states of any large scale human rights violation. It has since taken the role of a European bill of rights and is primarily used to settle smaller human

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1 The Council of Europe was formed after World War II as a first attempt to unify Europe. The following countries are currently members of the Council of Europe: Albania, Andorra, Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Netherlands, Norway, Poland, Portugal, Romania, San Marino, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Turkey and the United Kingdom. Albania, Andorra, Estonia, Latvia and Moldova have yet to ratify the European Convention on Human Rights.

2 See in general Harris, O'Boyle and Warbrick The law of the European Convention on Human Rights 648 et seq; European Convention on Human Rights - Collected texts 150 et seq; Manual of the Council of Europe 277 et seq with regard to the structure, jurisdiction and procedures of the European Court of Human Rights.

3 See in general Harris, O'Boyle and Warbrick The law of the European Convention on Human Rights 571 et seq; European Convention on Human Rights - Collected texts 117 et seq; Manual of the Council of Europe 266 et seq concerning the structure and procedures of the European Commission of Human Rights.

4 Article 3 Statute of the Council of Europe, European Treaties Series No 1 2.
rights violations within the boundaries of its member states.\textsuperscript{5}

It is important to note that the Council of Europe and the European Union are two different institutions. The European Union is not directly liable under the Convention for the conduct of its institutions because it is not a party to the Convention.\textsuperscript{6} It did however incorporate the Convention into Union law via the Maastricht Treaty.\textsuperscript{7} However, this does not allow an individual to make an application against the Union at the European Court of Human Rights. Harris, O'Boyle and Warbrick\textsuperscript{8} point out that it is unclear, insofar as the Convention is applied as part of Union law, that the Convention would prevail in case of a conflict between the provisions of the Convention and Union law. In such an instance the interpretation and application of the Convention will be subject to the views of the European Court of Justice in Luxembourg (an institution of the European Union), and not the views of the institutions of the Council of Europe (the European Court and the European Commission of Human Rights).

This chapter will look at the protection and application of the guarantee of property in article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. The jurisprudence of both the European Commission and the European Court of Human Rights has an increasing influence on the domestic law of the member states, and for this reason it is important to study the nature and extent of the property guarantee provided by the Convention.

\textbf{10.2 The property guarantee}

Article 1 of the First Protocol to the Convention for the Protection of Human Rights and

\textsuperscript{5} See in general Harris, O'Boyle and Warbrick \textit{The law of the European Convention on Human Rights} 1 et seq; Peukert 1981 \textit{HRLJ} 37 et seq; Schwelb 1964 \textit{Am J Comp Law} vol 13 518 et seq; Beddard \textit{Human rights and Europe} 19 et seq.

\textsuperscript{6} \textit{CFDT v European Communities No 8030/77} 13 DR 231 (1978).

\textsuperscript{7} Article F(2) determines that "the Union shall respect fundamental rights, as guaranteed by the European Convention .... as general principles of law".

\textsuperscript{8} Harris, O'Boyle and Warbrick \textit{The law of the European Convention on Human Rights} 27.
"[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".10

The property guarantee in article 1 consists of three sentences. The first sentence guarantees the peaceful enjoyment of possessions. The second sentence determines that no one may be deprived of his/her possessions and the third sentence (second paragraph) provides for the control of the use of property by a member state. The different sentences are generally referred to as the first, second and third rules respectively.11

10.2.1 The scope of property

A comparison between the English and French texts of the First Protocol, which are equally authentic, reveals that no terminological symmetry and consistency exists within article 1. Rule 1 of the English text states that every person is entitled to the peaceful enjoyment of his 'possessions', whereas the French text uses the term 'biens'. The term

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9 It should be noted that in the context of the European Convention on Human Rights the term 'deprivation' is equated with 'expropriation'. In most other jurisdictions 'deprivation' is interpreted to mean 'regulation'.


11 Initially reference were made to the first sentence of the first paragraph, the second sentence of the first paragraph and the second paragraph, but since Sporrong and Lönnroth v Sweden 5 EHRR 35 (1989) the different sentences are referred to as Rules 1,2 and 3 respectively.

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'possessions' is repeated in Rule 2 of the English text, while the French text speaks of 'propriété'. In Rule 3 the terms 'property' and 'biens' are used respectively. The inconsistency in the use of terminology leads to the conclusion that the term 'possessions' should not be interpreted in the narrow sense as actual factual possession as opposed to property (or as 'possession' - a term which is never used in the French text of article 1 - as opposed to 'propriété').

Peukert points out that article 1 of the First Protocol is an international text, and as such it may be assumed that it guarantees not only real rights, but rather the international concept of ownership as understood in its widest sense. The international law concerning the protection of property has taken the largest and widest definition of property from various jurisdictions.

The court stated in *Marckx v Belgium* that article 1 in substance guarantees the right of property (more particularly ownership of property). The property guarantee encompasses the right to have, use, dispose of, pledge, lend or even destroy one's property. It seems as if the Court and the Commission do not attribute any weight to the phrase "peaceful enjoyment of possessions" and that they simply apply article 1 as a guarantee of property in the wide sense. A wide range of proprietary interests have been protected by the institutions of the Council of Europe. This approach is followed

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12 See in general Wiggins v United Kingdom No 7456/76 13 DR 40 (1978) at 46; Schwelb 1964 Am J Comp Law 518 at 519 et seq; Harris, O'Boyle and Warbrick *The law of the European Convention on Human Rights* 517; Van Dijk and Van Hoof *Theory and practice of the European Convention on Human Rights* 340 et seq.

13 Peukert 1981 HRLJ 37 at 42 et seq.


15 Harris, O'Boyle and Warbrick *The law of the European Convention on Human Rights* 519. Also see Van der Walt *Constitutional property clauses: a comparative analysis* chapter on Council of Europe.

even if the wide interpretation of the property concept is in conflict with a narrower
interpretation in a domestic legal system.\textsuperscript{17}

The property guarantee does not include the mere expectation to claim in terms of a
right, but only protects rights which already exist and to which the claimant has an
existing and valid (vested) claim.\textsuperscript{18}

10.2.2 Rule 1: The general principle and the fair balance test

There has always been uncertainty as to what the exact meaning of each rule is and
to what extent the three different rules are interrelated. Rule 2 has always been
identified with the expropriation of property, while Rule 3 has been identified with the
regulation of property. The role and meaning of Rule 1, however, have always been
contentious. It has never been clear what the meaning or purpose of Rule 1 is and
whether it should have any bearing or influence on the interpretation and application
of the other two rules. Despite the positive formulation of Rule 1 it has always been
accepted that Rule 1 does not provide a claimant with a positive claim against the

\textsuperscript{17} See 7.6 above in this regard. See in general Van der Walt Constitutional property clauses:
\textit{a comparative analysis} chapter on Council of Europe; Peukert 1981 \textit{HRLJ} 37 at 43; Harris, O’Boyle and Warbrick \textit{The law of the European Convention on Human Rights} 517 et seq.

\textsuperscript{18} See in general Harris, O’Boyle and Warbrick \textit{The law of the European Convention on Human
Rights} 517; Van der Walt Constitutional property clauses: \textit{a comparative analysis} chapter on Council of Europe; Van Dijk and Van Hoof \textit{Theory and practice of the European Convention on Human Rights} 341.
The suggestion that Rule 1 signifies an institutional guarantee of property has also been rejected.\textsuperscript{20}

The question regarding the exact meaning and purpose of Rule 1 and its relation to the rest of article 1 was resolved in \textit{Sporrong and Lönroth v Sweden}.\textsuperscript{21} The court explained the situation as follows:

"... this provision comprises three distinct rules. The first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of peaceful enjoyment of property; the second rule, contained in the second sentence of the same paragraph, covers deprivation of possessions and makes it subject to certain conditions; the third rule, stated in the second paragraph, recognises the contracting states are entitled, amongst other things, to control the use of property in accordance with the general interest. The three rules are not 'distinct' in the sense of being unconnected: the second and third rules are concerned with particular instances of interference with the right to peaceful enjoyment of property and should therefore be construed in light of the general principle enunciated in the first rule ...".

In light of this statement Rule 1 amounts to much more than a mere statement of

\textsuperscript{19} Harris, O'Boyle and Warbrick \textit{The law of the European Convention on Human Rights} 519; Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Council of Europe; Peukert 1981 \textit{HRLJ} 37 at 52 et seq.

\textsuperscript{20} The fact that Rule 1 is phrased positively creates the impression that it constitutes an institutional guarantee of property. In \textit{Hauer v Land Rheinland-Pfalz} ECR 3727 (1979) the Court of Justice of the European Communities stated that the regulation of property is acceptable as long as the interference is not disproportionate to the rights of the owner and as long as the interference does not impinge upon the very substance of the right to property. This resembles the German situation where an institutional guarantee is derived from the positively phrased guarantee (see chapter 8 above). The possibility of an institutional guarantee in Rule 1 was, however, ruled out in \textit{Sporrong and Lönroth v Sweden} 5 EHRR 35 (1982) and \textit{James v United Kingdom} 8 EHRR 123 (1986). See in general the discussion in Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Council of Europe.

\textsuperscript{21} 5 EHRR 35 (1982) at par 61.
principle. It provides a separate ground for the regulation of interferences with property. State action which does not amount to either a deprivation or a control of the use of property may be regulated in terms of Rule 1 if it constitutes an interference with the claimant’s peaceful enjoyment of his/her property. The court relied on Rule 1 in the *Sporrong and Lönroth* case to declare state action in breach of the property guarantee. In this case the city of Stockholm issued expropriation permits for the redevelopment of the city centre. The expropriations were not carried out, but the owners of the affected properties were prohibited from construction on their properties as long as the permits remained in place (some of these permits were in place for up to 25 years). The court found that, although this did not amount to either an actual expropriation or a control of the use of property, it constituted an unjust interference with the owner’s right to peaceful enjoyment of his/her property.

The court introduced the ‘fair balance’ test in the *Sporrong and Lönroth* case as a means to determine whether Rule 1 has been complied with. The court stated that:

"[f]or the purposes of [Rule 1]... the Court must determine whether a fair balance was struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights. The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1".

In the application of the fair balance test the state has a wide discretion (or in the words of the court, a wide margin of appreciation) to determine exactly what the general or public interest in a particular case is. The court attempts not to dictate to the contracting

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22 Harris, O’Boyle and Warbrick *The law of the European Convention on Human Rights* 521 et seq; Van der Walt *Constitutional property clauses: a comparative analysis* chapter on Council of Europe; Van Dijk and Van Hoof *Theory and practice of the European Convention on Human Rights* 342.

23 See also *Stran Greek Refineries and Stratis Andreadis v Greece* ECHR Series A vol 301 (1994); *Polss v Austria* ECHR Series A vol 117 (1987); *Erkner and Hofauer v Austria* ECHR Series A vol 117 (1987).

24 5 EHRR 35 (1982) at par 69.
states how to conduct their business, and the states' determination of what qualifies as the general interest, and that the general interest outweighs the individual interest, will not easily be overturned by the court. The court will, however, conduct an investigation to determine whether there is a proportional relation between the means employed by the contracting state and the purpose of the action. The measures taken by a contracting state in an attempt to strike a balance between the interests of the community and the requirements of the protection of the individual's fundamental rights may be a factor which the court will take into account to determine whether a balance, compatible with the requirements of the Convention, has indeed been struck. Whenever it is found that the affected party has to carry an individual and excessive burden, the state action will be in conflict with the provisions of article 1.25

According to Harris, O'Boyle and Warbrick26 the fair balance test finds its authority in two sources. The first is the general balance between the individual's rights and the public interest which is present throughout the Convention27 and the second has to do with the substantive content of law as understood by the institutions of the Council of Europe. The latter includes the protection of the individual against arbitrary and disproportionate effects of an otherwise formally valid national law.28 Any interference with the individual's rights has to be in accordance with a specific national law and this law has to provide an indication of the factors which motivate the interference. The court will apply the fair balance test with reference to these factors. It has been stated above that a contracting state has a wide margin of appreciation to determine exactly what the public interest is and whether a balance has been struck between the individual and public interest. Although the state's conclusion carries a lot of weight, the

25 Harris, O'Boyle and Warbrick The law of the European Convention on Human Rights 522 et seq.
26 Harris, O'Boyle and Warbrick The law of the European Convention on Human Rights 525.
28 See in general Harris, O'Boyle and Warbrick The law of the European Convention on Human Rights 285 et seq.
Despite the fact that the fair balance test has been devised to deal with cases which fall within the ambit of Rule 1, the test has been used to judge the proportionality and acceptability of all interferences with property. Due to the fact that Rule 1 constitutes the general principle with regard to the protection of property, and that Rule 2 and Rule 3 are seen as specific instances where Rule 1 is given more specific content, the fair balance test will apply to the whole of article 1. The court will thus apply the fair balance test in cases of both deprivation of property as well as the control of the use of property to determine whether a fair balance has been struck between the interests of the community and the interests of the affected individual. Due to the fact that Rule 2 and 3 contain specific requirements for the validity of deprivations and regulations respectively, the application of the fair balance test will not be exactly the same in all instances. It does, however, provide a framework within which all interferences can be assessed.

The separate ground for assessing and regulating an interference with an individual's property rights identified in Rule 1 has proved to be of great importance. There has been a tendency to judge any interference with property in terms of the guarantee of the peaceful enjoyment of property rather than in terms of Rule 2 or Rule 3, and to assess the interference with reference to the fair balance test.

The court may furthermore only judge a case with reference to article 1 as a whole and

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30 Harris, O'Boyle and Warbrick The law of the European Convention on Human Rights 522; Van der Walt Constitutional property clauses: a comparative analysis chapter on Council of Europe; Beddard Human Rights and Europe 105.
31 Harris, O'Boyle and Warbrick The law of the European Convention on Human Rights 525 et seq. It is pointed out that the reason for the assimilation of the assessment of all interferences with the peaceful enjoyment of possessions is twofold. In the first place the court is reluctant to expand the concept of deprivation to instances of de facto deprivations and in the second place it is argued that the conditions (both substantive and procedural) for interferences in terms of Rule 1 are set out in such a way that it can be applied successfully to both the second and third rules.
not with reference to any specific rule. In Papamichalopoulos v Greece\textsuperscript{32} the court held that the occupation of the claimant's land by a public body constituted a \textit{de facto} expropriation because the claimant was refused access to the land and was not able to deal with the land in any way. Although the court held that the state action amounted to a \textit{de facto} expropriation, it did not identify any specific rule in its decision. The court merely decided that there had been a breach of article 1.

10.2.3 Rule 2: Deprivation of property

Rule 2 determines that no one may be deprived of his/her possessions (property) except in the public interest and subject to the conditions provided for by law and by the general principles of international law. This rule is commonly regarded as the expropriation clause. (In the context of the European Convention on Human Rights the term 'deprivation' is equated with 'expropriation'.) A few questions need to be addressed with regard to the interpretation and application of Rule 2: what qualifies as a deprivation; does the Convention provide for regulatory expropriation (inverse condemnation); what constitutes the public interest; what is the position regarding the general principles of international law; and the question concerning compensation.

According to Peukert\textsuperscript{33} the deprivation of property in international law embraces nationalisation, confiscation and expropriation in the wide sense. Expropriation in the broad sense includes the actual deprivation (taking) of property as well as measures of interference which affect the substance of the right of ownership. The institutions of the Council of Europe have, however, consistently interpreted Rule 2 to encompass expropriation in the narrow sense. This implies that the affected party must have been the owner of the property in question and he/she must be divested of his/her ownership.\textsuperscript{34} All the legal rights of the applicant (the owner) must be extinguished by operation of law. This approach is interesting because of the fact that Rule 1

\textsuperscript{32} ECHR Series A vol 260 (1993).
\textsuperscript{33} Peukert 1981 \textit{HRLJ} 37 at 54 et seq.
\textsuperscript{34} Holy Monasteries v Greece ECHR Series A vol 301 (1994).
guarantees the peaceful enjoyment of possessions and not, as is suggested by the narrow approach to Rule 2, ownership.\footnote{Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Council of Europe.} Cases where the owner's rights (to use his/her property) are dramatically limited, while he/she retains ownership of the property, are not regarded as expropriations or deprivations in terms of Rule 2, but rather as extreme measures of control of the use of property in terms of Rule 3. In \textit{Handyside v United Kingdom}\footnote{ECHR Series A vol 24 (1976). Also see Lithgow and Others \textit{v United Kingdom} ECHR Series A vol 102 (1986); \textit{Marcx v Belgium} ECHR Series A vol 31 (1979); \textit{Wiggins v United Kingdom No 7456/76} DR 40 (1978); \textit{Mellacher and Others v Austria} ECHR Series A vol 169 (1989); \textit{Tre Traktörer AB v Sweden} ECHR Series A vol 159 (1989); \textit{X v Austria No 8003/77} 17 DR 80 (1980); \textit{X and Y v The Netherlands No 6202/73} 1 DR 66 (1975); \textit{Allgemeine Gold- und Silberscheideanstalt [AGOSI] v United Kingdom} ECHR Series A vol 108 (1986); \textit{James v United Kingdom} 8 EHRR 123 (1986).} the court held that the temporary seizure of property by the state amounts to the control of the use of property and not the deprivation thereof. There has to be an actual taking of ownership before Rule 2 will come into play.

It is important to distinguish between deprivations and regulations for purposes of article 1, because they are governed by different provisions,\footnote{According to Rule 2 deprivations have to be in the public interest and are subject to conditions of law and the general principles of international law, while regulations in terms of Rule 3 must be lawful, deemed necessary by the contracting state and must be in the general interest.} and because of the fact that compensation may only be claimed for deprivations. This distinction is, however, complicated by the possible recognition of regulatory expropriations. Regulatory expropriations are interferences with property which are regulatory in nature, but which have an expropriatory effect. Article 1 does not provide for regulatory expropriations or inverse condemnations. Van der Walt\footnote{Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Council of Europe.} points out that the door was left open for the recognition of regulatory expropriation in \textit{Sporrong and Lönroth v Sweden}.\footnote{5 EHRR 35 (1982).} The same approach was followed in \textit{Papamichalopoulos v Greece}\footnote{ECHR Series A vol 260 (1993).} where the court decided that
the occupation of the claimant's land by a public body for a public purpose constituted a *de facto* interference which amounted to a *de facto* expropriation (a regulatory expropriation) because the claimant was refused access to the land and was not able to deal with the land in any way. It is, however, doubtful that the court will give outright recognition to the theory of regulatory expropriations.\(^{41}\) Harris, O'Boyle and Warbrick\(^ {42}\) are of the opinion that regulatory expropriations will be in breach of Rule 2 because they are not 'provided for by law'. In view of the case law it seems as if the court will only deal with an interference with property in terms of Rule 2 if it is clear that the claimant has been deprived of his/her ownership. All other interferences will be dealt with either in terms of Rule 1 which guarantees peaceful enjoyment of possessions, or Rule 3 in terms of which the contracting state's control use of property is regulated. It was pointed out in *Banér v Sweden*\(^ {43}\) that if ownership is seen as a bundle of rights, the deprivation of one of these rights does not amount to the deprivation of ownership, but rather a measure to control the use of property.

Rule 2 requires that any deprivation of property has to be in the public interest. It has always been the opinion of the court that the contracting states are in the best position to determine exactly what the public interest is and which objectives would promote the public interest. The states are thus left a wide margin of appreciation in this regard, but the court retains the final power of review. It was stated in *Lithgow v United Kingdom*\(^ {44}\) that the justification and motivation for the actual expropriation directly relates to the public interest and that the court will not easily challenge to state's conclusion that a particular deprivation will promote the public interest. In this case the court held that the justification and motivation for the nationalisation of the shipbuilding industry was in the

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42 Harris, O'Boyle and Warbrick *The law of the European Convention on Human Rights* 528.

43 *NO 11763/85 60 DR 128* (1989) at 140.

public interest. In *James v United Kingdom*,\(^{45}\) where landowners were deprived of their property in order to enfranchise long lease holders, the court came to the conclusion that the deprivation of the property of one individual in order to transfer it to another individual may be in the public interest, depending on the circumstances. Even if the community at large does not benefit directly from the use or enjoyment of the property taken, it might still be argued that the state action promotes the public interest, as long as the deprivation is carried out in pursuance of a legitimate social, economic or other policy. The taking of property to enhance social justice within the community will therefore always be in the public interest.\(^{46}\)

It was further stated in *James v United Kingdom*\(^{47}\) that, in order to satisfy the requirements of the public interest provision, there has to be a proportional relationship between the means employed by the contracting state and the purpose it aims to achieve. In other words, there has to be a fair balance between the public interest and the interests of the affected individual. Whenever the individual has to bear a personal and excessive burden the means employed by the contracting state will be in conflict with the provisions of article 1. Due to the structure of article 1 and the relation between the general principle formulated in Rule 1 and specific applications thereof in Rules 2 and 3 respectively, the fair balance test is applicable to the whole of article 1.

Any deprivation in terms of Rule 2 is subject to the conditions provided for by law. This means that any expropriation has to be based on a specific law on a national level. The law has to be generally accessible and sufficiently certain. This requirement also provides a safeguard against arbitrariness.\(^{48}\) The term 'law' is not limited to statutory

\(^{45}\) 8 EHR 123 (1986).

\(^{46}\) *James v United Kingdom* 8 EHR 123 (1986) at par 45. Also see *Holy Monasteries v Greece* ECHR Series A vol 301 (1994) at par 67 *et seq.* In view of this decision a land reform programme will most probably constitute a legitimate purpose.

\(^{47}\) *James v United Kingdom* 8 EHR 123 (1986) at 145. Also see *Sporrong and Lönroth v Sweden* 5 EHR 35 (1982).

\(^{48}\) Harris, O'Boyle and Warbrick *The law of the European Convention on Human Rights* 530.
law but also includes unwritten law.\textsuperscript{49}

The reference to the general principles of international law is of special importance for nationals as far as a claim for compensation is concerned. The reference to the general principles of international law has two possible interpretations.\textsuperscript{50} The first is that the general principles of international law are only applicable as far as non-nationals are concerned. This interpretation is based on the argument that they have no influence as far as the formation of national law is concerned and have to rely on the general principles of international law to provide them with adequate protection against measures of confiscation, nationalisation or expropriation.\textsuperscript{51} The second interpretation is that the standards of international law is to be incorporated into the Convention. Such an interpretation would provide nationals and non-nationals with equal protection.\textsuperscript{52} The court, however, favours the first interpretation. It was stated in \textit{Gudmundur Gudmundsson v Iceland}\textsuperscript{53} that:

"... the general principles of international law, referred to in Article 1, are the principles which have been established in general international law concerning the confiscation of the property of foreigners; ... it follows that measures taken by a State with respect to the property of its own nationals are not subject to these general principles of international law

\textsuperscript{49} \textit{Sunday Times v United Kingdom} ECHR Series A vol 30 (1979) at par 49. Also see Peukert 1981 \textit{HRLJ} 37 at 65; Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Council of Europe.

\textsuperscript{50} See in general Harris, O'Boyle and Warbrick \textit{The law of the European Convention on Human Rights} 530 et seq.

\textsuperscript{51} \textit{Gasus Dosier- und Fördertechnik v Netherlands} ECHR Series A vol 306 (1995) at par 63; \textit{Gudmundur Gudmundsson v Iceland} YB 3 394 (1960); \textit{James v United Kingdom} 8 EHRR 123 (1986). Also see Harris, O'Boyle and Warbrick \textit{The law of the European Convention on Human Rights} 530; Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Council of Europe; Peukert 1981 \textit{HRLJ} 37 at 65.

\textsuperscript{52} Schwelb 1964 \textit{Am J Comp Law} 518 et seq. Also see Salgado 1987 \textit{Vir J Int Law} 865 et seq, Van Dijk and Van Hoof \textit{Theory and practice of the European Convention on Human Rights} 344.

\textsuperscript{53} YB 3 394 (1960) at 422 et seq.
in the absence of a particular treaty clause specifically so providing".

This view was confirmed in *James v United Kingdom*\textsuperscript{54} where it was said that it was not the intention of the parties to the Convention to extend the protection of the general principles of international law to nationals.

The question surrounding the applicability of the general principles of international law becomes all the more important if it is considered that no mention is made in article 1 of compensation, and claimants thus have to rely on international law to claim compensation from the expropriating state. The position of non-nationals is secure in this regard, because, as was pointed out above, the reference to the general principles of international law provides them with a claim for compensation. Nationals, however, do not have a claim for compensation in terms of article 1. Rule 2 merely protects them against arbitrary confiscation.\textsuperscript{55}

This approach to the compensation claims of nationals was clearly unfair, and a more equitable approach has been followed since the 1980's. The introduction of the fair balance test in *Sporrong and Lönroth v Sweden*\textsuperscript{56} brought about a more just approach to the position of nationals where their property rights have been interfered with. Although this decision did not clearly establish the nature and extent of the obligation to compensate, it did establish the principle that compensation may be used as a means to create a fair balance between the different parties.

The uncertainty surrounding compensation was resolved in *James v United Kingdom*.\textsuperscript{57} The court set out the principle as follows:

\textsuperscript{54} 8 EHRR 123 (1986) at 148.

\textsuperscript{55} Peukert 1981 *HRLJ* 37 at 65 et seq; Van der Walt *Constitutional property clauses: a comparative analysis* chapter on Council of Europe; Van Dijk and Van Hoof *Theory and practice of the European Convention on Human Rights* 343.

\textsuperscript{56} 5 EHRR 35 (1982) at par 69 and 73.

\textsuperscript{57} 8 EHRR 123 (1986) at par 54.
"[I]ke the Commission, the Court observes that under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances ... As far as Article 1 is concerned, the protection of the right to property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants".

The principle that at least some compensation is required to establish a fair balance between the various interests of the parties involved in the case of an interference with an individual's property was confirmed in Lithgow v United Kingdom.\textsuperscript{58} This principle is applied even in the case where the public interest requires strong protection.\textsuperscript{59}

Although the principle that article 1 impliedly requires the payment of compensation for the taking of property was acknowledged in James v United Kingdom, the court stated that article 1 does not guarantee the right to full compensation in all circumstances. The amount of compensation must be reasonably related to the value of the property in question. However,

"[I]egitimate objectives of 'public interest', such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call for less reimbursement of the full market value".\textsuperscript{60}

\textsuperscript{58} ECHR Series A vol 102 (1986) at par 120. For a discussion of this case see Salgado 1987 \textit{Vir J Int Law} 865. Also see \textit{Hetrich v France} ECHR Series A vol 296 (1994) at par 47 et seq.

\textsuperscript{59} \textit{Stran Greek Refineries and Stratis Andreadis v Greece} ECHR Series A vol 301 (1994) at par 80 et seq; \textit{Holy Monasteries v Greece} ECHR Series A vol 301 (1994) at par 74.

\textsuperscript{60} 8 EHRR 123 (1986) at par 54.
The court acknowledges the fact that the states have a wide margin of appreciation to determine the necessity and quantum of compensation. The states have a wide discretion to determine the amount and terms of compensation and, in the first place, to determine the value of the property in question. The court will not easily question the states' decision in this regard.\footnote{Lithgow v United Kingdom ECHR Series A vol 102 (1986) at par 137 \textit{et seq}.} The court's power of review is limited to determining whether the choice of compensation terms falls outside the state's wide margin of appreciation.\footnote{James v United Kingdom 8 EHRR 123 (1986) at par 54. Also see Harris, O'Boyle and Warbrick \textit{The law of the European Convention on Human Rights} 533.} The fair balance test remains the guiding principle to establish a right to compensation for nationals in the first place, and in the second place to determine an amount of compensation which can be regarded as just and equitable in a specific set of circumstances.

\subsection{10.2.4 Rule 3: Control of the use of property}

Rule 3, which is generally associated with the state's power to regulate the use of property, provides that the provisions of Rule 1 and Rule 2 shall not in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest, or to secure the payment of taxes other contributions or penalties. It is clear from the wording of Rule 3 that the contracting states have wide powers to regulate the use of property by its subjects. This power is, however, limited by the requirement that is has to be exercised in accordance with the general interest. It is pointed out by Peukert\footnote{Peukert 1981 \textit{HRLJ} 37 at 61. Also see Handyside v United Kingdom ECHR Series B vol 22 (1976) at par 167.} that the concepts "public interest" (as used in Rule 2) and "general interest" (as used in Rule 3) mean exactly the same thing. The concepts are, however, interpreted differently in the sense that the margin of appreciation of the state in the case of expropriations (Rule 2) is interpreted narrower than in the case of control of the use of property (Rule 3).
Although it might seem that Rule 3 is not subject to the rest of article 1 ("the preceding provisions shall not, however, in any way impair the right of a state ..."), the ruling in Sporrong and Lönnroth v Sweden\textsuperscript{64} made it clear that the different rules are interrelated, and as such the fair balance test is applicable to Rule 3 as well. In order for a regulatory measure to comply with the requirements of article 1 it must: (a) be lawful (comply with national law); (b) have a legitimate purpose (be in the general/public interest); and (c) reflect a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.\textsuperscript{65} The apparent unlimited right of a state to control the use of property is therefore curtailed by two factors: the first is the fact that the control measure must be in the general interest, and the second is that the measure has to meet the requirements of the fair balance test.

Peukert\textsuperscript{66} points out that it is absolutely essential that the general interest for which the particular measure is taken, is specified in legislation. It is, however, not necessary to specifically name the general interest in question, as it is sufficient if it follows from the purpose of the legislation.

The court has confirmed that the state has a wide margin of appreciation the determine whether a particular measure to control the use of property falls within the ambit of 'the general interest'\textsuperscript{67} and as such it is highly unlikely that the court will contradict the

\textsuperscript{64} 5 EHRR 35 (1982).

\textsuperscript{65} See in general Harris, O'Boyle and Warbrick The law of the European Convention on Human Rights 534 et seq; Van der Walt Constitutional property clauses: a comparative analysis chapter on Council of Europe.

\textsuperscript{66} Peukert 1981 HRLJ 37 at 63.

\textsuperscript{67} Gudmundur Gudmundsson v Iceland YB 3 394 (1960); A, B, C and D v United Kingdom YB 10 506 (1967); X and Y v Netherlands No 6202/73 1 DR 66 (1975); X and Others v Belgium No 6837/74 3 DR 135 (1976); Handyside v United Kingdom ECHR Series A vol 24 (1976); Wiggins v United Kingdom No 7456/76 13 DR 40 (1978); Marckx v Belgium ECHR Series A vol 31 (1979); X v Austria No 8003/77 17 DR 80 (1980); Sporrong and Lönnroth v Sweden 5 EHRR 35 (1982); James v United Kingdom 8 EHRR 123 (1986); Lithgow v United Kingdom ECHR Series A vol 102 (1986); Tre Traktörer AB v Sweden ECHR Series A vol 159 (1989); Mellacher and Others v Austria ECHR Series A vol 169 (1989); Pine Valley Developments Limited and Others v Ireland 14 EHRR 319 (1991).
states' conclusion. The court nevertheless has the final power of review and may determine whether the state has satisfied the requirements of lawfulness and legitimate purpose, and that the burden placed on the individual is not excessive.

The states' power to control the use of property includes the power to oblige an individual to take positive action, as well as the power to restrict or limit specific activities. The latter includes, amongst others, land reform, the seizure of property for legal proceedings, import and export laws, the issuing of licences, planning controls, inheritance laws, measures aimed at the protection of the environment, rent control and economic regulation of professions.

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69 X v Austria No 7287/75 13 DR 27 (1979); ISKCON v United Kingdom No 20490/92 76 DR 90 (1994). Also see Harris, O'Boyle and Warbrick The law of the European Convention on Human Rights 535; Van der Walt Constitutional property clauses: a comparative analysis chapter on Council of Europe; Peukert 1981 HRLJ 37 at 62.

70 Denev v Sweden No 12570/86 59 DR 127 (1989). In this case the claimant was required to plant trees on his property in the interest of environmental protection.

71 James v United Kingdom 8 EHRR 123 (1986); X and Others v Belgium No 6837/74 3 DR 135 (1976).


74 Tre Traktörer AB v Sweden ECHR Series A vol 159 (1989).


76 Inze v Austria ECHR Series A vol 126 (1987).


78 X v Austria No 8003/77 17 DR 80 (1980); Mellacher and Others v Austria ECHR Series A vol 169 (1989).

The regulatory power of a contracting state to impose and enforce measures to secure the payment of taxes, other contributions or penalties has been interpreted widely. Although the state has to ensure that the measures taken in this regard reflect a fair balance between the general interest and the interests of the affected parties respectively, it has more or less unlimited powers to determine the levels of taxation, the means of assessment and the manner in which these liabilities are enforced. Harris, O'Boyle and Warbrick point out that a taxation scheme may adversely affect the individual's guarantee of ownership if the scheme places an excessive burden on the taxpayer or fundamentally interferes with his/her financial position. The state's wide margin of appreciation is, however, respected by the court, and the court will not easily question the state's conclusion as to what is in the general interest, except in cases where the purpose or aim of the taxation seems to be devoid of any reasonable foundation. Notwithstanding the very lenient approach of the court in this regard, it was stated in "X v Austria" that the court always has the power to investigate the proportionality and necessity of a certain measure, even if it is clear that it is a tax, contribution or penalty in terms of Rule 3.

10.3 Conclusion

The institutions of the Council of Europe have interpreted article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms to provide the widest possible protection to individuals while ensuring that the contracting states retain the power to regulate the property regimes in their respective jurisdictions. The phraseology of article 1 reflects the compromising attitude at the negotiation

80 Van Dijk and Van Hoof Theory and practice of the European Convention on Human Rights 345.
81 Harris, O'Boyle and Warbrick The law of the European Convention on Human Rights 537. Also see Wasa Liv Omsesidigt v Sweden No 13013/87 58 DR 163 (1988); Scenska Managementgruppen v Sweden No 11036/84 45 DR 211 (1985).
83 No 7287/75 13 DR 27 (1979). Also see Van der Walt Constitutional property clauses: a comparative analysis chapter on Council of Europe.
process at which the property clause was drafted, but its interpretation and application to some extent disregard the exact wording of the article and follow the general trend of guaranteeing and protecting property as a fundamental human right.

The term 'possessions', as used in article 1, is interpreted to mean 'property' in the wide sense, and as such it allows for the protection of most of the individual's patrimonial interests, while at the same time allowing the state to regulate a wide range of property interests in an attempt to promote the public interest. Article 1 is furthermore interpreted to protect the peaceful enjoyment of property (Rule 1, as a general principle). The deprivation or expropriation and regulation or control of the use of property (Rules 2 and 3 respectively) are seen as specific instances of interference with the individual's peaceful enjoyment of property. An interference with the individual's property interests may be declared invalid or disproportional in terms of Rule 1, even if it does not constitute an expropriation in terms of Rule 2 or a regulation of property in terms of Rule 3.

The inference of the fair balance test from article 1 as a whole in Sporrong and Lönroth v Sweden further ensures that an interference with or limitation of an individual's property interests reflects a proportional balance between the public or general interest on the one hand and the interests of the affected parties on the other. Although the state has a wide margin of appreciation (discretion) to determine what constitutes the public interest and which interferences will promote the public interest, the interference will be in breach of article 1 if it places an excessive burden on the individual. The question of compensation (for both nationals and non-nationals) in the case of deprivation is also dealt with in terms of the fair balance test. The court has the final power of review to determine whether an interference complies with the requirements of valid interferences: the interference has to be lawful, has to be in pursuance of a legitimate purpose and has to comply with the fair balance test.

The interpretation and application of the property guarantee in article 1 of the First

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84 5 EHRR 35 (1982).
Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms reflects the importance of the social function of property in a post-World War II Europe. As is pointed out in this chapter the institutions of the Council of Europe afford the individual adequate protection of his/her property rights, but the exercise of these rights have to be reflect and provide for the social and political context within which they function. As a result of the relationship between the Council of Europe and the contracting states, the contracting states have a wide margin of appreciation to determine what constitutes a public interest in a particular jurisdiction and which interferences with an individual's property rights serve to promote the social and political well being of all members of that particular society.
PROPERTY IN SOUTH AFRICAN CONSTITUTIONAL LAW

11.1 Introduction

The property clause in the Constitution of the Republic of South Africa\(^1\) is the result of a negotiated settlement between the African National Congress and the main opposition parties, the National Party and the Democratic Party. The African National Congress wanted to ensure that the property guarantee was phrased in such a manner that it would not frustrate land reform, while the opposition strived for the widest possible protection of existing property rights.\(^2\) It is clear from the text of the property clause that it is supposed to provide adequate protection of existing property rights while still allowing for comprehensive land reform. The attempt to find an equitable balance between these seemingly conflicting interests is a theme which influences almost every aspect of the nature, scope and application of the property guarantee.

This chapter focuses on the nature and extent of constitutional property rights in South Africa. The requirements for valid deprivations and expropriations are looked at, and in the case of expropriations, the question of compensation is discussed.

11.2 Interpreting the property clause

In order to understand the true meaning of and properly interpret the property

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\(^1\) Section 28 of the *Constitution of the Republic of South Africa Act* 200 of 1993, and section 28 of the Constitution of the Republic of South Africa of 1996. The final Constitution is officially numbered Act 108 of 1996, but Van Wyk 1997 *THRHR* 377 at 378 *et seq* points out that it is a mistake to number the Constitution in this manner, because, unlike the interim Constitution of 1993, this is not a normal act of Parliament, but a document drafted by the Constitutional Assembly.

\(^2\) For a discussion on the negotiations over the protection of property rights in the interim Constitution see Chaskalson 1995 *SAJHR* 222.
guarantee, it has to be seen against the background of the Constitution as a whole. Although the phraseology of the guarantee itself is important, the property clause has to be read in context in order to determine its meaning. The property guarantee forms part of the bill of rights in chapter 2 of the Constitution. All rights contained in the bill of rights have to be interpreted in terms of the interpretation clause in section 39. Section 39 determines that all fundamental rights have to be interpreted so as to promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It is furthermore pointed out in the preamble that 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 the property clause it is stated that property may only be expropriated for a public purpose or in the public interest, and that the public interest includes land reform. Compensation, in the case of expropriation, has to be just and equitable and it has to reflect an equitable balance between the public interest and the interests of the affected parties.

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3 Reference to the 'Constitution' should be regarded as reference to the final Constitution of South Africa (1996). References to the interim Constitution (1993) will be indicated as such.

4 Section 39 determines that:
   "(1) When interpreting the Bill of Rights, a court, tribunal or forum -
       (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
       (b) must consider international law; and
       (c) may consider foreign law.
   (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.
   (3) The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill".

5 Section 25(2)(a).

6 Section 25(4)(a).

7 Section 25(3).
All these references to the promotion of the public interest indicate that the Constitution
(and as such also the property clause) is directly geared towards the advancement and
realisation of a specific socio-political programme. The Constitution should be seen as
an instrument to achieve social upliftment, the obliteration of inequalities, the promotion
of equality, human dignity and freedom, the realisation of land reform, and so on. Van
der Walt points out that

"...the property clause must be read against the background of a social policy aimed at striking a compromise between providing a simple but powerful constitutional guarantee for (inevitably) existing property rights on the one hand and a purposeful effort at removing some of the historical imbalances with regard to the distribution of land rights on the other".

The nature, scope and extent of property rights are directly influenced by societal needs. Thus, although an individual is entitled to the constitutional protection of his/her property rights, these rights are not inviolate, and may be limited validly if and when the public interest requires such a limitation. Like most fundamental rights the right to property is limited in principle. However, this does not mean that the state has carte blanche to limit or take an individual's property whenever and however it sees fit. Any interference with property has to comply with the requirements for such an interference as set out in sections 7, 25 and 36 of the Constitution, and it has to reflect an equitable balance between the rights and interests of the affected party and the public interest.

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8 Van der Walt 1994 THRHR 181 at 186.

9 See section 7(3) of the Constitution determines that all rights in chapter 2 are subject to
the limitations contained in the general limitation clause in section 36, or elsewhere in the
bill of rights.

10 Van der Walt The constitutional property clause 164; Van der Walt 1994 THRHR 181 at
186 et seq. Also see the judgement of McCreath J in Diepsloot Residents and landowners
Association v Administrator, Transvaal 1993 (3) SA 49 (T).
Kleyn\(^{11}\) points out that although the social state principle is not explicitly mentioned in the Constitution, the Constitution contains references to the principles on which the social state is founded. The protection of a variety of socio-economic rights and the stated aim to create a society based on social justice and the improvement of the quality of life of all citizens indicate that the social state principle is applicable in South Africa. As such the state has an obligation to guarantee a dignified existence for all and to work towards the elimination of inequalities which exist within the society.\(^{12}\) This has a direct bearing on the interpretation and application of the property clause, specifically as far as land reform is concerned.

By following a purposive and functional approach towards the interpretation of the property clause, it is possible to account for and deal with the tension between the interests of the individual and the public interest and to create a just and equitable balance between the interests of the haves and the have-nots, the privileged and the underprivileged. This approach will also ensure that the private-law concept of ownership will not interfere with the adjudication of constitutional property disputes. The purposive approach to interpretation of the property clause will enable the courts to follow a more socially conscious approach to the property question.\(^{13}\)

In order to understand and interpret the property clause both of the goals of the property clause have to be taken into account. In each individual case an attempt should be made to create an equitable balance between the protection of individual property and the social function and responsibility of property. This implies that neither the protection of private land rights nor land reform may take precedence over the other, but that the promotion of both these goals should be harmonised to ensure that each of them enjoys the greatest possible relative protection or advancement. The

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\(^{11}\) Kleyn 1996 \textit{SAPL} 402 at 407. Also see De Waal 1995 \textit{SAJHR} 2 at 8.

\(^{12}\) See the preamble of the Constitution.

\(^{13}\) Van der Walt \textit{The constitutional property clause} 13 \textit{et seq}; Van der Walt 1995 \textit{SAPL} 298 at 334 \textit{et seq}; Van der Walt 1994 \textit{THRHR} 181 at 185 \textit{et seq}; Kleyn 1996 \textit{SAPL} 402 at 415; Davis, Chaskalson and De Waal in Van Wyk \textit{et al} \textit{Rights and Constitutionalism} 1 at 122 \textit{et seq}; Murphy 1995 \textit{SAPL} 115; Murphy 1994 \textit{SAJHR} 386 \textit{et seq}.
tension between the protection of individual rights and the social function of property forms an integral part of the meaning and application of the property clause, and the balancing of these apparent contradicting interests should be the main focus in the process of solving each individual case. In any attempt to create a just and equitable balance between individual property rights and the public interest the courts have to recognise the aim of the Constitution, namely to ensure for every citizen an existence characterised by equality, freedom and human dignity in an open and democratic society. Van der Walt\textsuperscript{14} points out that no magic formula exits according to which the courts can solve the tension or maintain the balance between the protection of individual rights and the promotion of the public interest. This tension will always form an integral part of any property dispute and the courts cannot adjudicate any property case without recognising or dealing with this tension.

According to Van der Walt\textsuperscript{15} the identification of a fundamental guideline for the interpretation of the different fundamental rights contained in the bill of rights will assist in solving interpretation and limitation problems. He suggests that the phrase 'the values which underlie an open and democratic society based on human dignity, equality and freedom' be used as such a constitutional guideline. This guideline would accommodate both individual interests\textsuperscript{16} and public interests,\textsuperscript{17} and would ensure that individual rights are not perceived as absolute rights, and that these rights cannot be infringed upon arbitrarily.

11.3 The property clause

The property clause, contained in section 25 of the Constitution reads as follows:

14 Van der Walt The constitutional property clause 16.
15 Van der Walt The constitutional property clause 99.
16 The protection of fundamental rights should promote human dignity, equality and freedom.
17 The protection of fundamental rights should take place within an open and democratic society.
"(1) [n]o one may be deprived of property except in terms of a law
general application, and no law may permit the arbitrary
deprivation of property.

(2) Property may be expropriated only in terms of a law of general
application -
   (a) For a public purpose or in the public interest; and
   (b) subject to compensation, the amount of which and the time
       and manner of payment of which have either been agreed
       to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of
payment must be just and equitable, reflecting an equitable
balance between the public interest and the interests of those
affected, having regard to all relevant circumstances, including -
   (a) the current use of the property;
   (b) the history of the acquisition and use of the property;
   (c) the market value of the property;
   (d) the effect 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 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 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 or 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)".

Section 25 comprises mainly four different categories of provisions: (a) the deprivation provision in section 25 (1); (b) the expropriation provisions in section 25(2) and 25(3); (c) the interpretation provision in section 25(4); and (d) the land reform provisions in section 25(5) to section 25(9). A discussion of the first three categories of provisions is provided below, while the provisions on land reform are discussed in chapter 15 below.

The property guarantee in section 25 is phrased negatively. This raises the question whether section 25 includes a guarantee of the positive entitlements usually associated with property (the right to acquire, hold and dispose of property), as was guaranteed in section 28 of the 1993 Constitution. It was, however, held in In re: Certification of the Constitution of the Republic of South Africa, 1996 that neither the positive nor the negative guarantee of property can be regarded as a universally recognised

18 Chaskalson and Lewis in Chaskalson et al Constitutional law of South Africa 31-1 at 10.

19 Section 28 of the interim Constitution provided that: "(1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights”. See Badenhorst in Bill of Rights Compendium 3FB-1 at 10.

20 1996 (10) BCLR 1253 (CC).
formulation, and that the negative formulation implicitly provides protection for the right to hold property.\textsuperscript{21} The fact that the property guarantee is formulated negatively is not regarded as an indication that the guarantee does not include a guarantee of the positive entitlements of property.\textsuperscript{22} Van der Walt\textsuperscript{23} points out that the exact phraseology of the guarantee is not all that important: different formulations of the property guarantee in different jurisdictions with completely different socio-economic, legal and constitutional backgrounds are all interpreted within a broad constitutional framework to mean more or less the same and provide more or less the same guarantee.\textsuperscript{24} Thus, notwithstanding the fact that most of the other provisions in the bill of rights are formulated positively, the negative formulation of section 25 does not imply that property should not be regarded as a guarantee of property as a fundamental right.\textsuperscript{25}

The positive formulation of the property guarantee in section 28 of the interim Constitution may be regarded, as in German law,\textsuperscript{26} as a guarantee of property as an institution.\textsuperscript{27} Since the positive formulation of the property guarantee has been abandoned the question of an institutional guarantee of property is no longer at issue

\textsuperscript{21} 1996 (10) BCLR 1253 (CC) at 1287.

\textsuperscript{22} See Chaskalson and Lewis in Chaskalson et al Constitutional law of South Africa 31-1 at 10 where it is argued that the negative formulation of the property guarantee does not provide for the (formal or substantial) right to acquire, hold and dispose of property. They contend that the equality clause (section 9) will have to be used in order to ensure that all South Africans are afforded the same rights - whereas whites have existing property rights (and may consequently hold and dispose of those rights), members of other race groups will have to rely on the equality clause to ensure that they are afforded the same rights. But see Badenhorst in Bill of Rights Compendium 3FB-1 at 9.

\textsuperscript{23} Van der Walt The constitutional property clause 23 et seq.

\textsuperscript{24} See in this regard the discussion of the different property guarantees in chapters 8, 9 and 10. Although the formulation of the property guarantee in these jurisdictions differ substantially, they all have more or less the same result.

\textsuperscript{25} Van der Walt The constitutional property clause 25.

\textsuperscript{26} See 8.3.2 above.

\textsuperscript{27} Kleyn 1996 SAPL 402 at 413 et seq; Van der Walt 1995 SAPL 298 at 302 et seq; Chaskalson 1994 SAJHR 131 at 133; Chaskalson and Lewis in Chaskalson et al Constitutional law of South Africa 31-1 at 6; Badenhorst in Bill of Rights Compendium 3FB-1 at 8.
in South African law. The positive formulation of the rights to security of tenure in section 25(6) and land restitution in section 25(7) indicate that these are positive claim rights against the state. These are, however, not unlimited rights. Both section 25(6) and 25(7) clearly stipulate that these rights are to be limited by an Act of Parliament. The availability of resources will inevitably also have a limiting effect on these rights.

Section 25 reflects a balance between the protection of private property rights and the advancement of the common interest. The provisions on the deprivation\(^\text{29}\) and expropriation of property,\(^\text{30}\) the determination of just and equitable compensation\(^\text{31}\), access to land,\(^\text{32}\) security of tenure\(^\text{33}\), restitution of property and land reform in general\(^\text{35}\) accentuate the importance of private property rights. These provisions are of cardinal importance for the achievement and realisation of the clearly defined constitutional aims of personal freedom and human dignity. At the same time the promotion of the public interest is regarded as an aim of the Constitution in general and the property clause in particular. The restriction and limitation of private property rights are justified to the extent that is reasonable and justifiable in an open and democratic society.\(^\text{36}\) Section 25 provides for the deprivation\(^\text{37}\) and expropriation of private property

\(^{28}\) Van der Walt *The constitutional property clause* 24 et seq; Chaskalson and Lewis in Chaskalson *et al* Constitutional law of South Africa 31-1 at 10. But see Kleyn 1996 *SAPL* 402 at 418 who argues that the negative formulation of the property guarantee does not necessarily imply that the institution of property is no longer guaranteed in South African law.

\(^{29}\) Section 25(1).

\(^{30}\) Section 25(2).

\(^{31}\) Section 25(3).

\(^{32}\) Section 25(5).

\(^{33}\) Section 25(6).

\(^{34}\) Section 25(7).

\(^{35}\) Section 25(8).

\(^{36}\) Section 36(1). Also see section 7.

\(^{37}\) Section 25(1).
for a public purpose or in the public interest,\textsuperscript{38} and the amount of compensation in the case of expropriation is determined with reference to the public interest.\textsuperscript{39} Land reform is recognised in section 25 as an important goal and it is stated specifically that the public interest includes land reform.\textsuperscript{40}

11.4 Scope of constitutional property

The term 'property' is not defined in the Constitution. The courts and the legislature will have to give meaning and content to the term 'property', and to determine the scope of constitutional property to be afforded protection in terms of section 25. It is impossible to provide a clear indication of what exactly will qualify as property (this includes both the objects of property and the rights which may qualify as property rights), and one may only speculate as to how wide the term 'property' will be interpreted by the courts and the legislature.\textsuperscript{41} It is, however, possible to derive general trends with regard to the scope and content of constitutional property from other jurisdictions.

In line with the situation in most other jurisdictions, the courts can be expected to follow an inclusive approach with regard to the objects and rights under the property clause. The inclusion of an object or right is determined by the question whether or not it promotes the purpose of the constitutional protection of property, and in most other

\textsuperscript{38} Section 25(2).

\textsuperscript{39} Section 25(3) determines that the amount of compensation must reflect an equitable balance between the public interest and the interest of the affected party, taking into account the current use of the property, the history of the acquisition and use of the property and the extent of direct state investment and subsidy in the acquisition and capital improvement of the property.

\textsuperscript{40} Section 25(4) to (9).

\textsuperscript{41} It should be noted that the interim Constitution protected the 'rights in property' (section 28(1)). Section 25 changed this to 'property'. Most commentators treat these two terms similarly and regard them as having the same meaning. See Van der Walt 1995 SAPL 298; Van der Walt The constitutional property clause 30; Kleyn 1996 SAPL 402 at 423; Chaskalson and Lewis in Chaskalson et al Constitutional law of South Africa 31-1 at 2 et seq; Badenhorst in Bill of Rights Compendium 3FB-1 at 12.
jurisdictions the courts are lenient in answering this question. In terms of the so-called ‘two stages’ approach the court will first determine whether a particular right can be afforded constitutional protection in terms of the property clause (in the first stage), and only then will the court continue to investigate substantive issues like due process and compensation in the second stage. The courts will rather include than exclude an object or right under the property clause, and they will then proceed to the second stage of the constitutional dispute where the validity and constitutionality of an infringement of that right are investigated.

The distinction between private law and public law is of special importance as far as the scope and content of constitutional property is concerned. In private law the object of property law is usually limited to corporeal things, and property rights are usually associated with real rights, of which ownership is regarded as the most important. In most jurisdictions where a clear distinction is made between private and public law, the scope and content of constitutional property is much wider than in private law. This may be ascribed to the fact that the purpose of the protection of property in private law differs from the purpose of the protection of property in constitutional law. Whereas the purpose for the protection of property in private law is to provide an absolute safeguard against any unpermitted interference with that right, the purpose of the property clause is to ensure that an equitable balance is struck between the rights of the affected individual and the public interest in the case of any state interference with private

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42 See chapters 8, 9 and 10 above in this regard.

43 Van der Walt The constitutional property clause 41 and 57 et seq. The so-called ‘two stages’ approach has been confirmed by the Constitutional Court in S v Makwanyane and Another 1995 (3) SA 391 (CC) at 100 et seq, Ferreira v Levin and Others; Vryenhoek and Others v Powell NO and Others 1996 (1) BCLR 1 (CC) at 44 and Prince v President of the Law Society, Cape of Good Hope and Others 1998 (8) BCLR 976 (C) at 982.

44 Van der Walt The constitutional property clause 55.

45 See in general 8.3.3 above with regard to the scope of constitutional property in German law and 7.e above with regard to the scope of constitutional property in Dutch law. Also see 10.2 above with regard to the position in terms of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.
Property law in South Africa has been dominated by the civil-law tradition. Ownership was regarded as the most comprehensive and valuable property right, and corporeals were the main property objects. The introduction of the constitutional property clause was obviously going to change this perception of property law dramatically. \textit{Property} has a much wider meaning in the constitutional context than the private-law concept of 'ownership'.\footnote{Van der Walt \textit{The constitutional property clause} 67.} A wide range of objects and rights may be expected to be afforded constitutional protection in line with experiences in other jurisdictions. It can be expected that most real rights,\footnote{Administrator, Natal, and Another \textit{v} Sibiya and Another 1992 (4) SA 532 (A) at 539.} personal rights with regard to property and so-called 'new property' will be included in the constitutional concept of property. It should, however, be noted that 'new property' includes a vast variety of different rights and objects, and the courts will have to determine the grounds on which these rights or objects will be accepted as property in terms of the property clause.\footnote{See Chaskalson and Lewis in Chaskalson \textit{et al.} \textit{Constitutional law of South Africa} 31-1 at 7 where it is argued that the term 'rights in property' is too narrow to allow for the protection of the occupation rights of labour tenants and the undisturbed possession of squatters. But see Van der Walt 1994 \textit{THRHR} 181 at 193 \textit{et seq.}} The different objects which may qualify for protection in terms of section 25 include immovable tangible property, movable tangible property, immaterial property, rights with regard to debts, claims, goodwill and shares in a company, welfare rights against the state, licences, permits, quotas, and other rights against the state which are based on legislation. In \textit{Transkei Public Servants Association \textit{v} Government of the Republic of South Africa and Others}\footnote{In German law three requirements are formulated for the acknowledgement of public law rights as constitutional property: (a) it must accrue to a person exclusively like a private law right; (b) it must be substantially based on the personal contribution or effort of the individual; and (c) it must serve to secure the person's survival. See Kleyn 1996 \textit{SAPL} 402 at 421; Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on Germany.} it was stated obiter that a housing subsidy could be a right in property for the purposes of section 28 of the interim Constitution. Similarly, the

\footnote{1995 (9) BCLR 1235 (TkS).}
protection of *property as a right* may be extended to include ownership and limited real rights, personal rights, immaterial property rights, customary residential and commonage-use rights, statutory rights in terms of land reform legislation, social security rights and other non-proprietary rights.\(^{51}\) According to Van der Walt\(^ {52}\) the exact range of objects and rights which can be included under the property clause will have to be determined, in each individual case, with reference to the principle underlying the Constitution, namely whether the inclusion of a specific object or right will promote the values that characterise an open and democratic society based on human dignity, equality and freedom.

It should, however, be noted that the meaning and scope of constitutional property are not stable or unchangeable, and will always be subject to changes within a society. Different social, political or economic circumstances may cause the courts to remove an object or rights from the category of protected property interests. The question will always be whether a specific right serves to promote the constitutional purpose of the property clause, namely to establish an equitable balance between the interests of an individual property holder and the public interest in an open and democratic society based on equality, freedom and human dignity. It may also be possible that while a specific property interest is afforded constitutional protection, not all entitlements associated with that property interest will necessarily be guaranteed.\(^ {53}\)

It has been pointed out above that ownership in the private law context is regarded as an absolute and exclusive right, and although ownership is always subject to limitation,

\(^{51}\) See in this regard the discussion by Van der Walt *The constitutional property clause* 46 and 63 *et seq.* Also see Van der Walt 1995 *SAPL* 298 at 311; Van der Walt 1994 *THRHR* 181 at 193 *et seq.*; Badenhorst in *Bill of Rights Compendium* 3FB-1 at 10 and 12 *et seq.*; Chaskalson and Lewis in Chaskalson *et al* *Constitutional law in South Africa* 31-1 at 2 *et seq.* especially at 6; Kleyn 1996 *SAPL* 402 at 423; Du Plessis and Olivier 1997 *HR & Const L J of SA* 11 at 12. Also see 8.3.3 above with regard to the scope of constitutional property in German law and 7.4 above with regard to the scope of constitutional property in Dutch law. Also see 10.2 above with regard to the position in terms of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms.

\(^{52}\) Van der Walt *The constitutional property clause* 55.

\(^{53}\) Van der Walt *The constitutional property clause* 68.
it is perceived as an inherently unrestricted right. Limitation and restriction of the owner's right are regarded as exceptions. Constitutional property rights, on the other hand, are regarded as inherently restricted rights. 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 (the general limitations clause). Section 25 furthermore provides for the limitation (either by way of deprivation or expropriation) of property rights and sets out the requirements for valid limitations.

Roux points out that the phrase 'rights in property', as it was used in the interim Constitution, coupled with the notion of property as a bundle of rights, might lead to the recognition of the idea of conceptual severance. A reactionary court would be in a position to regard every taking of a specific entitlement in property as an expropriation for which just and equitable compensation is required. The application of the idea of conceptual severance would, however, be limited by the term 'expropriation' in section 25, which has a narrower meaning than the American term 'taking'. The question of conceptual severance would only be raised in those cases where the state actually acquires a specific entitlement in property, and not in cases where the state merely deprives or restricts a specific entitlement. If the courts adopt a reactionary approach to expropriation and compensation the notion of property as a bundle of rights would provide ample opportunity to apply the idea of conceptual severance without any assistance of the phrase 'rights in property'.

In an effort to create an equitable balance between the interests of the individual and the public interest, the introduction of limits, restrictions, controls, regulations and levies on individual property right are necessary to ensure that the public interest is protected.

54 See chapter 6 above.
55 Van der Walt The constitutional property clause 47 et seq; Kleyn 1996 SAPL 402 at 419.
56 Roux in Chachalia et al Fundamental rights in the Constitution 239 et seq.
57 Van der Walt Constitutional property clauses: a comparative analysis chapter on South Africa; Van der Walt 1995 SAPL 298; Badenhorst in Bill of Rights Compendium 3FB-1 at 12.
The extent to which property rights may be restricted is determined by balancing the rights or interests of the individual with the interests of society. The courts may follow the German approach in terms of which the right's proximity to either personal or social interests plays a decisive role when rights are restricted: the closer or more important the right is to the individual freedom and personality, the less severe the restrictions will be, and the further a right is removed from the individual and the closer it is to serving the public interest, the more severe the restrictions will be.56

11.5 Limitation of property

Section 7(3) determines that all the rights in the bill of rights are subject to the limitations contained or referred to in section 36, or elsewhere in the bill. Section 36 contains the general limitation provisions and every limitation of a fundamental right has to comply with the requirements set out in this section. Section 25 explicitly provides for the limitation of property rights. Section 25(1) provides that no one may be deprived of property except in terms of a law of general application and that arbitrary deprivations are not permitted. Section 25(2) and (3) specifically deal with the question of expropriation.

Any limitation of a property right (either deprivation or expropriation of property) has to comply with the specific limitation provisions set out in section 25 as well as with the general limitation provisions contained in the general limitation clause in section 36. Specific limitation provisions are contained in the guarantee clause itself (in this case the property clause) and provide for limitations of that right specifically with regard to the purpose for which the right may be limited, the procedure to be followed for imposing a limitation, the organs which may limit the right, and so on.59

56 Kleyn 1996 SAPL 402 423 et seq.
59 Prince v President of the Law Society, Cape of Good Hope and Others 1998 (8) BCLR 976 (C) at 992. See also Rautenbach General provisions in the South African bill of rights 106 et seq; Woolman 1997 SAJHR 102 et seq; Woolman in Chaskalson et al Constitutional law of South Africa 12-1 et seq; Van der Walt 1997 SAPL 275 at 282; Van der Walt The constitutional property clause 80 et seq.
The general limitation clause reads as follows:

"Limitation of rights

36. (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".

Section 36 differs from the limitation clause in the interim Constitution (section 33) in that the requirements that a limitation needs to be necessary in certain circumstances, and that the limitation must not negate the essential content of the right are not included in section 36. Other than this the two limitation clauses are similar. The limitation clause has been interpreted by the Constitutional Court in *S v Makwanyane and Another*. Although this case was decided on the grounds of section 33 of the interim Constitution, it is assumed that the court's interpretation will also apply to section 36. In essence the limitation clause involves the assessment of the competing public and private interests or rights based on the proportionality principle. The court stated that:

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60 1995 (3) SA 391 (CC).
61 Van der Walt *The constitutional property clause* 83; Van der Walt 1997 *SAPL* 275 at 314 *et seq.*
"[t]he limitation of constitutional rights for the purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality".\(^{62}\)

The court stressed the fact that no absolute standard can be laid down for determining reasonableness, because different rights have different implications in a open and democratic society based on freedom and equality. Although general principles can be established, they have to be applied on a case to case basis, taking the particular circumstances of the case into consideration. The balancing of the different interests is inherent to the requirement of proportionality. The court went on to set out the considerations which may be taken into account in balancing the rights of the affected individual with the public interest.\(^{63}\) The considerations mentioned by the court were ultimately included in section 36. The general limitation clause, as interpreted by the Constitutional Court, embodies the proportionality test, according to which limitations will be judged. By applying the proportionality test the courts will determine whether a limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom and whether the limitation is rationally related to the purpose it aims to achieve.\(^{64}\)

The court emphasised the fact that it is not for the courts to second-guess the wisdom of policy choices made by the legislature.\(^{65}\) The balancing of the different interests should not be done in such a manner that it amounts to a inquiry into the political

\(^{62}\) 1995 (3) SA 391 (CC) at 436C.

\(^{63}\) 1995 (3) SA 391 (CC) at 436E.

\(^{64}\) The proportionality test, as set out in the *Makwanyane* decision has its roots in Canadian law. The proportionality principle in the general limitation clause is strongly based on the Canadian decision in *R v Oakes* (1986) 19 CRR 308. See in general Rautenbach *General provisions in the South African bill of rights* 81 et seq; Woolman 1997 *SAJHR* 102 at 107 et seq; Woolman in Chaskalson et al *Constitutional law of South Africa* 12-1 et seq; Van der Walt *The constitutional property clause* 83 et seq, Van der Walt 1997 *SAPL* 275 at 314 et seq; Carpenter 1995 *SAPL* 260.

\(^{65}\) 1995 (3) SA 391 (CC) at 436F-G.
wisdom of legislative measures. This would amount to the application of a substantive due process standard and may severely frustrate any attempt by the state to effect social and economic change.\textsuperscript{66} The role of the courts is rather to judge the constitutional suitability of a limitation of a fundamental right.\textsuperscript{67} This means that the courts have to determine whether a specific limitation can be justified in terms of the provisions set out in the Constitution itself, and whether it is justified to allow one constitutional principle to outweigh another constitutional principle. The court's view on the political wisdom or necessity of a specific law should have no bearing on its decision whether or not to allow a particular limitation of a fundamental right.

With regard to the interaction between the specific limitation provisions and the general limitation provisions it is important to note that the general limitation clause is applicable to all rights contained in the bill of rights.\textsuperscript{68} The reason for and purpose of a specific limitation provision determines its relationship with the general limitation clause.\textsuperscript{69} Firstly, a specific limitation provision can deviate from one of the general limitation provisions. In this case the specific limitation provision will override that specific element of the general limitation clause, while all the other elements of the general limitation clause are still fully applicable. Secondly, a specific limitation provision may clarify one of the elements of the general limitation provisions in order to avoid confusion and uncertainty. All other elements of the general limitation clause

\textsuperscript{66} See in this regard 9.2 above with regard to the effects of the application of the substantive due process standard in the United States of America. Also see Chaskalson 1993 SAJHR 388 at 401 \textit{et seq}; Chaskalson and Lewis in Chaskalson \textit{et al} Constitutional law of South Africa 31-1 at 11.

\textsuperscript{67} Van der Walt \textit{The constitutional property clause} 83 \textit{et seq}, Van der Walt 1997 SAPL 275 at 315 \textit{et seq}.

\textsuperscript{68} Section 36(1). For different interpretations on the relationship between the specific limitations provisions in the property clause and the general limitations clause see Murphy 1995 SAPL 107 at 120 \textit{et seq}; Chaskalson and Lewis in Chaskalson \textit{et al} Constitutional law of South Africa 31-1 at 11 where a distinction is made between limitations effected by the exercise of executive powers and limitations effected by the legislature. Also see Badenhorst in \textit{Bill of Rights Compendium} 3FB-1 at 33.

will still apply unchanged. Thirdly, specific limitations can be mere repetitions of the general limitations provision. This will not detract from the validity of any of the elements of the general limitation clause.\textsuperscript{70}

The term 'deprivation' is used in the specific limitation provisions in section 25(1). This is not in conflict with the term 'limitation' as used in the general limitations clause. The provision that no one may be deprived of property except in terms of a law of general application simply repeats the similar provision in section 36(1). The specific limitation provisions in section 25(1) do not change or add anything to the general limitation provisions in section 36(1) and will consequently be treated in terms of the second category mentioned above.\textsuperscript{71} Although section 25(1) mentions the extra requirement that a limitation may not be arbitrary, it may be argued that the phraseology of section 36 will not allow arbitrary limitations of rights either.\textsuperscript{72} Any limitation (deprivation and expropriation) of property thus has to be imposed in terms of a law of general application (as required by both section 25(1) and section 36(1)), may not be arbitrary (as explicitly required by section 25(1) and implicitly by section 36(1)), and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including: the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the same purpose (as required by section 36(1)). The limitation also has to be imposed for a public purpose or in the public interest and must be proportionate in the sense that there has to be a rational connection between the limitation and the limitation.

\textsuperscript{70} For a discussion see Van der Walt 1997 SAPL 275 at 287; Van der Walt The constitutional property clause 92 et seq; Kleyn 1996 SAPL 402 at 428.

\textsuperscript{71} For a discussion see Kleyn 1996 SAPL 402 at 431 et seq; Van der Walt The constitutional property clause 93; Van der Walt 1997 SAPL 275 at 285 et seq.

\textsuperscript{72} Section 36 requires that a limitation has to be effected in terms of a law of general application, and in terms of the proportionality principle the limitation has to bear a rational relationship to the legislative goal it intends to achieve. Section 36 will not allow for any 'arbitrary' limitation of a right - no matter what interpretation is given to the word 'arbitrary'. See Van der Walt The constitutional property clause 107 et seq; Kleyn 1996 SAPL 402 at 433; Chaskalson and Lewis in Chaskalson et al Constitutional law of South Africa 31-1 at 13.
Deprivations include all legitimate state interferences with private property rights. Deprivations constitute a wide category of state interferences including both the regulation of the use of property and expropriation of property. Not all of these interferences require compensation. Compensation is only required for expropriation. The difference between deprivations and expropriations can be explained in terms of the difference between the state’s police power and its power of eminent domain. In terms of the police power the state has the authority to limit and regulate the use of private property. Property is not expropriated (acquired) from an individual in the case of deprivations. Deprivations merely limit the use and exploitation of property by the imposition of regulations, controls and restrictions. Because of the fact that deprivations are non-acquisitive in nature, no compensation is payable to the affected party. Deprivations may include measures such as land-use and planning controls, building regulations, certain land reform measures and environmental conservation laws. Expropriations, on the other hand, are effected in terms of the state’s power of eminent domain. In this case property is actually taken from the individual and acquired by the state for a public purpose or in the public interest, and consequently compensation will be payable in this case.

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73 Van der Walt The constitutional property clause 95 and 109.

74 The distinction between deprivation and expropriation corresponds with the situation in other jurisdictions. See 8.4 and 8.5 with regard to the situation in Germany, 9.4 with regard to the position in the United States of America and 10.2 regarding the position in terms of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. See Van der Walt in Van Wyk et al Rights and constitutionalism 455 at 464 et seq; Murphy 1992 SAJHR 362 et seq; Murphy 1993 THRHR 623 et seq; Badenhorst in Bill of Rights Compendium 3FB-1 at 15; Chaskalson 1993 SAJHR 388. Also see Davies and Others v Minister of Land, Agriculture and Water Development 1997 (1) SA 228 (ZS) where the distinction is accepted as part of Zimbabwean law.

75 Van der Walt The constitutional property clause 102 et seq; Van der Walt 1995 SAPL 298 at 307 et seq; Klyn 1996 SAPL 402 at 427; Chaskalson 1994 SAJHR 131 at 134 et seq; Murphy 1995 SAJHR 107 at 115 et seq; Chaskalson and Lewis in Chaskalson et al Constitutional law of South Africa 31-1 at 10 et seq.
11.5.1 Deprivation of property

In terms of section 25(1) the deprivation has to be imposed by a law of general application and no law may permit arbitrary deprivations of property. The requirement that the deprivation of property has to take place in accordance with a law of general application entails that the law must apply generally and not just to one person or a group of persons so as to single them out for discriminatory treatment. Such a law also has to be accessible, non-arbitrary, specific and clear.\footnote{Van der Walt \textit{The constitutional property clause} 81 \textit{et seq.} Chaskalson and Lewis in Chaskalson \textit{et al.} \textit{Constitutional law of South Africa} 31-1 at 11; Woolman in Chaskalson \textit{et al.} \textit{Constitutional law of South Africa} 12-1 \textit{et seq}; Badenhorst in \textit{Bill of Rights Compendium} 3FB-1 at 33. With reference to the position in terms of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms see \textit{Lithgow v United Kingdom} ECHR Series A vol 102 (1988) where it was held that a law depriving some one of their property has to be adequately accessible and precise.} In terms of the interim Constitution the term 'law' in section 28(2) has been interpreted to connote a statute. The Afrikaans translation of section 28(2) uses the word \textit{wet} which means statute.\footnote{Du Plessis \textit{v De Klerk} 1996 (5) BCLR 658 (CC) par 44 \textit{et seq.} Also see Kleyn 1996 \textit{SAPL} 402 at 432.} In the final Constitution, however, the Afrikaans translation of 'law of general application' is \textit{'algemeen geldende regsvoorskrif}. In this context 'law' is interpreted in its widest sense to include common law and customary law.\footnote{Badenhorst in \textit{Bill of Rights Compendium} 3FB-1 at 32; Van der Walt \textit{The constitutional property clause} 108.}

It is not exactly clear what the meaning of the second part of section 25(1), which requires that no law may permit arbitrary deprivations, is. The obvious meaning would be that deprivations may not only be directed at one or a group of persons, but have to be of general validity. A deprivation would also be regarded as arbitrary if it depends simply on the will of the party effecting the deprivation. This meaning is, however, already established by the requirement that deprivations have to be effected in terms
of a law of general application.\textsuperscript{79} Van der Walt\textsuperscript{80} points out that the meaning of 'arbitrary' may be to ensure that no law can delegate the arbitrary power to effect a deprivation to some state body or official. Legislative measures will also be arbitrary when they bear no rational relationship to the legislative goal they are intended to achieve.\textsuperscript{81}

Section 25(1) contains no explicit requirement for a deprivation to be in the public interest or for a public purpose. Read against the background of the purpose of the property clause (to create an equitable balance between the interests of an individual and the public interest in an open and democratic society based on human dignity, equality and freedom) and the requirements for the valid limitation of all fundamental rights contained in the bill of rights as set out in section 36, it may be assumed that a public purpose or public interest requirement implicitly forms part of the requirements for valid deprivations of private property. The factors listed in section 36(1) which have to be taken into account in order to determine whether a limitation is reasonable and justifiable in an open and democratic society also indicate that a limitation will only be valid if it is effected for a public purpose or in the public interest.\textsuperscript{82}

11.5.2 Expropriation of property

It is pointed out above that expropriations form part of the broader category of

\textsuperscript{79} Kleyn 1996 SAPL 402 at 433.

\textsuperscript{80} Van der Walt \textit{The constitutional property clause} 107. Van der Walt also indicates that 'arbitrary' may be interpreted to mean that an individual or a small group of individuals may not be expected to bear an unacceptably heavy burden for the sake of the general public.

\textsuperscript{81} See \textit{S v Lawrence}; \textit{S v Negal}; \textit{S v Solberg} 1997 (4) SA 1176 (CC). Although this case was decided with reference to the right to economic activity (section 26 in the interim Constitution) its implications will have a direct bearing on section 25(1) in that it equates the non-arbitrary standard of review with the rationality review standard in US law. Also see Chaskalson and Lewis in Chaskalson \textit{et al Constitutional law of South Africa} 31-1 at 13; Badenhorst in \textit{Bill of Rights Compendium} 3FB-1 at 33.

\textsuperscript{82} See Van der Walt \textit{The constitutional property clause} 108 \textit{et seq} where it is pointed out that a comparative analysis of the situation, in among others, Germany, Switzerland, Austria and the European Convention reveals that the courts have generally been strict in requiring that deprivations have to be for a public purpose.
deprivations, and in order to determine whether the provisions of section 25(2) will be applicable to a specific case, it is important to differentiate between 'mere deprivations' and expropriations. According to the traditional view an expropriation entails the transfer of property from an individual to the state (for a public purpose) against the payment of compensation to the expropriatee. In terms of this narrow, traditional view, expropriations are those deprivations where the state actually acquires the individual's property. 83 According to Chaskalson and Lewis 84

"[e]ven state action which extinguishes property rights is not recognised as expropriation unless there is some transfer of the rights in question to the state or to a third party. It would follow that the 'expropriations' to which... s 25(2) refer are instances where the state, without the consent of the owner of the property concerned, acquires that property or transfer it to a third party. State interference with property rights which does not involve acquisition or transfer of property is not an expropriation, irrespective of the extent of the interference".

With regard to the nature of an expropriation, Van der Walt 85 indicates that the scope of expropriation should not be restricted unduly, but should be interpreted wide enough to include the acquisition of any right in the property (not only ownership), any form of property which is recognised for the purposes of the property guarantee, and

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83 Kleyn 1996 SAPL 402 at 434; Van der Walt The constitutional property clause 136 et seq. See Badenhorst in Bill of Rights Compendium 3FB-1 at 28 where an exposition of the differences between expropriation (in the narrow sense) and regulatory measures of control (deprivations) of property is provided.

84 Chaskalson and Lewis in Chaskalson et al Constitutional law of South Africa 31-1 at 15.

85 Van der Walt The constitutional property clause 134. Van der Walt The constitutional property clause 135, however, points out that the technique of conceptual severance, according to which the entitlements of a property holder are conceptually divided into separate properties, should be avoided. See in this regard Radin Reinterpreting property 126 et seq.
permanent as well as temporary acquisitions.\textsuperscript{86} The scope of expropriation should furthermore not be restricted to the private law concept of an actual acquisition of property by the state, because property can be taken without the state acquiring anything.\textsuperscript{87} It is, however, up to the courts to decide exactly what the term 'expropriation' will encompass in the South African context.

The constitutional validity of an expropriation will be scrutinised during the second phase of the constitutional property dispute. Only after it has been established that the right in question qualifies for protection in terms of the property clause will the court evaluate the constitutionality of the limitation in question. In order for an expropriation to be constitutionally valid it has to conform with the specific limitation provisions set out in section 25 and the general limitation provisions set out in section 36.\textsuperscript{88} As is pointed out above, expropriations can be regarded as a specific form of deprivations, and as such all expropriations have to meet the requirements for valid deprivations as set out in section 25(1). An expropriation will only be valid if: (a) it is effected in terms of a law of general application;\textsuperscript{89} (b) it is not arbitrary;\textsuperscript{90} (c) it is effected for a public purpose or in the public interest;\textsuperscript{91} (d) it is subject to the payment of just and equitable compensation;\textsuperscript{92} and (e) it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its

\textsuperscript{86} Also see Chaskalson and Lewis in Chaskalson \textit{et al} \textit{Constitutional law of South Africa} 31-1 at 15; Chaskalson 1994 \textit{SAJHR} 131 at 136 with regard to the extension of the concept of expropriation to include temporary expropriation.

\textsuperscript{87} Van der Walt \textit{The constitutional property clause} 134; Kleyn 1996 \textit{SAPL} 402 at 437. Also see 9.5 above.

\textsuperscript{88} See the discussion in 11.5 above.

\textsuperscript{89} Section 25(1), section 25(2) and section 36(1).

\textsuperscript{90} Section 25(1).

\textsuperscript{91} Section 25(2)(a) read with section 25(4)(a).

\textsuperscript{92} Section 25(2)(b) and section 25(3).
purpose, and less restrictive means to achieve the same purpose.  

Section 25(2) determines that property may only be expropriated for 'a public purpose or in the public interest'. It is unclear why the public purpose/public interest requirement is duplicated, but it probably is to ensure that land reform measures are not frustrated by a narrow interpretation of the public purpose requirement to include only 'public use'. The duplication of the public purpose/public interest requirement and the statement in section 25(4)(a) that the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's resources, ensures that the validity of land reform measures are not attacked for not being in the public interest. Expropriations will thus only be valid if they are effected for a public purpose and if they are for purposes of land reform, which is in the public interest. 

Van der Walt points out that the two different references to the public purpose requirement in section 25(2) and section 25(3) may be interpreted differently. The public purpose requirement in section 25(2) is aimed at the protection of the individual against unnecessary or unjustified expropriation by the state and as such it may be read restrictively to mean 'public necessity'. The public purpose requirement in section 25(3), on the other hand, is aimed at the protection of the common interest in the determination of the amount of compensation and should be read extensively to mean 'public benefit'. The two different interpretations of the public purpose requirement can indicate that expropriations, even if they are effected to effect land reform, have to reflect an equitable balance between the interests of the individual and the public interest, and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. However, this does not mean that

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93 Section 36(1).
94 Chaskalson 1994 SAJHR 131 at 137; Kleyn 1996 SAPL 402 at 434.
95 Van der Walt The constitutional property clause 135; Kleyn 1996 SAPL 402 at 437.
96 Van der Walt The constitutional property clause 137 et seq, with reference to the opinion of Böhmer J in the German case BVerfGE 56, 249.
private rights will be sacrificed or that the implementation of land reform measures will be unnecessarily restrained or frustrated by the public-purpose requirement. The phraseology of the property clause as well as the direct programmatic paradigm within which the property clause functions will ensure that comprehensive land reform will not be impeded by the property guarantee. The interpretation and application of the property clause have to reflect the values underlying an open and democratic society based on human dignity, equality and freedom, and the property clause specifically emphasises the importance of the public interest in both the protection and the limitation of property rights.

Up to the implementation of the first democratic Constitution in South Africa, expropriation of property implied the actual acquisition of property by the state or the transfer of property to the state. However, in a constitutional context there is a wider perception of expropriation, in terms of which compensation is required for the taking of property. Takings include both expropriation (where the state acquires property) and those cases where the property rights of the individual are affected so severely that it requires the payment of compensation. This second category of cases where the payment of compensation is required notwithstanding the fact that the state does not acquire anything is commonly known in the US as inverse condemnation or regulatory expropriation. Thus, although no actual expropriation is effected, the effects of the deprivation is such that it is regarded as going too far and amount to a taking of property for which compensation is required. In these instances the loss of the individual property holder rather than the gain of the state is considered to be the functional element of a taking.

It is not clear whether the South African courts will recognise the existence of a

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97 Van der Merwe Sakereg 294; Kleyn and Borraine Silberberg and Schoeman's The law of property 316.
98 See chapter 9 in this regard.
99 Van der Walt The constitutional property clause 118; Kleyn 1996 SAPL 402 at 437 et seq; Chaskalson 1993 SAJHR 388 at 396; Chaskalson 1994 SAJHR 131 at 134; Chaskalson and Lewis in Chaskalson et al Constitutional law of South Africa 31-1 at 18.
category of regulatory expropriations. In light of the purpose of the property clause (to create an equitable balance between the interests of the individual and the public interest) and the application of the proportionality principle embodied in section 36) it seems likely that the courts will not allow the severe restriction of an individual's property rights without compensation. Although it might seem that the recognition of the middle category of regulatory expropriations may impede reform measures in that the payment of compensation is required for regulatory interferences with private property, it does not necessarily mean that existing property rights are afforded absolute protection. It is accepted in other jurisdictions that existing, legitimate uses of property may be prohibited without compensation if and when they become contrary to public health or safety. In protecting the public health and safety the legislature is not restricted to a choice between upholding existing rights or expropriating them against compensation. The legislature has the authority to subject existing rights to new legal regimes in order to accommodate new or changed circumstances. In the process existing rights or entitlements can be abolished, changed or subjected to new or stricter controls and restrictions without attracting compensation and without violating the property guarantee, as long as the rule of law is upheld, the changes are effected in the public interest and are in accordance with the proportionality principle. The

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100 See 8.5 above where it is pointed out that inverse condemnation is not recognised by the Bundesverfassungsgericht in German law. This is mainly the result of article 14.3 (the Junktim-Klausel or linking clause) which requires that law which authorises an expropriation should provide for the nature and extent of compensation. Also see 9.5 above where the position in US law is explained. Regulatory taking is recognised in US law. Whenever it is found that a deprivation 'goes too far' it will be classified as a taking for which compensation is payable. The US courts judge each case on its own merits in an 'essentially ad hoc, factual inquiry'.

101 Van der Walt The constitutional property clause 120 et seq; Kleyn 1996 SAPL 402 at 437 and 441. Although Chaskalson and Lewis in Chaskalson et al Constitutional law of South Africa 31-1 at 18 strongly criticise the ad hoc approach of the US courts, they also recognise the possibility that the South African courts may accept the distinction between deprivations, expropriations and regulatory or constructive expropriations. Chaskalson 1994 SAJHR 131 at 138 expresses the opinion that the South African courts would do well by not recognising regulatory expropriations, because this may result in a situation where the duty on the state to pay compensation becomes so burdensome that it may impede land reform.

102 See 8.5 and 9.5 above.

103 Van der Walt The constitutional property clause 130; Kleyn 1996 SAPL 402 at 437.
recognition of a category of regulatory expropriations will not entrench existing property rights as long as the courts recognise the simultaneous need for regulatory measures that do not require compensation.

The line between deprivations and regulatory expropriations is not very clear and the courts will have to determine in each individual case whether a specific limitation requires the payment of compensation. The principles of reasonableness and proportionality will have to be applied to each case, and compensation will only be due if it is unjust and inequitable to expect the affected property holder to bear the burden without compensation, either because the burden is too harsh or the individual (or a small group of individuals) is expected to bear a burden which should be borne by society at large.

11.6 Compensation

Section 25(2) determines that expropriation of property by the state is subject to compensation. Section 25(3), which deals with the determination of the quantum, manner and time of payment of compensation, determines that compensation must be just and equitable and that it must reflect an equitable balance between the public interest and the interests of the affected party. In order to determine whether compensation is just and equitable and whether an equitable balance is created between the conflicting interests, section 25(3) states that all relevant factors must be taken into account, including: (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.

104 With reference to section 25(2) and (3) and section 36(1).

105 Van der Walt The constitutional property clause 132; Kleyn 1996 SAPL 402 at 441; Chaskalson and Lewis in Chaskalson et al Constitutional law of South Africa 31-1 at 18.

106 For a discussion of these factors see Badenhorst Bill of Rights Compendium 3FB-1 at 39 et seq; Budlender in Budlender, Latsky and Roux Juta’s New Land Law 1-56 et seq.
The amount, time and manner of payment of compensation have to be agreed on by the affected parties, and failing an agreement, the court will have to make a determination in this regard.\textsuperscript{107} Van der Walt\textsuperscript{108} points out that compensation need not be paid in money, nor is it necessary to pay it immediately, as long as the time and manner of payment of compensation adhere to the balancing principle and are just and equitable in view of the relevant circumstances.

The balancing principle embodied in section 25(3), as well as the list of factors which have to be taken into account in the determination of the quantum of compensation clearly indicates that the state need not pay full compensation or the full market value of the expropriated property. In a comparative analysis the Constitutional Court found in \textit{In re: Certification of the Constitution of the Republic of South Africa, 1996}\textsuperscript{109} that there is no evidence to suggest that market value is the only acceptable standard for compensation. Compensation may also be less than market value, as long as the amount of compensation reflects a proportional balance between the interests of the affected individual and the common interest. The factors listed in section 25(3)(a) to (e) will assist the court in creating such a balance. Property which was acquired or improved with direct state investment and subsidies, is underutilised or is held for purely speculative purposes may justify expropriation against compensation less than market value or even no compensation at all. In light of the statement in section 25(4)(a) that the public interest includes the nation's commitment to land reform, coupled with the immense social, political and economical importance of efforts to bring about a just and equitable distribution of land in South Africa, it might be justified to set the quantum of compensation in the case of land reform at less than market value.\textsuperscript{110}

\textsuperscript{107} Section 25(3).
\textsuperscript{108} Van der Walt \textit{The constitutional property clause} 144. Also see Chaskalson and Lewis in Chaskalson \textit{et al} \textit{Constitutional law of South Africa} 31-1 at 25; Badenhorst \textit{Bill of Rights Compendium} 3FB-1 at 38.
\textsuperscript{109} 1996 (10) BCLR 1253 (CC) at 1288.
\textsuperscript{110} See in general Kleyn 1996 SAPL 402 at 444; Van der Walt \textit{The constitutional property clause} 145 \textit{et seq}; Chaskalson and Lewis in Chaskalson \textit{et al} \textit{Constitutional law of South Africa} 31-1 at 23 \textit{et seq}; Badenhorst \textit{Bill of Rights Compendium} 3FB-1 at 38.

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Budlender\textsuperscript{111} provides an interesting analysis of the factors which have to be taken into account when the quantum of compensation is determined. The guiding principle is that compensation should be just and equitable. To determine exactly what is just and equitable all relevant factors have to taken into account, and the weight and meaning of the different factors should be determined with reference to the overall structure and purpose of the Constitution. The facts and circumstances of each case will have a bearing on the method and outcome of the way in which the factors are weighed against each other. The market value of the affected property is only one of the relevant factors, and it should not be regarded as the most important factor. In terms of the \textit{Expropriation Act}\textsuperscript{112} market value has traditionally been regarded as the only guiding principle in the calculation of the quantum of compensation,\textsuperscript{113} but in light of the fact that this Act has to be interpreted in accordance with the Constitution, this perception is likely to change. Every relevant factor has to be accounted for in light of the facts and circumstances of the specific case.

It is theoretically possible that compensation may be higher than market value, depending on the circumstances in that particular case. Although the value of the property holder's own investment in the property is not mentioned in section 25(3) as a factor which must be considered in the process of determining the amount of compensation,\textsuperscript{114} it is stated in section 25(3) that all relevant factors must be taken into account to determine just and equitable compensation, and own investment may play a decisive role in this regard.\textsuperscript{115} Chaskalson and Lewis, however, point out that in the

\textsuperscript{111}Budlender in Budlender, Latsky and Roux Juta's \textit{New Land Law} 1-56 et seq. Although this discussion is based on the factors enumerated in section 28(3) of the interim Constitution, the arguments are also valid for section 25(3).

\textsuperscript{112}63 of 1975.

\textsuperscript{113}The importance of the market value in the \textit{Expropriation Act} 63 of 1975 has perhaps been overstated. See \textit{Kerksay Investment (Pty) Ltd v Randburg Town Council} 1997 (1) SA 511 (T) at 522.

\textsuperscript{114}Section 28(3) of the interim Constitution specifically included the value of investments by those affected as one of the factors which must be taken into account in the determination of the quantum of compensation. Also see Murphy 1995 \textit{SAPL} 107 at 129.

\textsuperscript{115}Kleyn 1996 \textit{SAPL} 402 at 444.
determination of the quantum of compensation it is the benefit of the state and not the loss of the affected individual which has to be taken into account, and as such is seems highly unlikely that compensation at more than market value will be regarded as just and equitable.\textsuperscript{116}

The duty to compensate in the case of expropriation is recognised in most jurisdictions.\textsuperscript{117} Compensation needs to be just and equitable and must reflect an equitable balance between the interests of the affected individual and the public interest. This requirement allows for the possibility of very low or even no compensation, depending on the circumstances of the specific case. In these exceptional cases the state will, however, have to indicate that all relevant factors justify the payment of very low or no compensation and that the quantum of the compensation reflects an equitable balance between the conflicting interests. Exceptional cases where property has been acquired and/or improved inequitably with direct state funding and subsidy may justify expropriation against very little or no compensation.\textsuperscript{118}

Section 25(8) states that no provision of section 25 may impede land or other reform measures taken by the state to redress the results of past racial discrimination, provided that any departure from the provisions of section 25 is in accordance with the provisions of section 36(1). Van der Walt\textsuperscript{119} points out that section 25(8) seems superfluous and that the only possible interpretation of section 25(8) is that the state may be able to expropriate without compensation if the state can indicate that the non-

\begin{itemize}
\item[\textsuperscript{116}] Chaskalson and Lewis in Chaskalson \textit{et al} \textit{Constitutional law of South Africa} 31-1 at 24 point out that in the determination of the quantum of compensation it is the benefit of the state and not the loss of the affected individual which have to be taken into account, and as such is seems highly unlikely that compensation at more than market value will be regarded as just and equitable. Also see Badenhorst \textit{Bill of Rights Compendium} 3FB-1 at 38.
\item[\textsuperscript{117}] See 8.6, 9.6 and 10.2.3 above.
\item[\textsuperscript{118}] Van der Walt \textit{The constitutional property clause} 144.
\item[\textsuperscript{119}] Van der Walt \textit{The constitutional property clause} 143 \textit{et seq}; Budlender in Budlender, Latsky and Roux \textit{Juta's New Land Law} 1-72 \textit{et seq}.
\end{itemize}
payment of compensation is in accordance with section 36(1). It should, however, be noted that the specific limitation provisions for valid deprivation and expropriation of property set out in section 25 correspond with the general limitation provisions of section 36, and consequently it seems improbable that an expropriation without compensation will meet the requirements of section 36 without also meeting the requirements of section 25. Or put differently, if an expropriation without compensation aimed at land reform is not just and equitable in terms of section 25, it is hard to imagine that it will be justifiable in terms of section 36.

11.7 Conclusion

It is pointed out in section 1 that the concept of ownership and property rights did not develop in an uninterrupted, linear line, but that the development was subject to a few discontinuities. Each of these discontinuities constituted a break in the logical development of property rights in that the different concepts or the social function of ownership or property had to change dramatically in order to suit the needs of a particular society. Vulgar Roman law, the introduction of feudalism, the abolition of feudal law and the concept of divided ownership, and the creation of a scientific, hierarchical system of property rights each called for a totally new approach to either ownership or property rights in general. The change in the social function of ownership or the creation of a new concept of property rights was necessitated by the changing social and political context in which property rights had to function.

It is pointed out in chapter 6 that the process of scientification of the private-law concept of ownership (and other property rights) in South Africa was influenced by German Pandectism. The social function of property rights was negated and pushed to the background by conceptual approach to property law. The hierarchical system of property rights reinforced the concept of absolute, exclusive and individual ownership as the most comprehensive real right. All other property rights were regarded as lesser rights. In terms of this concept of ownership, ownership was regarded as an in principle unlimited right and all limitations or restrictions of the owner's rights were seen as
exceptions.

The implementation of the first democratic Constitution in South Africa signalled another discontinuity or break in the development of property rights in South Africa. The constitutional guarantee of property placed the whole property debate within a new constitutional context. The traditional conceptual approach to property law is replaced by a new, broader debate which emphasise the social and political function of property. The range of rights and objects which are afforded protection in terms of section 25 is much broader than in private law, and ownership is no longer regarded as the most important property right.

The implementation of the constitutional property guarantee does not mean that a new concept of property is created, but rather that the property debate has changed. Cognisance is taken of the important social and political function of property and this has become part of the public debate on property. All property rights are now afforded the same protection and the limitation of all rights are regulated by section 25. Special provision is made in section 25(4) to 25(7) for different measures to effect comprehensive land reform. These provision further emphasise that property has a social function and that the exercise and limitation of property rights should be dictated by the social context in which they function.
Property in a constitutional context is approached differently from property in a private-law context. It is pointed out in the previous section that property law in private law in the twentieth century is dominated by the abstract conceptualist approach to property rights. In terms of this approach property law is dealt with scientifically. The different property rights are fitted into a hierarchical system of rationally connected concepts and definitions. The conceptualist approach does not take cognisance of the social or political function of property, but treats the different property rights as scientific concepts largely unaffected by social circumstances. The conceptualist approach is regarded as flexible enough to adapt to different social and political circumstances. In view of the neutrality and abstractness of this approach, it is said that property is not affected by new social and political circumstances, it merely adapts to suit the new context in which it has to function.

In a constitutional context property is approached differently. In this context the private-law concept of property is not amended or changed to accommodate the socially important role that property has to fulfill, but property rights are rather interpreted and approached differently. Cognisance is taken of the importance of the social and political role and function of property, and the protection and limitation of property rights have to reflect its social and political dimension. The extent of the protection and limitation of property has to be determined with reference to the public interest, and as such the courts have to establish an equitable or fair balance between the interests of the individual property holder and the common interest. Constitutional property is not dealt with in terms of different concepts which form part of and fit into a hierarchical system of rights. All property rights which are afforded constitutional protection are protected equally.

It is pointed out in the different chapters in this section that individual property rights
are afforded strong protection, but that this protection is balanced with the interests of society. On the other hand, the range of property rights which are protected in terms of the constitutional guarantee of property is much wider than in private law. The scope of constitutional property includes much more than merely ownership and limited real rights with regard to corporeal things. In a constitutional context property is interpreted to include all patrimonial rights, including real rights, personal rights, immaterial property rights, and contractual rights of purchase and sale. In South Africa particularly, it is believed that the scope of constitutional property will be so wide as to also include customary residential and commonage-use rights, statutory rights in terms of land reform legislation, social security rights as well as other non-proprietary rights. The different objects which are or may be recognised as property in terms of the constitutional property clause include movable and immovable tangible property, immaterial property, rights with regard to debts, claims, goodwill and shares in a company, welfare rights, licences, permits, and other rights against the state which are based on legislation. It is up to the courts to decide whether a particular right, interest or object qualify for protection in terms of the property guarantee. In Germany the guiding principle in this regard is whether the protection of a particular right or object will serve to secure for the individual a sphere of personal liberty within which he/she can take responsibility for his/her own affairs in the patrimonial sphere. In South Africa the values underlying the Constitution, namely the promotion of freedom, equality and human dignity in an open and democratic society, will be decisive in the court's determination of whether constitutional protection ought to be afforded to a particular right or object.

On the other hand, unlike the position in civil law, constitutional property rights are not seen as in principle unlimited and absolute rights. It is commonly recognised that the state may limit or restrict an individual's rights in the public interest. The social function of property is accentuated in this regard. The state has the power to limit private property rights. In terms of its power of eminent domain the state may expropriate private property (against just compensation) and in terms of its police power the state has the authority to regulate the use of property. In most western jurisdictions (including
South Africa) the courts strive to establish an equitable or fair balance between the interests of the affected individual and the public interest whenever private property rights are limited. The proportionality principle forms an integral part of constitutional property in German law and is has a substantial influence on the treatment of constitutional property. The proportionality principle is applied in one form or another in most developed countries. Although the European Court of Human rights and the European Commission of Human Rights emphasise the social function of property by leaving a wide margin of appreciation to the contracting states to determine what constitutes a public purpose within their respective circumstances, they still require that a fair balance be struck between the individual and public interest when private property rights are limited. In the US there are Supreme Court decisions which seem to indicate that US law is also moving in the direction of applying a proportionality principle not dissimilar to the principle applied in Germany, the Council of Europe and South Africa. It was stated in *Prune Yard Shopping Center v Robins* that in order for a regulation to be constitutionally valid, it must not be unreasonable, arbitrary or capricious. In *Nollan v California Coastal Commission* the court set out the test for a reasonable deprivation. In the first place the court has to determine whether there is an 'essential nexus' between the conditions imposed by the regulating body and the legitimate state interest it sought to promote. After the 'essential nexus' is established, the court will look into the nature of the relationship between the imposed conditions and the effects of the permission for a certain land-use. In *Dolan v City of Tigard* the court mainly had to deal with the second part of the test, namely the nature of the relationship between the restriction and the proposed development. The court stated that if it can be found that there is a 'reasonable relationship' between the regulatory measure or condition and the expected effects of the development, the regulatory condition will be constitutionally valid. The court, however, expressly stated that it prefers to refer to this test as the 'rough proportionality test', because it best describes

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1. 447 US 74 (1980) at 84.
2. 483 US 825 (1987) at 837 et seq.
the requirement of the Fifth Amendment. Van der Walt, however, points out that the growing tendency to recognise more categories of the so-called 'per se' takings, seems to frustrate the move towards a contextual and proportionality-oriented approach and rather confirm the definitional approach in terms of which certain rights and limitations are regarded as an inherent part of the definition of that right. The conceptual approach to property rights in US law differs from the a-conceptual approach in most other western jurisdictions.

A further indication that the social function of property is recognised and emphasised in the constitutional context is the fact that compensation for expropriation (taking in the US) does not have to be set at market value, but that it may be set at less than market value, depending on all relevant circumstances. This principle is of particular importance in the South African context where land reform is being effected. Section 25 (3) of the South African Constitution determines that the amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the effect of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.

The social importance of property is recognised in the constitutional context and individual property rights are thus not protected at all cost. The individual has to exercise his/her rights in such a manner that it does not harm the interests of society. Where private property rights are limited the individual is expected to make some proportional sacrifice for the common good. The public interest plays a decisive role in the determination of the extent of the sacrifice expected of the individual property holder. The weight of the public interest is determined by the particular circumstances

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4 Van der Walt Constitutional property clauses: a comparative analysis chapter on the United States of America.
in a specific society. Whereas private property rights are afforded strong protection in the US, it can be expected that the public interest will weigh much heavier in the South African context where the maldistribution of land and the land reform measures which aim to rectify this situation, place stronger emphasis on the social function of property.

The approach to property rights in a constitutional context is visibly different from the conceptual approach followed in private law. The importance of scientific, socially and politically unaffected concepts is diminished by the fact that all property rights are interpreted and applied in view of their social role and function within society. The nature and extent of the rights, as well as the extent of the protection and limitation of property rights, are determined with reference to the social role and function of property in society. In the constitutional context recognition is given to the fact that property rights are creatures of their socio-political context and are therefore themselves political in nature. Each property decision (whether to create, reinforce or protect a right) is a political question that has to be taken and justified for each case with full recognition of the context within which the decision is made and the implications of the decision. Property rights are not seen as unchangeable concepts, but rather as violate rights which may be changed or limited to promote the common interest. The introduction of the constitutional order in most jurisdictions (including Germany, the Council of Europe and South Africa) has emphasised the need for a socialised or social-sensitive approach to property, and consequently it necessitated the re-evaluation of the traditional private law model in terms of which property rights are reduced to abstract, scientific and context-neutral concepts.
This section deals with land reform and the relation between land reform and the constitutional protection of property. It is pointed out in the previous section that the traditional, conceptualist approach to property rights is not followed in constitutional law, where the social function of property is emphasised much more strongly than in private law. It is pointed out in section 1 below that there is no historical foundation for the assumption that property developed in an uninterrupted line from its inception in Roman law and that it is flexible enough to adapt to different social and political circumstances. Therefore, there does not seem to be any legitimate justification for the argument that the traditional private law perception of property need or may not be replaced by a new debate on the social role and function of property in society. Section 2 indicates that the protection and limitation of constitutional property is strongly influenced by the social function of property. The public interest plays a decisive role in the determination of the extent of the protection and limitation of property rights, and the courts aim to establish an equitable balance between the interests of the existing property holder and the public interest. In a constitutional context property is seen as a violate right which may be limited for social and political reasons to promote the public interest.

Land reform can be described as a direct, publicly controlled change in the existing character of land ownership and land tenure in an attempt to diffuse wealth, income and productive capacity. In this sense land reform (which aims to promote the public interest) can be interpreted conservatively as being in conflict with the constitutional protection of existing individual property rights. This may lead to a constitutional conflict between a judiciary, that interprets the constitutional property guarantee as a strong guarantee of existing property rights, and a legislature, that attempts to promote the public interest. The Indian experience illustrates the possible dangers and effect of a constitutional battle between the judiciary and the legislature over the implementation
of land reform. However, it is pointed out in this section that the implementation of land reform measures need not lead to a constitutional conflict between the protection of existing property rights (by the judiciary) and the promotion of the public interest (by the legislature). In jurisdictions where the judiciary recognises the importance of the social function of property, land reform is not necessarily seen as an unwarranted interference with individual property rights. Land reform is rather seen as a legitimate public purpose for which the state may limit the rights of the individual. In these jurisdictions the courts attempt to establish an equitable balance between the existing property rights of an individual and land reform in the public interest.

In this section the different forms of land reform and the reasons for the implementation of land reform are discussed in chapter 12. The court's treatment of the relation between existing property rights and land reform is looked at both in jurisdictions with an official land reform programme (mostly developing countries) in chapter 13, and in jurisdictions without an official land reform programme (mostly developed countries) in chapter 14. The different land reform measures introduced by the Mandela government in South Africa, as well as the provisions in the constitutional property clause relating specifically to land reform are investigated in chapter 15.
12.1 Introduction

The concept of land reform is well-known in a variety of jurisdictions, but due to the fact that its purpose and application vary in different jurisdictions it is difficult to provide a general definition of land reform. The term *land reform* is open to a wide range of interpretations. On the one hand it can be interpreted narrowly to mean the redistribution of land or rights in land in order to provide land to the landless. This would include any programme that leads to change (for the better) in the way in which land is held and used.¹ The wide interpretation of the concept of land reform encompasses a comprehensive public programme designed to correct defective land tenure systems and to transform a society on a social, political and economical level. In this sense land reform is a direct, publicly controlled change in the existing character of land ownership and land tenure in an attempt to diffuse wealth, income or productive capacity. In the broad sense a land reform programme includes measures aimed at the redistribution of land, the improvement of existing systems of land tenure, resettlement schemes, the imposition of a land tax, land consolidation for the reorganisation of agricultural units, the provision of housing and the restitution of land to people who have been unjustly dispossessed of their land.² The broader definition of the concept of land reform ensures that a land reform policy is not restricted to the redistribution of land, but that a range of other measures to support land reform can also be included in a comprehensive land reform policy. Essentially, land reform can be described as a state initiative to modify, redirect or change the rights to, use of and relations on the

¹ Warriner *Land reform in principle and practice* xiv.
² Jacoby in Weitz *Rural development in a changing world* 270 et seq; Chivyia *Land reform in Zimbabwe: Policy and Implementation* 20 et seq.
land with regard to the way in which land is used and held in a particular jurisdiction.  

12.2 Reasons for the introduction of land reform

According to Tai the need for land reform centres around two problems: maldistribution of land and tenancy problems. Maldistribution of land refers to the fact that a large percentage of land is concentrated in the hands of a few landowners, while the rest of the land is shared, usually in small fragmented farming units, by a large number of peasants. Maldistribution of land is characteristic of most developing countries. Particularly countries which have a history of colonialism are plagued by inequalities in the patterns of land distribution. More often than not the disparities which exist with

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3 King Land reform - a world survey 5; King Land reform: The Italian experience 2; Carroll The concept of land reform 35; Tai Land reform and politics: a comparative analysis 11; Domer Land reform and economic development 19 et seq; Marcus, Eales and Wildschut Down to earth 179; Hann in Abrahams After socialism 23 at 24.

4 Tai Land reform and politics: a comparative analysis 22 et seq. Also see Domer Land reform and economic development 19 et seq.

5 It is pointed out by Tai Land reform and politics: a comparative analysis 24 that although a high concentration of agricultural land is common in developed countries, the agricultural sector in the national economy is relatively small, and non-agricultural employment opportunities are abundant. The maldistribution of land does therefore not pose serious economic problems. In developing countries, however, the capacity of industries to absorb the surplus rural population is limited and consequently the pressure on land is generally high. King Land reform - a world survey 115 points out that 4.5% of the rural population in Bolivia owned 70% of all rural land in 1950, prior to the implementation of land reform measures. Prior to land reform in Brazil 81% of the land was owned by 4.5% of the population. Also see King Land reform: The Italian experience 10 and The World Bank Staff working paper no. 275 Land reform in Latin America: Bolivia, Chile, Mexico, Peru and Venezuela 1 et seq for more examples of the maldistribution of land.

6 For the purposes of this study the situation in Southern Africa is of particular importance. For an exposition of the history of black land tenure and the apartheid legislation in respect to land in South Africa see Van der Merwe 1989 TSAR 663; Olivier, Du Plessis and Plenaar 1990 SA Public law 266; Van der Walt 1990 Stell LR 26; Van der Walt 1990 De Jure 1; Davenport 1985 Acta Juridica 53; Schoombee 1985 Acta Juridica 77; Van der Post 1985 Acta Juridica 213; Kleyn and Boraine Silberberg and Schoeman's The law of property 493 et seq. For a discussion of the position regarding the maldistribution of land in Zimbabwe see Van Horn 1994 JAL 144 at 147; Naldi 1993 The J Mod Afr Stud 585; Moyo The land question in Zimbabwe 104 et seq; Moyo and Skalness 1990 Africa Focus 201 et seq, and for the position in Namibia see Development Strategy and Policy Unit of the Urban Foundation Urban Foundation Research Report 4 and 5 - Land ownership and conflicting claims: studies from Germany 1937-1991, and from Kenya, Zimbabwe, and Namibia 1950-1991 1 et seq; Office of the Prime Minister Report of the technical committee on commercial farmland 42; Biesele Democratization in Namibia - the view from
regard to the distribution of land are indicative of a disparity in wealth, income and political power, and land reform is used as a means to create social justice and to remove barriers to economic development. Maldistribution of land is characterised by the high concentration of landownership in the hands of a few; the fact that a high concentration of landownership is often coupled with a high degree of absenteeism of the owners; and lastly, the fact that the remaining land is often largely fragmented into small, uneconomical units. High rents, insecurity of tenure and a lack of incentives for productive utilisation of land characterise the tenancy problem.

Land reform programmes are usually adopted due to the existence of one or more of the following conditions: revolution, rural unrest, an ideological commitment to land reform, an international climate conducive to land reform, and pressure from the population itself. The forcible change of the existing political order is usually accompanied by an idealistic aspiration to promote social justice and the public welfare. It is therefore not uncommon for land reform to be associated with political revolutions, for both aim to improve the position of the poor by means of compulsory change. Rural unrest may be an indication that the need for land reform exists. Terrorism against landowners, banditry, and land invasions are regarded as (violent) manifestations of pressure for change from the rural community. The ideological commitment of a group or political party may also provide the impetus for the initiation of land reform. A further condition that may lead to the implementation of land reform measures is pressure from the international community. Lastly, rapid population growth may necessitate a change in the pattern of land use.

The adoption and implementation of a land reform programme by the state is generally

7 Chiviya Land reform in Zimbabwe: Policy and implementation 24.
8 Tai Land reform and politics: a comparative analysis 24.
9 Tai Land reform and politics: a comparative analysis 51 et seq.
based on one - or a combination - of three motives: social, political and economic.\textsuperscript{10} The motive to bring about social equity is founded on the premise that inequality and exploitation are unacceptable in a society based on human dignity and freedom. In this case the aim of land reform is to bring about an equal distribution of land, wealth, income and political power, and to create a free and equal society.\textsuperscript{11} The social motive for land reform entails measures to deal effectively with the injustices of inequitable dispossession of land and the need for an equal distribution of land. The \textit{White Paper on South African Land Policy} emphasises the need to undo the injustices of the past. The policy of racial segregation - particular with relation to the distribution of land - has led to the impoverishment of a large section of the South African population, and the land reform programme aims to alleviate the poverty and suffering of the victims of apartheid. By ensuring that land and rights to land are distributed equitably amongst all the people of South Africa, the land reform programme aims to make a contribution towards national reconciliation and the creation of a stable environment in which all South Africans can live and work.\textsuperscript{12}

King\textsuperscript{13} points out that the social motive may also be interpreted in a different perspective. In many Latin American countries the social responsibility and function of ownership is recognised by law, and when an owner fails to bear his/her social responsibility to the community the state may expropriate the land for redistribution purposes. In terms of this perspective the state uses the social responsibility of landowners as a lever to ensure that owners provide for at least some of the needs of the local community.

\textsuperscript{10} See in general Tai \textit{Land reform and politics: a comparative analysis} 38 et seq; King \textit{Land reform - a world survey} 11; Chivya \textit{Land reform in Zimbabwe: Policy and implementation} 24; Sullins \textit{An assessment of selected land redistribution programs in Latin America, Asia and Africa and implications for the analysis of land resettlement} 16.

\textsuperscript{11} Warriner \textit{Land reform in principle and practice} 4; Chivya \textit{Land reform in Zimbabwe: Policy and implementation} 23 et seq. For an exposition of the social equity motive in the South African context see \textit{White Paper on South African Land Policy} 7.

\textsuperscript{12} \textit{White Paper on South African Land Policy} 11.

\textsuperscript{13} King \textit{Land reform - a world survey} 11.
The political motive behind land reform is closely related to the social motive. In a country characterised by landlessness and the concentration of land ownership in a few hands, land reform can be used as a political tool to demonstrate the government’s sincerity in its attempts to bring about visible and effective change. An effective land reform programme can furthermore establish or confirm the political legitimacy of the government of the day. However, the implementation of a land reform programme is not dependent on a specific political order. Land reform programmes have been implemented under a variety of different political forms with varying degrees of success. Land reform has been instituted under democratic procedures (India), under military regimes (Egypt), under foreign military occupation (Japan), as the result of peasant revolution (Bolivia and Mexico), under revolutionary movements (China, Cuba and Algeria), as a result of rural unrest (Columbia and the Philippines), and under communist collectivisation (Russia).

The economic motive for land reform centres around the need to create employment, increase agricultural production, distribute income equally, and to correct a defective land tenure system. In most developing countries employment opportunities are concentrated in urban areas and due to the fact that a large sector of the population of most developing countries live in rural areas, land reform can assist in creating alternative and additional employment opportunities in rural areas. Although it may be argued that land reform will inevitably cause a reduction in production on large farming

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14 Tai Land reform and politics: a comparative analysis 38 et seq; King Land reform - a world survey 11; Chiviviya Land reform in Zimbabwe: Policy and implementation 25 et seq.

15 Dorner Land reform and economic development 33; Chiviviya Land reform in Zimbabwe: Policy and Implementation 30; Tai Land reform and politics: a comparative analysis 63; Warriner Land reform and development in the Middle East 10 et seq; King Land reform - a world survey 279 (India), 379 (Egypt), 192 (Japan), 92 (Mexico), 115 (Bolivia), 154 (Columbia), 252 (China), 127 (Cuba), 426 (Algeria); World Bank Staff working paper no. 275 Land reform in Latin America: Bolivia, Chile, Mexico, Peru and Venezuela 17 and 21.

16 Dorner Land reform and economic development 20. For a discussion of how land reform contributed to alleviate poverty in Egypt, Syria and Iraq see Warriner Land reform and development in the Middle East 1, 10 et seq, 71 et seq and 113 et seq. See King Land reform - a world survey for the position in a variety of countries, including Mexico (92), Bolivia (115), Cuba (127), Japan (192), India (279), China (252), Egypt (379), and Iraq (392). Also see Sullins An assessment of selected land redistribution programs in Latin America, Asia and Africa and implications for the analysis of land resettlement 19 et seq.
estates, Chiviya points out that this is only a temporary situation and it can be accounted for by administrative difficulties. The productive output on new, small farming units will increase as soon as the farmers settle and establish themselves on the new farms. Small agricultural units are often farmed more intensively and are more labour absorbing than large estates.

A defective land tenure system may be regarded as an obstacle to economic development. By implementing measures directed at correcting the defective land tenure system, land reform can contribute to economic development and growth. The White Paper on South African Land Policy identifies the following economic benefits of land reform: (a) major cost savings resulting from a more rational use of urban land; (b) more households will be able to access sufficient food on a consistent basis; (c) the creation of more opportunities for small scale production; (d) land reform can make a major contribution towards addressing unemployment, particularly in rural areas and small towns; (e) land reform will support business and entrepreneurial culture; and (f) land reform can have an important favourable environmental impact in both urban and rural areas. The White Paper emphasises that redistributive land reform cannot in itself ensure national economic development. It is, however, a precondition for a more secure and balanced civil society. Due to the fact that land reform contributes to

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17 See King Land reform - a world survey 115 et seq and 392 et seq where it is pointed out that the market output in Bolivia and Iraq respectively fell by more than 50% during the first 3 years after land reform was introduced.

18 Chiviya Land reform in Zimbabwe: Policy and implementation 28. Also see Hunt The impending crisis in Kenya: The case of land reform 1 et seq; Sullins An assessment of selected land redistribution programs in Latin America, Asia and Africa and implications for the analysis of land resettlement 19 et seq.


20 See Chiviya Land reform in Zimbabwe: Policy and implementation 29 and the sources mentioned there.


creating conditions of stability and certainty, it is an essential element of sustainable growth.

Although the social, political and economic objectives may complement and enhance one another, they may also impede one another. Land reform to effect social justice is often not reconcilable with economic efficiency. India is a case in point. In India a ceiling of 20 acres was put on the size of land holdings in order to enable as many families as possible to own and live off the land. However, the creation of millions of small plots adversely affected food production and reduced the marketable surplus. This in turn had a disastrous effect on the economy of India.\textsuperscript{23} The social and economic objectives or motives for land reform should, however, not be seen as mutually exclusive, because it is more often than not the case that a land reform programme does not strive to realise only one of these objectives. Usually, a programme has multiple objectives in varying arrangements of priority and it is simply a question of finding the optimal combination. Dorner\textsuperscript{24} points out that social equity and productivity goals conflict only if the present ownership structure of land and the capital connected with that land are assumed to be fixed. When calculations are based on national accounts, with all social costs and benefits appraised, the dilemma seems to break down. Economic considerations should thus not be allowed to dominate or dictate the terms of land reform. Effective land reform measures may succeed in relieving social and political tension, which in turn may create a climate conducive to economic development and new entrepreneurial attitudes.\textsuperscript{25} According to King\textsuperscript{26} the political motive should not be underestimated, for it is often the political balance in a country that determines the extent of land reform. The political motive can be decisive to ensure that land reform laws are indeed implemented and that the practical effects serve to

\textsuperscript{23} King \textit{Land reform - a world survey} 279 et seq; King \textit{Land reform: The Italian experience} 10.

\textsuperscript{24} Dorner \textit{Land reform and economic development} 141 et seq.

\textsuperscript{25} Warriner \textit{Land reform and development in the Middle East} 5 et seq.

\textsuperscript{26} King \textit{Land reform - a world survey} 12. Also see Tai \textit{Land reform and politics: a comparative analysis} 13 et seq.
benefit society as a whole.

12.3 Different forms of land reform

Land reform can take many forms, including land redistribution, restitution of land, tenancy and tenure reform, land tax reform, consolidation of land holdings and colonisation schemes.

12.3.1 Land redistribution

A common characteristic of developing countries, especially post-colonial countries, is the inequality in the distribution of landownership. Any programme which aims to redress these inequalities has to focus strongly on the redistribution of land. It is therefore generally accepted that the redistribution of land forms the core of any effective land reform programme, and it is thus perceived as a universal feature of land reform programmes. Ladejinsky\(^27\) points out that without land redistribution, all other land reform measures, including security of tenure and rent reduction, may prove to be short-lived.

In most jurisdictions land redistribution involves the expropriation of some or all land from big land owners and the assignment thereof to the landless or semi-landless either in the form of individually owned land or as communal units.\(^28\) It often happens that foreign-owned land is confiscated or expropriated against little compensation for redistribution purposes.\(^29\) The imposition of a ceiling on the size of privately owned land

\(27\) Ladejinsky in Hapgood \textit{Policies for promoting agricultural development} 298. Also see King \textit{Land reform - a world survey} 6; Tai \textit{Land reform and politics: a comparative analysis} 12.

\(28\) King \textit{Land reform - a world survey} 14 et seq; King \textit{Land reform: The Italian experience} 3; Cheng \textit{Land reform in Taiwan} 15; Warriner \textit{Land reform and development in the Middle East} 7; Sullins \textit{An assessment of selected land redistribution programs in Latin America, Asia and Africa and implications for the analysis of land resettlement} 13.

\(29\) King \textit{Land reform - a world survey} 15 mentions Algeria, Tunisia and Libya in this regard. Also see the discussion in 14.4 of the position in Namibia with reference to the \textit{Agricultural (Commercial) Land Reform Act} of 1995 in this regard.
is also used as a means to acquire land for redistributive purposes. All land held in excess of the permitted size may be expropriated by the state. The redistribution of land is, however, not dependent on expropriation alone. There are other means of acquiring land for redistributive purposes. The *White Paper on South African Land Policy* states that the process of redistribution in South Africa relies mainly on voluntary transactions between willing sellers and willing buyers. The state will ensure that all impediments to the efficient operation of the land market are removed, and will establish financial mechanisms to provide grants and loans for land acquisition. State land suitable for redistribution will also be identified. Expropriation (against compensation) will only be used as a last resort where land is needed urgently for redistribution and the land needs cannot be met through voluntary market transactions.

Although the level of compensation may vary in different jurisdictions, it is commonly accepted that at least some compensation should be paid to the land owner in the case of redistribution. King points out that compensation can take different forms. Compensation is paid in cash only in the richer countries (such as Venezuela) or in countries where the reform is very small (such as Guatemala). Compensation was also paid in cash in Kenya where the reforms were funded by Britain. In poorer countries (such as Bolivia and Peru) compensation is often paid in non-negotiable government bonds. In China all non-working landlords were expropriated without any

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30 A ceiling on permitted private landholding was introduced in Paraguay, Taiwan, India, Egypt and Cuba. See King *Land reform - a world survey* 15. Also see Cheng *Land reform in Taiwan* 68. Also see 14.4 with regard to the position in Namibia.


32 Also see Cheng *Land reform in Taiwan* 15; Dorner *Land reform and economic development* 48.

33 King *Land reform - a world survey* 16.

34 King *Land reform - a world survey* 147 et seq; Also see World Bank Staff working paper no. 275 *Land reform in Latin America: Bolivia, Chile, Mexico, Peru and Venezuela* 24.

35 King *Land reform - a world survey* 16.

36 Sullins *An assessment of selected land redistribution programs in Latin America, Asia and Africa and implications for the analysis of land resettlement* 29 and 31.
The defects of tenancy and insecurity of tenure are well known. Tenants and people with insecure tenure have little incentive to invest in and improve the land since they can never be sure of enjoying the fruits of the land or of their labour. Insecurity of tenure is related to and aggravated by poverty, forced removals, unemployment and social unrest. In the case of tenancy reform the aim is to improve the position of the tenant. These reforms amount to an amendment of the law of contract in that it changes the relation between the landlord and the tenant. Tenancy reform may include measures concerning: (a) rent levels and form of payment (cash or in kind); (b) the period of tenancy; (c) the basis for renewal of tenancy; (d) grounds for the termination of the contract and the eviction of the tenant; (e) restrictions on subletting; (f) the right to, and compensation for improvements; and (g) encouragement of eventual ownership by the tenant.

Tenure reform is aimed at the clarification and strengthening of the rights of individuals or groups to the land they occupy. Tenure reform also amounts to an amendment of the law with regard to land holding, and as such it amounts to an amendment of property law. It is mainly rights-based and is generally designed to extend registerable tenure rights to all landholders, to eliminate land holding systems based on temporary and provisional permission to use and occupy the land, and to ensure that holders of individual and communal rights in land have comparable status in law to that of land owners.

In Taiwan, where most land was owned by landlords but worked by tenants, tenancy

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37 King Land reform - a world survey 252 et seq.
38 Abensour and Moral-Lopez Principles of land tenancy legislation 9 and 92 et seq. Also see King Land reform - a world survey 16 et seq; Cheng Land reform in Taiwan 18 et seq.
39 Marcus, Eales and Wildschut Down to earth 190.
reform entailed a reduction of rent to a level not exceeding 37.5% of the total annual yield of the main crop. These reforms did not improve the position of the tenants sufficiently and shortly after this rent reduction was implemented, Taiwan abolished the tenancy system and replaced it with a system of direct ownership in order to provide the former tenants with security of tenure.\textsuperscript{40}

The \textit{White Paper on South African Land Policy}\textsuperscript{41} states that tenure reform is primarily aimed at providing security of tenure by: (a) the award of independent land rights and secure lease agreements; (b) through protection against eviction; (c) by membership of a group based system of land rights; or (d) through private ownership. Tenure reform in South Africa focuses on two principles. Firstly it is aimed at developing mechanisms for the upgrading of \textit{de facto} vested interests in land into legally enforceable rights, and secondly it aims to provide occupants of privately owned land with protection against eviction, while at the same time respecting the rights of the current owners.

12.3.3 Land restitution

The purpose of the restitution of land is to restore property to persons or groups of persons who were unjustly dispossessed. Restitution differs from redistribution in the sense that restitution deals with claims relating to specific property. Whereas redistribution is aimed at the general distribution of land (or other property) amongst the landless, restitution deals only with that group of persons who were unjustly dispossessed and relates only to the specific property which has been taken from them. Claimants have to prove that they have a claim to the specific land or property and that they were dispossessed in terms of unjust legislation or an unjust act of government. In South Africa the \textit{Restitution of Land Rights Act}\textsuperscript{42} determines that a person is entitled

\textsuperscript{40} Cheng \textit{Land reform in Taiwan} 18 \textit{et seq} and 71 \textit{et seq}, and for the problems regarding tenancy in Taiwan see 29 \textit{et seq}. With regard to the abolition of tenancy in Japan see King \textit{Land reform - a world survey} 192 \textit{et seq}.

\textsuperscript{41} \textit{White Paper on South African Land Policy} 64.

\textsuperscript{42} 22 of 1994.
to restitution if he/she was dispossessed of a right in land after 19 June 1913 under or for the object of furthering the object of a racially discriminatory law (that is in terms of apartheid legislation), or was not paid just and equitable compensation. In Australia and New Zealand, where the claims for restitution are based on the claimants' aboriginal title, dispossession was effected by the British colonisation. In Germany claims for the reinstatement of private property rights in the former East Germany are based on the premise that the expropriation of private property by the East German government and the Soviet occupying authorities who preceded it is illegal and that the property should therefore be returned. Remedies in the case of restitution of property include restoration of the specific property from which the claimants were dispossessed, the provision of alternative property or the payment of compensation.

12.3.4 Land tax reform

Due to different circumstances and objectives in different jurisdictions it is difficult to provide a clear definition of 'land tax'. Defined broadly it can be described as any tax

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43 Aboriginal title reflects the historic entitlement that indigenous inhabitants have to their traditional lands under their own laws and customs. Aboriginal title is recognised in Australia in terms of the decision in Mabo v Queensland (1992) 175 CLR 1, and in New Zealand in terms of the Treaty of Waitangi Act. On aboriginal title in general see Butt in Van Maanen and Van der Walt Property Law on the threshold of the 21st century 495 at 499; Theron 1998 Vic Uni of Wel LR 311 at 323; McHugh 1984 Cant LR 235; Nettheim 1987 Aus LJ 297; Davies 1987 L & Anthropology 30; Bennett 1993 SAJHR 443; Bennett in Van Maanen and Van der Walt Property law on the threshold of the 21st century 517.

44 Although the Restitution of Land Rights Act 22 of 1994 does not rule out a claim for restitution on the grounds of aboriginal title Bennett in Van Maanen and Van der Walt Property law on the threshold of the 21st century 517 points out that such a claim has little chance of success because of historic and demographic circumstances peculiar to South Africa.

45 See in general Jeffress 1991 Yale LJ 527 et seq.

46 Theron 1998 Vic Uni of Wel LR 311 at 334; Jeffress 1991 Yale LJ 527 at 544; White Paper on South African Land Policy 56; Restitution of Land Rights Act section 35(2). In the South African context specifically restitution is not restricted to rights in land. Section 25(7) of the 1996 Constitution provides for "equitable redress" as an alternative to the restitution of specific property. See Dulabh and Another v Department of Land Affairs 1997 (4) SA 1108 (LCC) and Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area and Another 1998 (1) SA 78 (LCC).
with immovable property as the primary taxable object within its base. Franzsen defines a land tax as:

"... an annual wealth tax levied on the ownership, or in some instances, on other rights of occupation relating to agricultural land. Although the taxable value may be established with regard to real or potential farming income and the tax be paid out of that income, the base remains the land itself".

For the purposes of a land tax 'land' can be interpreted to mean all agricultural land, only underutilised land, or only land within commercial farming areas (thus excluding communal land). It is suggested in the White Paper on South African Land Policy that all land (that includes privately owned land, state-owned land and tribal land) be included in the tax base and that the tax be levied on the improved market value of the land. It is further suggested that the tax be levied on the owner and/or occupier to a maximum of 2% per annum for all land in all jurisdictions.

King indicates that land reform can be brought about automatically by indirect methods such as land tax reform. Franzsen, on the other hand, points out that the introduction of a land tax alone is not an appropriate tool to bring about comprehensive land reform, but that it has to be accompanied by other more direct land reform measures. The purpose of a land tax is to increase landholding costs to larger landowners, forcing them to increase the productive use of the land and/or to reduce the size of their estates. A land tax can also be used to raise revenue for the

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47 Franzsen 1994 De Jure 351.
48 Franzsen 1994 De Jure 351 at 357.
50 King Land reform - a world survey 18.
51 Franzsen 1994 De Jure 351 at 354.

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government. The implementation of land tax reforms may save the state some of the costs of a land redistribution program, because, apart from the revenue-raising possibilities of a land tax, a progressive land tax would gradually force owners of large estates to dispose of part of their land holdings. As such a land tax can function as a policy instrument to complement a non-confiscatory land reform programme. Furthermore, it can act as a disincentive to speculative landholding and may exert downward pressure on land prices.

12.3.5 Land consolidation

Land consolidation is concerned with land that is poorly organised in location and shape and is primarily aimed at improving poor spatial organisation of mainly farmland in order to improve productivity and production efficiency. This will be the case where farmers are badly located with respect to their farms/fields, where farms are fragmented or where farms are awkwardly shaped for modern farming techniques. Consolidation is used to remedy both the situation where farm property is divided into undersized units too small for rational exploitation, and the excessive dispersion of the parcels forming part of a single farm. Land consolidation entails the elimination of fragmentation of land by bringing disaggregated farms together through land exchange or by reducing the total number of farms by combining smaller farms. King points out that the greatest obstacle to consolidation is longstanding tradition and the unwillingness of farmers to participate, even in cases where the advantages of consolidation are clear. Furthermore, consolidation requires follow-up legislation to ensure that subsequent subdivision does not cause a recurrence of the unfavourable

52 Sullins An assessment of selected land redistribution programs in Latin America, Asia and Africa and implications for the analysis of land resettlement 15. Also see Dorner Land reform and economic development 128 et seq.


54 Sullins An assessment of selected land redistribution programs in Latin America, Asia and Africa and implications for the analysis of land resettlement 15 et seq. Also see King Land reform: The Italian experience 4; De Cloe Landinrichtingswet XIV; Edwards Planning betwist 61.

55 King Land reform - a world survey 21 et seq.
position before consolidation.

12.3.6 Colonisation schemes

These schemes are closely related to measures aimed at the redistribution of land. Colonisation schemes involve the colonisation of previously uninhabited and unused tracts of land. In terms of a colonisation scheme selected families are resettled on previously uncultivated land or less densely populated areas and supported by a range of measures including technical support and financial assistance. Colonisation schemes are designed to reduce population pressure and resource depletion in one area and to generate a more equitable distribution of land and labour for the colonists. These schemes are only effective where the problems of developing uninhabited land are manageable.

12.4 Requirements for an effective land reform programme

Tai identifies a number of requirements for a land reform programme to be successful. These requirements are identified with specific reference to the land reform programmes in Latin America and consequently not all of the requirements apply to the situation in Southern Africa. According to Tai the requirements for an effective land reform programme are that government has to play a decisive role in the drafting and implementation of the programme, the program needs government compulsion, it needs to effect drastic change, and it has to be implemented rapidly.

56 For a discussion of the implementation of a colonisation scheme in Italy see King Land reform: The Italian experience 203 et seq, and for a discussion of the colonisation scheme in Venezuela see Carroll in Hirschmann Latin American issues: Essays and comments 175 et seq; World Bank Staff working paper no. 275 Land reform in Latin America: Bolivia, Chile, Mexico, Peru and Venezuela 24.

57 Sullins An assessment of selected land redistribution programs in Latin America, Asia and Africa and implications for the analysis of land resettlement 14.

58 King Land reform - a world survey 22 et seq.

59 Tai Land reform and politics: a comparative analysis 13 et seq.
The role of government: Land reform programmes are generally programmes to solve power problems within a society. A disparity in the land tenure structure is more often than not indicative of a disparity in economic, social and political power. As such land reform programmes are in essence ‘public’ programmes and are dependant on government input and support. Any programme which aims to transform a society in such a drastic manner cannot be successful if it is run privately. Effective land reform cannot be achieved by depending completely on market forces either. Due to the fact that the implementation of land reform is often necessitated by the imbalances with regard to social, political and economic power within a society, the unequal position between landlords and the landless makes it virtually impossible to effect comprehensive land reform by relying on market forces alone. Government has to play at least some role to ensure that the landless are put on an equal footing with landlords where negotiation regarding the sale of land is concerned.

The need for compulsion: A land reform programme which aims to effect drastic change to the character of the economic, social and political power structures in a society is dependent on government compulsion. Landowners are generally in a strong position economically, socially and politically, and will not voluntarily renounce this position, but must be forced by the government to comply with the terms of the land reform programme. Another reason for government compulsion is the fact that landlords and peasants are not equal parties. For this reason a land reform programme which relies solely on the willingness of landowners to voluntarily part with their land is doomed to failure. To be effective, a land reform programme must rely on the willingness and readiness of the government to apply sanctions against those landowners who do not comply with the terms of the programme.

A land reform programme has to effect drastic changes: In a society where land is a decisive factor for the determination of a citizen’s financial, social and political position in that society, the land tenure system amounts to no more than an institution that

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60 Tai Land reform and politics: a comparative analysis 13 et seq.

61 Tai Land reform and politics: a comparative analysis 15 et seq.
determines and allocates the values of the society. Thus, if a land reform programme aims to change the tenure system in such a society, it has to effect drastic change in order to fundamentally alter the entire system. Minor changes to the tenure system or symbolic action will not produce lasting results.\textsuperscript{62}

Rapid process of change: In order to break old traditions and habitual acceptance of the existing system, a land reform programme needs to effect rapid change. A frontal attack on the system is needed to change people's rigid ideas of how things ought to be. Prompt execution is also needed to maintain the spirit of reform, which tends to fluctuate or fade away with time.\textsuperscript{63}

It may be accepted that the first two requirements identified by Tai, namely that government has to play a decisive role in the drafting and implementation of the programme and that the programme needs government compulsion, are applicable to the land reform programme in South Africa. The last two requirements, namely the need for land reform to effect drastic change and to be implemented rapidly, are, however, not directly applicable to the South African situation. Although the restitution of land in South Africa has to be effected within a relatively short period in order to contribute to legal certainty, the rest of the land reform programme in South Africa does not aim to bring about sudden and rapid change. Although it aims to change land holding patterns completely, the change is brought about gradually by means of a variety of land reform measures to ensure a more equitable distribution of land amongst all the people of South Africa. The respective land reform programmes in Southern Africa\textsuperscript{64} are not based on a process of nationalisation or confiscation of all (agricultural) land by the state in order to redistribute the land equally amongst the entire population. In South Africa particularly the land reform programme is a well planned programme based on broad consultation with all interest groups. While land reform is essential to redress

\textsuperscript{62} Tai \textit{Land reform and politics: a comparative analysis} 16 et seq. But see Mattei 1990 \textit{Rev of Soc L} 17 et seq.

\textsuperscript{63} Tai \textit{Land reform and politics: a comparative analysis} 17 et seq.

\textsuperscript{64} South Africa, Zimbabwe, Namibia and Botswana. See chapter 14 in this regard.
the injustices of the past, to improve the general household welfare and to alleviate poverty, the land reform programme also aims to foster national reconciliation and stability and to underpin economic growth. The programme takes cognisance of the rights, interests and aspirations of all South Africans. A wide variety of land reform measures, including land restitution, redistribution of land and measures to effect security of tenure, are introduced simultaneously to ensure that the process of distributing land equitably among all South African does not have a negative influence on the productive output of especially agricultural land.\textsuperscript{65} Due to the complexity of the situation regarding property rights and the process of consultation that accompanies the introduction of the different measures, the land reform programme follows a cautious approach and is not implemented rapidly.\textsuperscript{66}

King\textsuperscript{67} points out that a land reform programme can only be successful if the necessity for land reform is recognised by the people concerned. It is common cause that no landlord-dominated government or society will act so as to harm its own position, or vote itself out of its landowning status and the privileges associated or connected with landownership. There has to be broad dissatisfaction with the existing landholding structure. The impetus for land reform should be the recognition of its necessity by the people concerned. This situation is likely to occur in societies where the public's idea of social justice changes faster than the rate at which opportunities to advance financially and socially are created by economic development.

\textsuperscript{65} See in general \textit{White Paper on South African Land Policy} 7 et seq.

\textsuperscript{66} The \textit{White Paper on South African Land Policy} states that while interim measures are introduced to provide security of tenure to certain groups, a comprehensive tenure reform strategy will only be introduced after extensive consultation with the various interest groups. A period of two years is set aside for consultation around tenure policy, for implementation of test cases and for the preparation of legislation. See \textit{White Paper on South African Land Policy} states 60.

\textsuperscript{67} King \textit{Land reform - a world survey} 9 et seq. Also see Banfield \textit{The moral basis of a backward society}; World Bank Staff working paper no. 275 \textit{Land reform in Latin America: Bolivia, Chile, Mexico, Peru and Venezuela} 6 et seq.
12.5 Choice between individual and communal tenure

Lastly, it has to be pointed out that land reform does not imply that a choice for or against a specific form of tenure (individual or communal) has to be made. It is generally accepted that land reform aims to improve the economic, social and political conditions for the benefit of society as a whole, and for this reason it is important to consider all possible forms of tenure when a land reform programme is being drafted. In this regard it is important to look at the advantages and disadvantages of the communal form of tenure as it applies in customary law. It is common cause that customary land rights are very effective in a situation where there is an abundance of land, but overpopulation and the pressing need for product demand cause communal tenure to become unstable and fall victim to mismanagement and the over-exploitation of the available resources. Under these circumstances communal tenure seems to move in the direction of privately owned property or ownership in the western sense of the word. Other factors also contribute to the personalisation of customary land rights, but this form of land tenure should not be underestimated or disregarded when land reform is planned and effected. Platteau points out that:

"[u]pholders of the static view have ignored or downplayed the dynamic potential of indigenous African land systems partly because they have failed to see that individual tenures can exist under a general system of

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68 Van der Walt 1990 De Jure 1 at 12 et seq; Cross in Cross and Haines Towards freehold: Options for land and development in South Africa's black rural areas 3 and 369 et seq.

69 Inheritance may cause the personalisation of customary property rights. Fathers often disregard the customary rules of inheritance and tend to leave their land to their own sons. Communal property is furthermore personalised by the sale of the land, first only to members of a specific tribe or group with the permission of the group (subject to the right of pre-emption and the right of the seller to buy the property back), later the sale of land is permitted to non-members of the group subject to the permission of the group, and still later the sale of communal land to individuals is permitted freely. See Platteau 1996 Development and change 29 at 31 et seq.

70 Platteau 1996 Development and change 29 at 33. Also see Van der Walt 1990 De Jure 1 et seq; Marcus, Eales and Wildschut Down to earth 175 et seq; Cross in Cross and Haines Towards freehold: Options for land and development in South Africa's black rural areas 3, 342 and 369 et seq; Mattei 1990 Rev of Soc L 17 at 21 et seq.
corporate ownership; that communal arrangements are genuine multi-tenure systems with different land uses calling for different tenures; and that land-use rights to a specific plot of land, are most often held by individuals or households. Such systems are flexible enough to allow the proportions of land held under relatively well-secured rights of individual possession to increase as the need arises for agricultural intensification and the accompanying long-term investments".

It thus seems to be clear that communal tenure, just as private ownership, has a role to play in contributing to the creation of a just and equitable land tenure system. However, in order for communal tenure to play an effective role in the implementation of the land reform programme, the programme has to provide for secure customary land rights.71

12.6 Constitutional conflict: The Indian experience

In terms of the traditional view of property rights, in terms of which ownership is seen as an absolute, exclusive and individual right and all limitations or restrictions of the owner's rights are seen as exceptions to be restricted to the minimum, land reform is perceived as an unjust, political interference with an individual's existing property rights. Those who support this traditional view expect the constitutional property guarantee to protect their existing rights absolutely. Due to fact that the traditional view of property rights enjoy widespread support among most property owners, it is sometimes argued that the constitutional property clause stands in the way of effective and comprehensive land reform. A conservative court can either argue that land reform

71 See 14.3 below where it is pointed out that due to the lack of security of tenure of communal land rights is Zimbabwe, an informal system of land holding and transfer has develop whereby individuals have private rights to land. This led to the breakdown of the communal land rights system, a system which could have served the purposes of the Zimbabwean land reform programme very effectively.
does not constitute a valid public purpose for which property may be taken, or that the proposed amount of compensation offered by the state does not qualify as 'just compensation'.

The potential conflict between the protection of property as a fundamental right and land reform is illustrated by the constitutional conflict in India after its independence. The Indian experience indicates to what extent land reform can be frustrated by a conservative court and the results of a constitutional conflict. A brief exposition of the development and conclusion of this conflict in India illustrates how the court can use the guarantee of property as a fundamental right to frustrate effective and decisive land reform.

The right to acquire, hold and dispose of property was initially guaranteed in the Indian Constitution, and in some cases the Indian Supreme Court applied this guarantee to frustrate reform measures introduced by the legislature. The post-independent government in India attempted to effect drastic land and economic reforms, but in some cases the conservative Supreme Court interpreted the property guarantee narrowly and in doing so they blocked these reforms and protected the privileges of existing property owners.

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See in this regard the Australian decision in Clunies-Ross v The Commonwealth of Australia and Others (1984) 155 CLR 193, the US decision in Berman v Parker 348 US 26 (1954), and the German decision in BerfGE 74, 264 where the public purpose requirement was used to prohibit the state from expropriating private property. But see the US decision in Hawaii Housing Authority v Midkiff 467 US 229 (1984) for a good example of a case where it was stated that land reform constitutes a valid public purpose.

Article 19(1) of the Constitution of India determined that: "All citizens shall have the right - (f) to acquire, hold and dispose of property". Article 19(5) stated that: "Nothing in sub-clauses (d), (e) and (f) of the said clause [article 19(1)] shall affect the operation of any existing law in so far as it imposes, or prevent the state from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe". Property is further guaranteed in Article 31. Article 31(1) determined that: " No person shall be deprived of his property save by authority of law", and article 31(2) determined that no property shall be dispossessed or acquired for public purposes without compensation. See in general Shukla The Constitution of India 56 for a discussion of article 19 and 137 for a discussion of article 31.
Between 1950 and 1954 the court declared certain land and economic reform laws invalid and unconstitutional.\footnote{74} These laws were initially struck down in terms of the equality clause.\footnote{75} The legislature consequently amended the Constitution to ensure that its reform laws would not be declared unconstitutional in terms of articles 14, 19 and 31 of the Constitution.\footnote{76} The court's power of judicial review was also curtailed with regard to specified reform measures.\footnote{77} In \textit{State of Bihar v Kameshwar Singh}\footnote{78} the court nevertheless held that the amendment only affected the court's jurisdiction with regard to the quantum of compensation, but that it might still inquire whether the legislation complied with the public purpose requirement.\footnote{79}

In a number of subsequent cases the courts interpreted the property guarantee narrowly and in doing so they frustrated the government's reform measures. An important stage in the development of the constitutional conflict was the decision in \textit{State of West Bengal v Subodh Gopal Bose and Others}\footnote{80} where it was held that article 31(1) and 31(2) should be read conjunctively and that compensation should thus be paid for both deprivations and acquisitions of property. This judgment effectively destroyed the distinction between the government's exercise of its police power and its power of eminent domain. This decision had the effect that almost all deprivations were

\footnotetext[74]{\textit{Kameshwar Singh v Province of Bihar} AIR (37) 1950 Pat 392; \textit{Kameshwar Singh v State of Bihar} AIR (38) 1951 Pat 91 (FB); \textit{Charanjit Lal Chowdhury v The Union of India and Others} AIR (38) 1951 SC 41. In most of these early cases the reform laws were found to be unconstitutional because they introduced discriminatory measures.}

\footnotetext[75]{Article 14 of the Constitution of India. It is interesting to note that the court initially made use of the equality clause, and not the property clause, to frustrate reform measures introduced by the post-independent government.}

\footnotetext[76]{\textit{Constitution (First Amendment) Act} of 1951.}

\footnotetext[77]{See Shukla \textit{The Constitution of India} 142 et seq.}

\footnotetext[78]{AIR (39) 1952 SC 252.}

\footnotetext[79]{See in general Van der Walt \textit{The constitutional property clause: finding the balance between guarantee and limitation} paper read at a conference entitled 'Property and the Constitution' presented by the New Zealand Institute of Public Law; Murphy 1992 \textit{SAJHR} 362 at 381; Chaskalson 1993 \textit{SAJHR} 338 at 391.}

\footnotetext[80]{1954 (5) SCR 587. This decision was followed in \textit{Dwarkadas Shrinivas v The Sholapur Spinning and Weaving Co Ltd and Others} AIR (41) 1954 SC 119. Also see \textit{Saghir Ahmad v The State of Uttar Pradesh and Others} 1955 (1) SCR 707.}
subject to the payment of compensation. A different development that reinforced and deepened the impact of State of West Bengal v Subodh Gopal Bose and Others came with the decision in State of West Bengal v Bella Banerjee and Others where the Supreme Court stated that it had the jurisdiction to determine whether all the relevant elements in the determination of compensation have been included. In terms of this approach the court regarded compensation as a true reflection of the full value (full indemnification or just equivalent) of the property acquired. In reaction to these decisions the legislature enacted the Constitution (Fourth Amendment) Act in 1955 to rephrase article 31 so as to reaffirm the distinction between the state's power of eminent domain (article 31(2)) and the police power (article 31(1)). It also introduced an ouster clause to ensure that no law could be declared invalid on the basis of the compensation awarded. In response to the Fourth Amendment the court ruled that article 31(1) had to be read with article 19(5), which requires that any restriction of property has to be reasonable, thereby reclaiming jurisdiction via an alternative route.

It was decided in IC Golak Nath and Others v State of Punjab and Another that the legislature does not have the power to amend the Constitution to such an extent that it takes away fundamental rights guaranteed by the Constitution. In order to overturn the decision in IC Golak Nath and Others v State of Punjab and Another the

81 By distinguishing the distinction between deprivations and acquisitions the Indian courts required compensation for a much wider category of regulations than is the case in US law with regard to the requirement of compensation for regulatory takings. See Van der Walt The constitutional property clause: finding the balance between guarantee and limitation paper read at a conference entitled 'Property and the Constitution' presented by the New Zealand Institute of Public Law 17; Murphy 1992 SAJHR 362 at 367.

82 AIR (41) 1954 SC 170.

83 See Murphy 1992 SAJHR 362 at 374.

84 Van der Walt The constitutional property clause: finding the balance between guarantee and limitation paper read at a conference entitled 'Property and the Constitution' presented by the New Zealand Institute of Public Law 17.

85 Kochuni v States of Madras and Kerala AIR (47) 1960 SC 1080; Vajravelu Mudaliar v The Special Deputy Collector for Land Acquisition, West Madras and Another AIR (52) 1965 SC 1017; Union of India v The Metal Corporation of India Ltd and Another AIR (54) 1967 SC 637; RC Cooper v Union of India AIR (57) 1970 SC 564.

86 [1967] 2 SCR 762.
government enacted the Twenty-Fourth and Twenty-Fifth Amendments. The Twenty-Fourth Amendment amended the Constitution to recognise the power of the legislature to amend the Constitution, and the Twenty-Fifth Amendment completely removed the question of compensation from the court's power of judicial review by removing the duty to 'compensation' from article 31(2) and replacing it with the payment of 'an amount'. In the case of Kesavananda v State of Kerala the Supreme Court finally conceded that its jurisdiction to decide the question of the reasonableness of compensation has been ousted by the Twenty-Fourth and Twenty-Fifth Amendments. With this decision the conflict between the courts and the government was finally resolved and the government was now free to implement reform measures and to restrict the right of property in the Constitution. A change in government took place in 1977, and the new government introduced the Forty-Fourth Amendment in 1978 to rule the possibility of a constitutional conflict between the courts and the government out completely by removing the guarantee of property as a fundamental right from the Constitution. This guarantee was replaced with a constitutional right (as opposed to a fundamental right) to the protection of property. The constitutional right merely requires the deprivation of property to be effected in terms of a valid law which is within the power of the legislature.

12.7 Conclusion

Land reform can take different forms including the (re)distribution of land, tenancy reform, measures to promote security of tenure, land restitution, land consolidation,

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87 AIR (60) 1973 SC 1461.
88 In terms of this change the protection of property was removed from the sphere of fundamental rights (Part II of the Constitution) and replaced by a constitutional right (in Part XII of the Constitution) to the protection of property. Article 300A determines that: "no person shall be deprived of his property save by authority of law". See Van der Walt The constitutional property clause: finding the balance between guarantee and limitation paper read at a conference entitled 'Property and the Constitution' presented by the New Zealand Institute of Public Law 23.
89 Van der Walt The constitutional property clause: finding the balance between guarantee and limitation paper read at a conference entitled 'Property and the Constitution' presented by the New Zealand Institute of Public Law 23; Murphy 1992 SAJHR 362 at 387.
land tax reform and colonisation schemes. The manner in which these measures are implemented and the extent of the reform measures will depend on the particular circumstances of a specific jurisdiction.

The position in India illustrates the fact that a conservative interpretation of the constitutional property guarantee can frustrate government attempts to effect social and economic reforms. The potential conflict between the legislature and the courts with regard to land reform can be avoided if the courts take a different approach to the role of judicial review in general and the scope and extent of private property rights and its role within society as a whole. In jurisdictions where private property is regarded as having both a personal and a social function, infringements of property rights to effect land reform are regarded as a valid exercise of the state's power to regulate the property regime within that jurisdiction.

The relation between land reform and the constitutional protection of property is investigated in chapters 13 to 15.

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90 Murphy 1994 SAJHR 385 at 395; Nedelsky in Van Maanen and Van der Walt Property law on the threshold of the 21st century 417 at 432.
13.1 Introduction

This chapter deals with the question of land reform as it is applied and justified in a variety of jurisdictions without an official land reform programme. At first glance land reform seems to be in direct conflict with the idea of the constitutional protection of property rights, especially if land reform is also a state duty or supported by the state. Although it is true that most constitutional property clauses provide for and regulate the deprivation and expropriation of property for the benefit of society as a whole, there is a perception that land reform goes beyond the scope of limitations of property rights as provided for in a constitutional property guarantee.¹ As will be shown in this chapter, however, land reform is generally regarded as fulfilling a very important social function and as such land reform measures comply with the public purpose requirement for valid limitations with an individual’s property rights.

Due to the fact that land reform may be regarded as contradictory to or actually in conflict with the protection of property rights (especially in jurisdictions where property rights are perceived as an extension of the individual’s freedom and a means of realising self-determination), the implementation of land reform measures run the risk of being blocked by the courts. A strict and narrow interpretation of the constitutional guarantee of property may be used by the courts to block land reform measures by declaring them unconstitutional. This apparent danger of constitutional conflict is often used as an argument for omitting the protection of property from a bill of fundamental

¹ See, however, 13.8 on land reform in the Netherlands where the property question is dealt with in private law. Also see chapter 7.
It must, however, be pointed out that land reform is regarded as a valid exercise of the state's police power and its power of eminent domain in many jurisdictions, and that the constitutional protection of property is not always perceived as a stumbling block in the way of decisive and effective land reform. This is illustrated by the fact that some constitutions combine the protection of property with provisions for the implementation of land reform. Land reform can advance the public interest, and as such the individual property holder may be expected to suffer an interference with his/her rights because such interference is effected for an important public purpose. A constitutional conflict may also be avoided if the courts are able to create a suitable context for constitutional review. In terms of this context the court should take a different approach towards the relationship between the property clause and the public

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2 Chaskalson 1993 SAJHR 388 et seq; Van der Walt 1990 De Jure 1 at 43; See especially Nedelsky in Van Maanen and Van der Walt Property law on the threshold of the 21st century 417 et seq; Nedelsky Private property and the future of constitutionalism: the Madisonian framework and its legacy 204 et seq. Nedelsky argues that the constitutionalisation of property will inevitably reinforce the conceptual divide between public and private law. This in turn will lead to a situation where private property rights are insulated against state interference in that every limitation or restriction of property rights will have to be justified. The constitutionalisation of property will entrench the situation where property exists and operates in an almost regulation-free zone of private enterprise. The second argument against the constitutionalisation offered by Nedelsky concerns the relationship between property and equality. Because of the fact that property is closely related to power, the constitutionalisation of property creates and supports unequal power structures. By providing property with constitutional protection the existing hierarchy of inequalities will be left intact. Nedelsky's third argument is closely related to the second argument. Property is not one of the first order values (life, liberty and security of the person) that are regarded as fundamental constitutional rights, but it is rather a means to these higher values. By constitutionalising property a situation is created where equality is held accountable to property rather than the ideal situation where property is held accountable to equality. Nedelsky also offers pragmatic arguments against the constitutionalisation of property. High litigation costs and a waste of valuable resources can be avoided if property is not afforded constitutional protection. It will also avoid a situation where technical debates about the relationship between the state and private property become so intricate that it is in effect removed from the public debate and turned into the preserve of a small elite of lawyers. But see Van der Walt The constitutional property clause: finding the balance between guarantee and limitation paper read at a conference entitled 'Property and the Constitution' presented by the New Zealand Institute of Public Law 23 et seq for a critical analysis of Nedelsky's arguments.

3 See in this regard the property clauses in the Constitutions of South Africa, Namibia and Guyana.

4 The examples provided below illustrate the fact that the constitutional protection of property need not be an obstacle to the implementation of land reform measures.
interest. Proportionality is an essential ingredient for a model of judicial review.\textsuperscript{5}

In this chapter an overview will be provided of land-reform related constitutional case law from jurisdictions where no official land reform programme is in place. Most of the jurisdictions which are discussed below have a constitutional property clause. The purpose of this overview is to look at the court's willingness to allow land reform measures which benefit the public at large. In most of these jurisdictions private ownership is recognised and protected and land reform measures could be seen as in conflict with the principle of private ownership. The attempts of the courts to create an equitable balance between the rights and interests of the affected parties and the public interest, as well as the extent to which the courts are willing to infringe on the rights of the owner indicate that the conservative and narrow interpretation of the property clause by the Indian Supreme Court is not the only possible response to the question on the relation between the constitutional property clause and land reform.

13.2 Australia

The decision in \textit{Clunies-Ross v The Commonwealth of Australia and Others}\textsuperscript{6} illustrates the position where the court interprets the constitutional property guarantee narrowly. In terms of this interpretation the court did not regard social and political reasons as valid reasons for any interference with the individual property holder's existing property rights. This decision is distinguished from the rest of the cases discussed in this chapter in that the court did not allow for land-reform related measures on the grounds of social or political reasons.

The case in \textit{Clunies-Ross v The Commonwealth of Australia and Others}\textsuperscript{7} involved the question of how wide the public purpose requirement should be interpreted in the case

\textsuperscript{5} Murphy 1994 \textit{SAJHR} 385 at 395; Nedelsky in Van Maanen and Van der Walt \textit{Property law on the threshold of the 21st century} 417 at 432.


\textsuperscript{7} (1984) 155 CLR 193.
of an executive power. In terms of the *Land Acquisition Act* of 1955 the executive had been granted the power to ‘acquire land for public purposes’. In this instance the executive wanted to exercise this power in order to remove the plaintiff from a specific area, because he interfered with the political process in that area. Clunies-Ross owned property on the Cocos (Keeling) Islands as a result of a species of colonial feudalism. Due to his social and economical position on the island, he negatively influenced the political process on the Islands. He was not prepared to abandon the anachronistic, feudal relationship between himself and the Cocos Malay community. As a result of this the government wanted to acquire his land and remove him and his family from the Islands.

The High Court held that the words ‘acquire land for a public purpose’ does not include a remote purpose, but is limited to an acquisition of land which is needed or which it is proposed to use, apply or preserve for the advancement or achievement of that purpose. The court stated that:

"[t]he provisions of the Act would fall short of enabling the Commonwealth compulsorily to acquire land in circumstances where it is not suggested that the Commonwealth's purpose relates to any planned use, application or preservation of the land itself or of any buildings thereon but is for the purpose of depriving the owner of his possession of the land with the motive of thereby achieving some consequential advantage with can properly be described as a 'public purpose'."\(^8\)

According to the court there was no ground for extending the power which the Act conferred to include the acquisition of land to advance or achieve some remote purpose.

The court pointed out that there is a difference in nature between an executive power to acquire land for a public purpose and the power of the legislature to make laws with

\(^8\) (1984) 155 CLR 193 at 199.
respect to the acquisition of land. The power granted to the executive

"[t]o deprive a citizen of his property by compulsory acquisition should be construed as being confined within the scope of what is granted by the clear meaning or necessary intent of the words by which it is conferred".  

The court concluded to emphasise that its duty is to provide answers only on questions of law, and that the political or social desirability or otherwise of the deprivation of the plaintiff of his home is irrelevant to the proceedings of the court. It is the constitutional duty of the court to consider and answer the question objectively as a question of law and not as a matter to be determined by reference to the social or political merits of the case.  

In a dissenting judgement Murphy J pointed out that he did not agree with the majority that social and political issues should not be allowed to play a role in the court's decision. According to his view,

"[i]f the political and social considerations indicate a rational public purpose for the acquisition of the land, then under the Act, the Commonwealth is entitled to acquire it with just compensation". 

He pointed out, with reference to the US case of Hawaii Housing Authority v Midkiff, that, even if the 'public purpose' requirement was interpreted narrowly to mean 'public use', there was no reason why the acquisition of land for a public purposes cannot also include social and political considerations. In his view the spirit and enjoyment of life of the Island population could only be improved by the removal of the formal feudal lord

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from the formal feudal manor.\textsuperscript{13}

In this case the Australian High Court interpreted the public purpose requirement narrowly. The social and political function of property was not recognised as a valid motive or factor which might influence land distribution or the existing property rights of an individual property owner.

13.3 Germany

German case law provides a very good example of how the courts establish an equitable balance between the interests of the individual property owner and land-reform related measures undertaken in the public interest in absence of a large land reform programme. In terms of the property clause property is protected, but the legislature has the power to determine the scope and content of the owner's rights, while at the same time the courts have to ensure that property rights are exercised in such a manner that they serve the public interest. A number of rent control cases illustrate the balancing of rights principle, and a valuable lesson is to be learnt from the manner in which the courts avoid the potential conflict, and create a balance between the two constitutional values of the protection of existing rights and the promotion of the social interest, which in this case requires the protection of residential tenants.

In the \textit{Wohnraumkündigungsschutzgesetz} case\textsuperscript{14} the \textit{Bundesverfassungsgericht} had to deal with the issue of rent increase in terms of a federal law which sets certain requirements which have to be met if a lessor wants to effect a rent increase. This law was enacted to deal with the housing shortage and determined that a lessor may only raise the rent if the lessée agrees to the proposed increase. In order for the lessee to make an informed decision, the lessor has to provide the lessee with a written statement which contains information about comparable rent levels in similar situations. If the lessee does not agree, the lessor (owner) may apply to the court for permission

\textsuperscript{13} (1984) 155 CLR 193 at 209.
\textsuperscript{14} BVerfGE 37, 132.
to raise the rent. In the case at hand two lessors applied to the court for such permission after they supplied their lessees with the relevant documentation but the lessees refused permission to raise the rent. The court a quo interpreted the requirements strictly in favour of the lessees. The courts found that the information supplied to the lessees was insufficient to allow the lessees to consider the raise. The lessors consequently claimed that their property rights have been infringed upon. The Bundesverfassungsgericht pointed out that the provisions of the federal law effected a valid exercise of the legislature’s duty to regulate the use of property by determining the content and limits of property. This regulatory power is, however, limited by the duty to uphold the guarantee of property in the property clause (article 14(1)) and the duty to ensure that the regulation is in line with all the constitutional principles. The legislature has to establish a balance between the guarantee of property provided for in article 14(1) and the duty to ensure that property serves the social interest (article 14(2)) when determining the content and limits of property rights. The Bundesverfassungsgericht held that the rent control act was not in conflict with any of these principles, especially if the surrounding social circumstances (the housing shortage and the importance of the family home for the lessee) are taken into account, provided that an unfair burden is not placed on the lessor. This principle was later confirmed in the Wohnungskündigungsgesetz case.\footnote{BVerfGE 68, 361. Also see BVerfGE 38, 248; BVerfGE 91, 294.} The court thus ruled that the rent control measures in question conformed to the principles of proportionality and succeeded in creating a fair balance between the interests of the lessee (to have a secure family home) and the interests of the lessor (the fair opportunity to raise the rent). The federal law was thus found to be constitutionally valid, but the court held that the heavy burden imposed on the lessor by the court a quo, which required the lessor to provide the lessee with precise and detailed information which was not always available or even necessary, was in conflict with the property guarantee in that it conflicted with the requirement that the lessor’s interests also have to be taken into account.
In the *Eigenbedarfskündigung* case the *Bundesverfassungsgericht* had to decide exactly when it would be constitutionally valid to prohibit the owner to cancel a lease. In terms of the German civil code a lease of residential premises can only be cancelled if the lessor requires the premises for own use. In general all three the complainants were owners of apartment blocks in which they themselves lived, while they rented the rest of the apartments to other families. They all wanted to cancel the lease contract with one of the lessees, because they needed the apartments for their own purposes. All three the applications were denied in the court *a quo*.

The *Bundesverfassungsgericht* held that it is a recognised principle that the state has the authority to impose rent control measures and to impose strict control measures regarding the cancellation of leases. Measures such as these are regarded as regulations which determine the content and limits of property in terms of article 14(1). For these measures to be constitutionally valid, however, they have to reflect a proportional balance between the interests of the owner and the collective interest, taking into account the social importance of the property in question. Measures such as these are not seen to impose a too heavy burden on the owner, for he/she may on the one hand not cancel a lease without good reasons, while on the other hand he/she may cancel the lease if the property is required for his/her own needs. These considerations should always be evaluated with reference to the immense social importance of housing for both the owner and the lessee.

In deciding cases such as these, the *Bundesverfassungsgericht* pointed out that the court must always have due regard for the basic principle underlying the property guarantee, namely that the property is protected to such an extent and in such a manner that the owner will have the possibility to control and develop his/her own life, according to his/her own views and on his/her own responsibility. The owner does not lose this right when property is leased. Any decision by a court which ignores this principle will be constitutionally invalid. The courts thus do not have the authority to question an owner's decision regarding the necessity to use rented property

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16 *BVerfGE* 79, 292.
himself/herself, but have to accept the owner's decision in this regard. This does, however, not mean that the courts have no review powers in this regard, or that the lessee is without any protection. The court will always have to verify that the owner's need for the property does indeed exist, that it is reasonable and that it is feasible.

In view of this the court decided that the first two applicants in this case were permitted to cancel their respective leases, but that the third applicant could not. The reason for this decision is the fact that the third applicant's reasons for the cancellation of the lease already existed when the property was leased in the first place, and that the cancellation of the lease at this point would be unreasonable.

This case again illustrates the balancing principle: although the housing shortage necessitates strict rent control measures, the rights of the owner also have to be respected and the state cannot ride roughshod over these rights. In either protecting the rights of the owner or the imposition of regulatory measures to serve the public interest the legislature and the courts have to take cognisance of the interests of all affected parties in view of all the surrounding circumstances and attempt to create an equitable and reasonable balance between the conflicting interests.¹⁷

It was decided in the *Besitzrecht des Mieters* case¹⁸ that the rights of the lessee are also protected in terms of article 14 of the *Grundgesetz*. The *Bundesverfassungsgericht* pointed out that the fundamental characteristic of the property guarantee is that it provides the property holder with a secured area within the patrimonial sphere in which he/she may take responsibility for the development and control of his/her own life. The family home is essential for human existence and the lessee's lease rights to enjoy security with relation to the family home fulfill the same function in this regard as the owner's right of ownership. The security and protection which the lessee derives from rent control measures can be enforced against the whole world, including the lessor. Because of the fact that the lessee enjoys the same protection of his/her property rights

¹⁷ Also see *BVerfGE* 37, 132; *BVerfGE* 68, 361; *BVerfGE* 89, 237; *BVerfGE* 89, 1.

¹⁸ *BVerfGE* 89, 1.
as the lessor, the legislature has the duty to create a reasonable balance between the two legal positions. The lessee is, however, not protected in a horizontal relationship with regard to the lessor, and the relationship remains vertical because the protection of the property guarantee concerns statutory measures which disproportionally restrict the lessee's position against the lessor. Thus, even though the lessee enjoys constitutional protection, the *Bundesverfassungsgericht* held that the lessor's determination of what constitutes a need for own use of the leased property will be respected by the court if it is reasonable and feasible.

In the *Kleingarten* case\(^\text{19}\) of 1979 the *Bundesverfassungsgericht* had to decide another rent control case, although this case did not involve residential property. This case dealt with the rent control measures enacted to protect the lessees of allotment gardens. The allotment gardens are small pieces of land which were originally used (especially by the poor) to fulfill the basic need for food. Due to the immense social importance of these allotment gardens strict measures were enacted to control rent increases and the termination of leases. A 1969 law provided that a lease of an allotment garden may only be terminated with the approval of the responsible local authority. The complainant in this case was refused permission to terminate such a lease and he consequently contended that his property rights were infringed upon.

The *Bundesverfassungsgericht* extensively investigated the role and purpose of allotment gardens in German society and concluded that the social function of these gardens have changed. Whereas they initially ensured the livelihood and survival of their holders, they now are used mainly for relaxation. The court *a quo* held that the strict rent control measures applicable to allotment gardens actually destroys the substance of the right. The measures as such cannot be regarded as a determination of the content and limits of property, because they constitute such an extensive restriction of the owner's right that almost nothing is left. The court consequently decided that the measures have an expropriatory character, but since no provision is made in the *Grundgesetz* for compensation in cases like these, the court declared the

\(^{19}\) *BVerfGE* 52,1.
provisions invalid.

The Bundesverfassungsgericht did not agree with this line of reasoning. It was pointed out that the law was invalid, not because it amounted to an expropriation without compensation but because the legislature exceeded its power to determine the content and limits of property. In terms of the proportionality principle the legislature has to create an equitable balance between the rights and interests of both the individual and the collective, and in this case it failed to do so. The law was therefore declared invalid.

This case also illustrates the importance of the social function of property in the determination of the legislature's power to determine the content and limits of property: the closer the relation between the property and the personal freedom of the owner, the narrower the legislature's power, and the more important the social function of the property, the wider the powers of the legislature will be. Land has always been regarded as an invaluable natural resource with immense social importance and for this reason the legislature has always had extremely wide powers to determine the content and limits of the landowner's rights. It was, however, pointed out by the court that the social importance of allotment gardens have diminished considerably, and as such the very strict control measures applicable to these gardens are no longer justified. The court thus found that it would be constitutionally valid if the lessor was permitted to charge a reasonable rent. This principle was later confirmed in the Kleingarten case of 1992. In this case the court held that rent control measures are not in conflict with the property guarantee in the Grundgesetz, especially with relation to land, but in this case it was not justified in view of all the circumstances and constituted a disproportional and unconstitutional restriction of the owner's rights.

13.4 United States of America

The discussion of land-reform related constitutional cases in the US is centred around two issues: the redistribution of land and rent control.
The case of Hawaii Housing Authority v Midkiff\(^2\) concerned the redistribution of land. The main question before the court was whether the taking of property from one private individual, against just compensation, in order to transfer it to another private individual, falls within the scope of the public use requirement. The State of Hawaii enacted the Hawaii Land Reform Act of 1967 in order to redress the imbalances which existed in Hawaii. As a result of a long history of a feudal land tenure system almost half of the land in Hawaii was concentrated in the hands of 72 landowners. The aim of the Act was to transfer some of this land to the lessees. The Act determined that lessees living on single family residential lots of at least five acres in size could ask the Hawaii Housing Authority to condemn the land on which they lived. If the Hawaii Housing Authority found that the acquisition of the land by the state would effectuate the public purposes of the Act, it would then acquire the former fee owner's (landowner's or lessor's) right, title and interest in the land at a price set either by a condemnation trial or by negotiations between the lessor and the lessee. Once the former landowner had been compensated, the state would sell the land to the lessee.\(^3\)

The applicants in this case were landowners whose land was involved in the redistribution scheme of the state. They contended that the Act was unconstitutional in that it violated the public use requirement set in the Fifth Amendment for the taking of property. The Federal District Court found the Hawaii Land Reform Act of 1967 to be constitutional, but on appeal the Court of Appeals ruled that the Act violated the public use requirement of the Fifth Amendment. The Supreme Court, however, found that the Hawaii Land Reform Act of 1967 did not violate the public use requirement of the Fifth Amendment. The court ruled that the expropriation of property from one private owner and the transfer thereof to another private individual in order to redress the imbalance in landownership, constitutes a valid public purpose. The court emphasised the fact that the legislature alone can determine what falls within the ambit of the public interest, and that


\(^{3}\) The Act provided that the Hawaii Housing Authority could lend the tenants up to 90% of the purchase price to enable them to buy the land.
"the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation". 22

The court thus stated that the public use requirement is coterminous with the scope of the sovereign's police power. The court does have a role in reviewing the legislature's decision of what constitutes a public purpose, but this power is extremely limited. The court will only substitute the legislature's judgment with its own if the use is palpably without reasonable foundation. 23 This decision confirmed the court's rejection of substantive due process.

The court reiterated its stance on the taking of property from one individual in order to give it to another:

"[t]o be sure, the Court's cases have repeatedly stated that 'one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid'". 24

In the case where the exercise of the power of eminent domain is rationally related to a conceivable public purpose, the court has never prohibited a compensated taking on the ground that it was in conflict with the public use requirement. 25 For this reason the court found the Hawaii Land Reform Act of 1967 to be constitutionally valid and explained its reasoning as follows:

"[r]egulating oligopoly and the evils associated with it is a classic exercise of the State's police powers. ... We cannot disapprove of Hawaii's

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exercise of this power. Nor can we condemn as irrational the Act's approach to correcting the land oligopoly problem. 26

The fact that the property in question passed directly from the lessor to the lessee was also investigated by the court. It was decided that the mere fact that the property never at any stage resided with the state, does not mean that the public use requirement was not adhered to. Accordingly, the court ruled that:

"[t]he Act advances its purposes without the State's taking actual possession of the land. In such cases, government does not itself have to use property to legitimate the taking; it is only the taking's purpose, and not its mechanisms, that must pass the scrutiny under the Public Use Clause." 27

It seems clear from the above that land reform is regarded as a valid and justifiable ground in terms of the public use requirement of the Fifth Amendment, even when it means that the state is taking private property from one individual and transferring it to another individual. Although the court does not have wide powers of review in the case where the legislature has declared a specific action as a legitimate public purpose, the court found the redistribution of land in order when the aim was to redress the inequalities in the land market, since this purpose was considered to have a 'reasonable foundation'. 28

The question of rent control has been raised in two cases, Pennell v City of San Jose 29

27 467 US 229 (1984) at 244.
28 Also see the German decision in BVerfGE 66, 248. But see the Australian decision in Clunies-Ross v The Commonwealth of Australia and Others (1984) 155 CLR 193 and the German decision in BVerfGE 74, 264.
and Yee v City of Escondido,\textsuperscript{30} and in both these cases the Supreme Court held that rent control constitutes a legitimate exercise of the state’s police power.\textsuperscript{31}

In Pennell v City of San Jose\textsuperscript{32} the appellants challenged the constitutional validity of a provision of a rent control ordinance of the city of San Jose. The ordinance provides that a hearing officer must consider a number of factors in order to determine whether a rent increase proposed by a landlord can be approved. Among others, one of the factors to be considered is the possible hardship that a tenant may suffer as a result of the rent increase. The appellants claimed that the application of this provision of the rent control ordinance violated the Fifth and Fourteenth Amendments in that it constituted a taking of property for public use without just compensation. According to the appellants a reduction in rent as a direct result of the hardship provision constituted a taking, because the ordinance forced private individuals to bear a public burden in that they have to subsidise the poor tenants’ housing. In the court’s view, it was premature to consider such a contention on the facts before the court, because the facts did not provide any evidence that the hardship provision has ever been the direct cause of a reduction in rent, and

"[t]he constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary".\textsuperscript{33}

The appellants also contended that the mere fact that a hearing officer may consider the hardship provision in fixing a reasonable rent renders the ordinance ‘facially invalid’

\textsuperscript{30} 503 US 519 (1992).

\textsuperscript{31} See in this regard Radin Reinterpreting property 72 et seq. Radin contends that a distinction should be made between fungible property and personal property, of which the family home is the prime example. The protection of personal property should serve to improve the wellbeing of the person, and by treating personal property differently from other property, the wellbeing of the person will be ensured.

\textsuperscript{32} 485 US 1 (1988). See Singer Property law - Rules, policies and practices 676 et seq and 1221 et seq; Radin Reinterpreting property 168 and 175.

under the due process clause. The court disagreed with this contention, stating that:

"the standard for determining whether a price control regulation is constitutional under the Due Process Clause is well established: 'Price control is 'unconstitutional ... if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt'". 34

The court pointed out that price or rate regulation acted to protect the consumer's welfare and that this was a legitimate and rational goal. The court accordingly held that the hardship provision in the rent control ordinance of the city of San Jose

"[r]epresents a rational attempt to accommodate the conflicting interests of protecting tenants from burdensome rent increases while at the same time ensuring that landlords are guaranteed a fair return on their investment". 35

This decision of the court seems to be in line with the general view that the property clause must attempt to establish an equitable balance between the interests of the private property holder and the collective interest. The hardship provision does not prejudice the landlord, but it rather aims to balance the interest of the society at large with that of the landlord. The hardship provision ensures that the landlord is not prohibited from introducing a rent increase, provided that any increase is such that, although the landlord gets a fair return on his/her investment, it accounts for the public interest as well. 36

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36 It should, however, be noted that the minority decision in this case took the opposite view. According to the minority the hardship clause did not substantially advance legitimate state interests and did indeed constitute an uncompensated taking (485 US 1 (1988) at 15). By allowing the hardship clause the landlord was forced to bear a social burden which should rather be borne by the public as a whole (485 US 1 (1988) at 19).
In Yee v City of Escondido the court was also confronted with a rent control problem. The petitioners claimed that the California Mobilehome Residency Law, read with a rent control ordinance of the city of Escondido, effected a physical occupation of their property, and as such they were entitled to just compensation. Under the California Mobilehome Residency Law the basis for the termination of a mobile home owner's tenancy was limited to the non-payment of rent and the mobile home park owner's desire to change the use of his/her land. The Law furthermore prohibited the park owner from requiring the removal of a mobile home once it is sold, charge transfer fees for the sale of a mobile home, and from disapproving of a purchaser who is able to pay rent. The Law did not impose any limitation on the rent that the park owner may charge, but the city of Escondido enacted an ordinance which set the rent back to the levels of two years previously. The ordinance also prohibited any increase in the rent without the city's approval. The petitioners in this case, the owners of a mobile home park that rented pads to mobile home owners, contended that the ordinance effected a physical taking of their property by depriving them of all use and occupancy of their property, and that the ordinance in effect granted their tenants and their successors the right to permanently use and occupy the property.

The Supreme Court rejected this contention. It was pointed out by the court that most of the cases which deal with the takings clause fall within one of two categories: those where the government authorises a physical occupation of the property, for which compensation is required, and those cases where the government merely regulates the use of the property. In the latter category the payment of compensation is dependent on considerations such as the purpose of the regulation or the extent to which it deprives the owner of the economic use of the property. If it is found that the regulation unfairly requires a single individual to bear a burden which should be borne by the public as a whole, compensation will be required.

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According to the court, the government only effects a physical taking where it requires the landowner to submit to a physical occupation of his/her land. In this case, however, the court found that the Escondido rent control ordinance read with the California Mobilehome Residency Law did not require the park owners to submit to a physical occupation of their land, but, rather, that they voluntarily rented their land to mobile home owners and they were not required to continue doing so. The court reiterated the fact that the right to exclude is one of the most essential sticks in the bundle of property rights, but in this case the court found that the right to exclude was not taken from the petitioners. The ordinance and the Law merely regulate the use of the property in question by regulating the relationship between the landlord and tenant. The state acted within its police power in this case, for it is a confirmed principle that the state may regulate housing conditions and the landlord-tenant relationship without paying compensation. Due to the fact that the state action in question amounted to no more than a regulation of the use of the property, no 'per se' taking was effected by the state in this case.

This case illustrates the US Supreme Court's willingness to accommodate the interests of the collective. Although the decision in these cases confirmed the principle that rent control merely controls the owner's use of his/her property by regulating the relationship between landlord and tenant, it may also be read as a confirmation of the principle that the private property owner may be expected to make some sacrifice for the common good. It is, however, important to note that the sacrifice should never be such that the individual owner is expected to bear a burden which should be borne by

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40 503 US 519 (1992) at 522, with reference to Loretto v Teleprompter Manhattan CATV Corp 485 US 410 (1982) at 440. Also see Prune Yard Shopping Center v Robins 447 US 74 (1980); Pennell v City of San Jose 485 US 1 (1988). See Radin Reinterpreting property 72 et seq for a justification of rent control. Also see Singer Property law - Rules, policies and practices 684 et seq for the different arguments for and against rent control.

41 503 US 519 (1992) at 524.

42 See Singer Property law - Rules, policies and practices 676 et seq, 1179 et seq and 1221 et seq; Radin Reinterpreting property 72 et seq, 168 et seq and 175 et seq; Alexander 1996 J Leg Ed 586 at 593.
society as a whole. This approach seems to bring the US law in line with other western jurisdictions where private property is protected, but only to such an extent that an equitable balance is struck between the rights of the individual and the collective interest.\textsuperscript{43}

13.5 The Council of Europe

The European Court of Human Rights has consistently interpreted the guarantee of property in article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms so as to leave a wide margin of appreciation to the member states to decide exactly what falls within the ambit of the public interest. This principle is also confirmed in land-reform related cases.

In \textit{James v United Kingdom}\textsuperscript{44} the applicants claimed that a legislative programme, designed to transfer property from one individual to another for the purpose of enfranchising long-leaseholders, was not in the public interest. The case involved the application of the \textit{Leasehold Reform Act} of 1967, which gave tenants in houses held on long leases (for more than 21 years) at low rents the right to purchase compulsorily the freehold of the property (the landlord's interest). The court recognised the fact that the previous system regulating leasehold in the United Kingdom was inequitable to the leaseholder, and that the new law aimed to give effect to the occupying tenant's 'moral entitlement' to ownership of a house.\textsuperscript{45}

The court held that 'in the public interest' does not imply that the transferred property should be put to use for the general public or that the community, or even a substantial portion of the community, should benefit directly from the transfer. Legislative measures which intend to bring about a fair system to govern the property rights of private parties are capable of being 'in the public interest', even if they involve the compulsory transfer

\begin{itemize}
\item \textsuperscript{43} See chapters 8, 10 and 11 in this regard.
\item \textsuperscript{44} 8 EHRR 123 (1986).
\item \textsuperscript{45} 8 EHRR 123 (1986) at par 47.
\end{itemize}
of one individual to another. The court phrased its policy with regard to the interpretation of the public interest requirement as follows:

"[t]he taking of property in pursuance of a policy calculated to enhance social justice within the community can properly be described as being 'in the public interest'". 46

Due to the fact that modern societies consider housing of the population as a prime social need, the margin of appreciation provided to the member states to decide for themselves what qualifies as being in the public interest,

"is wide enough to cover legislation aimed at securing greater social justice in the sphere of people's homes, even where such legislation interferes with existing contractual rights between private parties and confers no direct benefit on the State or the community at large". 47

However, the court continued to state that there should be a reasonable relationship between the means employed by the legislature and the aim it sought to achieve. There should also be a proportional balance between the interests of the affected individuals and the interest of the broader society. Such a balance will be lacking where an individual is expected to bear an individual and excessive burden. 48

In a number of other cases the European Commission of Human Rights confirmed its stance that measures which effect land reform are regarded as a legitimate exercise of the state's power to regulate and control the use of property. In X and Y v The

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46 8 EHRR 123 (1986) at par 41. Also see Holy Monasteries v Greece ECHR Series A vol 301 (1994) at par 67 et seq.

47 8 EHRR 123 (1986) at par 47.

the European Commission of Human Rights held that, for the purposes of fair distribution of housing, the state may prohibit an individual to use his/her own house. The fair distribution of accommodation was regarded as a legitimate purpose for exercising control over the use of property in terms of Rule 3 of article 1. This may even go so far as to prohibit an owner from inhibiting his/her own house. This particular action was not regarded as an expropriation (or deprivation in the context of the European Convention on Human Rights) because the European Commission of Human Rights only regarded a deprivation of ownership as a deprivation in terms of Rule 2 of article 1. In this case ownership was not taken from the owner, and as such Rule 2 did not apply. In X and Others v Belgium\(^{50}\) the applicants claimed that a land redistribution programme caused them to suffer great losses and that the programme constituted a breach of article 1. The European Commission of Human Rights again held that land reform measures formed part of the state’s regulatory powers and that the state may deprive someone of his/her property ‘in the public interest and subject to the conditions provided for by law’ without violating the property guarantee in article 1. The view that land reform measures are ‘necessary’ measures to control the use of property in terms of Rule 3 of article 1 was confirmed in Wiggins v United Kingdom.\(^{51}\) In X v Austria\(^{52}\) the European Commission of Human Rights held that rent control measures are also regarded as a legitimate purpose for the control of the use of property. Due to the fact that deprivations\(^{53}\) are only present where an actual expropriation of ownership is effected, any measure which do not deprive the owner of his/her ownership will be evaluated in terms of Rule 3 of article 1. In a situation where a housing shortage is at hand, rent control measures will qualify as a legitimate exercise of the state’s regulatory power.

\(^{49}\) No 6202/73 1 DR 86 (1975).

\(^{50}\) No 6837/74 3 DR 135 (1976).

\(^{51}\) No 7456/76 13 DR 40 (1978).

\(^{52}\) No 8003/77 17 DR 80 (1980).

\(^{53}\) It should be noted that the term ‘deprivation’ as used in article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms is interpreted to mean expropriation or taking of property. In most other jurisdictions ‘deprivation’ is interpreted to mean the regulation of the use of property.
In *Erkner and Hofauer v Austria*\(^54\) and *Poiss v Austria*\(^55\) the European Court of Human Rights held that a scheme for the consolidation of agricultural land holdings in the interest of their economic exploitation was not in principle invalid in terms of article 1, but that the administration of the scheme constituted a breach of Rule 1 of article 1. In both these cases a provisional transfer of land took place in terms of a provisional consolidation plan in 1970 and 1963 respectively. The applicants received new land holdings but claimed that their original land was more valuable than their new land holdings. They never received compensation in land of special value to which they were entitled. The court held that the Austrian authorities did not effect a formal expropriation, because the transfer of land was effected in terms of a provisional consolidation plan, and it would only become irrevocable when a final consolidation plan was enacted. The applicants may therefore recover their land if the final plan does not confirm the distribution made at the earlier stage of the proceedings. Nor was the provisional transfer essentially designed to restrict or control the use of the land.\(^56\) The court consequently had to inquire whether a proper balance was struck between the demands of the community's general interest and the requirements of protecting the fundamental rights of the individual. The court found that, seeing that a final land consolidation plan was not enacted in 1987, the necessary balance was lacking. The applicants, who remained uncertain as to the final fate of their property, have been made to bear a disproportionate burden.\(^57\)

### 13.6 The Republic of Ireland

The two cases which are discussed in this section deal specifically with rent control in the Republic of Ireland. During World War I temporary statutory restrictions were

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\(^{54}\) *ECHR Series A* vol 117 (1987).


\(^{56}\) *Erkner and Hofauer v Austria* *ECHR Series A* vol 117 (1987) at par 74; *Poiss v Austria* *ECHR Series A* vol 117 (1987) at par 64.

\(^{57}\) *Erkner and Hofauer v Austria* *ECHR Series A* vol 117 (1987) at par 79; *Poiss v Austria* *ECHR Series A* vol 117 (1987) at par 69.
placed on rent payable by tenants in certain dwelling-houses, and restrictions were placed on the power of owners of the dwelling-houses to recover possession of these dwellings. The temporary restrictions were renewed from time to time until 1960, when a consolidation act was promulgated to replace the previous acts. This Act, the Rent Restriction Act, fixed the rent payable by tenants to pre-existing depressed levels of the rents prevailing as a result of the effect of the code since its inception. In *Blake and Others v Attorney General* the plaintiffs, who were owners of such dwelling-houses, claimed that the restriction of rent and the restriction relating to their recovery of possession were invalid in view of the Constitution. At the hearing it was established that in one instance the rent obtainable by the owner in an open market would be nine times greater, and in another instance nineteen times greater than the rent as fixed by the Rent Restriction Act.

After close scrutiny of the relevant section of the Constitution, the court held that the plaintiffs' claim should be heard in terms of article 40 of the Constitution, which protects an individual against unjust attack on the personal rights of the citizen. This article also determines that the state shall, in case of any injustice done to the citizen, vindicate the life, person, good name, and property rights of the affected citizen.


59 Article 40 of the Constitution of the Republic of Ireland determines that:

1. All citizens shall, as human persons, be held equal before the law. This shall not be held to mean that the State shall not in its enactments have due regard to difference of capacity, physical and moral, and of social function.
3. 1. The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. 2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

Article 43 states that:

1. The state acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. 2. The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
3. 1. The State recognises, however, that the exercise of rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice. 2. The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.
The court pointed out that the legislation in effect interfered with and rendered ineffective the exercise of the property rights of the owners of the dwellings. This constituted an attack on the rights of the owners. The question that needed to be answered was whether this attack was unjust and therefore in contravention of article 40.3.2. The court found that, while the Act provided for the restriction of rent 'in certain cases', no clear basis existed in terms of which the houses affected by the legislation in question were selected. The court also found that neither the means of the tenant, nor the lack of means or possible hardship of the landlord was considered in the determination of the rent. The rent charged to the tenants was found to be fixed at a level which was oppressively uneconomic (the payable rent related to the rent chargeable in respectively 1914 and 1941) and it was further eroded by the statutory obligation of the owner to repair and maintain the affected property. Furthermore, the fact that there existed no power of review of such rents, irrespective of changes in conditions, led the court to the conclusion that the provisions of the Act

"[r]estrict the property rights of one group of citizens for the benefit of another group. This is done, without compensation and without regard to the financial capacity or the financial needs of either group, in legislation which provides no limitation on the period of restriction, gives no opportunity for review and allows no modification of the operation of the restriction. It is, therefore, both unfair and arbitrary. These provisions constitute an unjust attack on the property rights of landlords of controlled dwellings and are, therefore, contrary to the provisions of article 40, s 3, sub-s 2, of the Constitution". 60

The court pointed out that article 43 mainly deals with the institutional guarantee of property, and since this specific case does not qualify as a regulation or delimitation of the property rights of the affected parties, "it requires to be examined for its validity in relation to the provisions of Article 40, s 3, sub-s 2. Therefore the question to be decided is whether the impugned provisions of the Act of 1960 (as amended) constitute an unjust attack on the property rights of the plaintiffs". See Blake and Others v Attorney General [1982] IR 117 at 136.

60 [1982] IR 117 at 139.
The court furthermore held, with regard to the restriction on the owners to obtain possession of their rented dwellings, that such a restriction in itself is not constitutionally invalid, provided that it is fair and not oppressive. In this case, however, where the tenant's family's right to retain possession after the death of the tenant is extensive, this restriction was found to be

"an integral part of the arbitrary and unfair statutory scheme whereby tenants of controlled dwellings are singled out for special favourable treatment, both as to rent and as to the right to retain possession, regardless of whether they have any social or financial need for such preferential treatment and regardless of whether the landlords have the ability to bear the burden of providing such preferential treatment".  

This part of the legislation was thus also found to be an unconstitutionally unjust attack on the property rights of the affected landlords.

In reaction to the decision in Blake and Others v Attorney General the Irish government drafted the Housing (Private Rented Dwellings) Bill of 1981. The Bill was sent to the Supreme Court to ascertain whether its provisions were in conflict with the provisions of the Constitution. The Bill was evaluated in Re Reference Under Article 26 Of the Constitution of the Housing (Private Rented Dwellings) Bill 1981. The court emphasised the fact that its function in this case was not to impress any part of the Bill with a stamp of constitutionality, but merely to declare repugnancy to the Constitution, should it be found. The purpose of this Bill was to regulate rent control issues during the period of transition while the system of rent control (which was declared unconstitutional in the Blake decision) was phased out. The Bill determined that the

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61 [1982] IR 117 at 140.
64 [1983] ILRM 246 at 247.
lessees of the affected dwellings would have security of tenure in that he/she would have a statutory entitlement to retain possession of the specific dwelling during his/her lifetime, or the lifetime of his/her spouse, and thereafter a qualified member of his/her family might retain possession for a period of 20 years from the commencement of the Act. The court pointed out that this situation seemed to have particular benefits for the tenant. The owner might not recover possession unless he or she needed the dwelling for his/her own residential purposes, the residential purposes of a fulltime employee, or for the interests of good estate management. In these instances the owner, however, had to pay for the tenant's expenses of quitting the dwelling, and for up to two years' rent for alternative accommodation.\textsuperscript{65}

The court found the 'gross rent' to be a just and proper rent, but during the first five years of the scheme the landlords would receive an amount which was substantially less than the just and proper rent payable in respect of their property. Due to the fact that no constitutionally permitted justification was supplied for depriving the landlords of part of their just rent for the period specified in the Bill, the court regarded it to constitute an unjust attack on the owners' property rights, and as such the provisions were in contravention of the Article 40.3.2 of the Constitution.\textsuperscript{66}

The court acknowledged the fact that the effects of its decision might cause hardship to many tenants, and it was accordingly pointed out that such hardship suffered by tenants might amount to an unjust attack upon the property rights of tenants. The court concluded by pointing out that:

\textsuperscript{65} [1983] ILRM 246 at 250 \textit{et seq.} As far as the payment of rent was concerned, sections 6 to 9 of the \textit{Housing (Private Rented Dwellings) Bill 1981} proposed an interesting scheme. The Bill proposed that a 'gross rent' was determined, either by agreement between the owner and the lessee or, if such an agreement was not reached, by the District Court. The 'gross rent' should be determined on the basis of what a willing lessee not in occupation would give and a willing lessor take. This amount would then be reduced by the amount allowed for improvements. For the first five years after the commencement of this scheme the lessee would pay the rent payable at the commencement of the Act plus, in the first year, 40% of the difference between that rent and the 'gross rent', 55% of the difference in the second year, 70% of the difference in the third year, 85% of the difference in the fourth year, and thereafter the lessee would pay the full rent as fixed by the court.

\textsuperscript{66} [1983] ILRM 246 at 252.
"[h]aving regard to the obligation imposed on the State by the Constitution to act in accordance with the principles of social justice, the court recognises the presumption that any such hardship will be provided for adequately by the State".67

This decision seems to be in line with the approach in most other jurisdictions. A clearly unjust situation with regard to the landowner will not be allowed, if a land-reform related law expects the individual to bear a burden which should be borne by the public at large. In this case the court placed the onus of carrying the financial burden during the transition period on the state. Private individuals would thus not have to suffer economic losses as a direct result of a clearly unfair and unjust system. The court accepted that land-reform related laws, such as rent control laws, are not invalid in principle. This will only be the case where the effects of the law are unfair or unreasonable.

13.7 The Netherlands

The situation in the Netherlands serves as an example of a jurisdiction where land reform constitutes a legitimate reason for the restriction or infringement of property rights in civil law in absence of a constitutionally entrenched property clause. The civil law perception of specifically ownership in the Netherlands bears close resemblance to the position in South African common law before the implementation of the 1993 Constitution, and it is therefore interesting for the purposes of this study to see that land reform is regarded as a valid reason for fairly extensive infringement of the owner's common law rights. Although ownership is protected by the Dutch Constitution, parliament has the power to determine the extent of these rights and may limit the rights as they see fit. The Bill of Rights is not entrenched in the Dutch Constitution, and the Constitution does not afford the courts the judicial power of review. The owner thus has to rely on civil law for the recognition and protection of the rights associated with


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ownership. Although civil law affords the owner with very strong protection of his/her property rights, these rights are not regarded as inviolate in civil law and may be restricted or limited to serve the public interest. For the purposes of this section the effect of two Acts will be looked at, both of which have an effect on the content and scope of the owner’s rights: the *Leegstandwet* and the *Landinrichtingswet*.

The *Leegstandwet* determines that the state may use uninhabited buildings suitable for housing in order to deal with the housing shortage. Kleyn points out that the *Leegstandwet* rests on two legs: firstly it aims to prevent the non-use of houses and other buildings suitable for accommodation, and secondly, it aims to increase government involvement in the prevention of non-use of houses. In terms of the Act a register for uninhabited houses or dwellings has to be established for every district in the Netherlands. Within one month after the house became uninhabited, it has to be entered into the register. Non-compliance with this by the owner is a punishable offence. Once a house has been registered in terms of the Act, the local authority may acquire and use the house for purposes of housing homeless residents in order to curb the housing shortage. After the house has been unoccupied for five months the local authority has to make a decision within two weeks whether it will acquire the house to

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68 See chapter 7 in this regard.


73 Section 2.

74 Section 6 determines that an owner who does not register his/her un-used house may be fined 25 000 or four weeks imprisonment. Also see Kleyn *Leegstandbestrijding. De Leegstandwet, tijdelijke verhuur, vorderen en kraken* 12.
use it for housing the homeless. The listing of a specific house in the register will only be scrapped if the owner starts to use the house him/herself again, or if the house has been empty for more than a year. Once a house has been acquired by the local authority in terms of the Act, the local authority may allocate the house to a properly identified person. No contract of lease will be created *ex lege*, but both parties (the owner and the new resident) will have certain obligations towards one another in terms of the Act. The owner will have to provide the new resident with the use and enjoyment of the house, while the resident is obliged to pay the owner a reasonable amount for the use of the house. The owner is, however, free to enter into a lease contract with the new resident.

The Act furthermore determines that *krakers* (squatters) occupying an unused house have to vacate the property immediately on the owner’s request, and if they refuse to do so, the mayor has the authority to have them forcibly removed. An interesting aspect of this part of the Act is that the occupation of an unoccupied house which is not entered into the register, is not a punishable offence in terms of this Act.

Another legislative measure which may have an impact on the landowner’s rights is the

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75 Section 7. In the case, however, where an owner is relocating to another district and has to sell the house, or where the owner built a house for purposes of selling it, this period is twelve months.

76 Section 5 of the Act determines that in the case where an owner starts to re-use his/her house, this has to be for a just cause. The owner may not re-use the house simply to frustrate the provisions of the Act. The onus of proof in this case will be on the local authority to prove that the re-use of the house, which has previously been empty, is clearly for purposes of escaping the effects of this Act.

77 This has both advantages and disadvantages. If the resident (lessee) does not pay rent regularly, the owner may terminate the contract. On the other hand, the contract of lease in the Netherlands has a more or less permanent character. In principle there is no stipulated period and the lessee is free to continue renting the property until his/her death, upon which the lessee’s spouse or partner may continue to lease the property. See 1623 BW.

Landinrichtingswet.\textsuperscript{79} This Act deals mainly with planning law, but it provides for land consolidation as one of the measures to effect the constructive use of land. The Act determines that property holders in a specific area may apply for the redevelopment and planning of that area. The process involves the creation of a comprehensive plan to ensure that the land in question is put to the best possible use. This process may include measures to consolidate agricultural land where farms have become too small or dispersed for effective farming.

Ruilverkaveling or land consolidation in the Netherlands traditionally entailed the exchange of farmland between individual owners where, as a result of subdivision of the land, farms were too small, peculiarly shaped or were not situated next to one another. Through a process of ruilverkaveling owners could exchange land in an attempt to consolidate their land. Since 1924 this process has changed to a certain extent. The Ruilverkavelingswet of 1924,\textsuperscript{80} 1938\textsuperscript{81} and 1954\textsuperscript{82} created a process whereby the state is in charge of land consolidation schemes. In terms of this process owners in a specific area may apply for the consolidation of their land. If more than half of the owners in that specific area vote in favour of a land consolidation scheme, the state will assist with the planning and the execution of the scheme for the designated area as a whole. Not only will farmland be redivided, but the state will also assist with the creation or improvement of the general infrastructure in that area (this may include the building of roads and canals, the reclamation of land, the supply of water for household purposes, electricity and so on).\textsuperscript{83}

The promulgation of the Landinrichtingswet in 1985 introduced a new era in this regard. This Act is primarily aimed at the comprehensive and detailed planning of designated

\begin{itemize}
\item \textsuperscript{79} Landinrichtingswet of 9 May 1985, Stb 299.
\item \textsuperscript{80} Ruilverkavelingswet of 1924, Stb 481.
\item \textsuperscript{81} Ruilverkavelingswet of 1938, Stb 618.
\item \textsuperscript{82} Ruilverkavelingswet of 1954, Stb 510.
\item \textsuperscript{83} See in general De Cloe Landinrichtingswet XIV; Edwards Planning betwist 61.
\end{itemize}

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areas. The purpose of this Act is to ensure a responsible, rational and economically sound agricultural industry, to create a socially acceptable living and working environment in the countryside, to ensure the maximum use of land by the whole of the non-agricultural community, and to conserve as wide a variety of natural areas as possible.\textsuperscript{84}

Land consolidation is just one of the measures provided for by the Act to effect effective planning. In terms of the \textit{Landinrichtingswet} the organization of land may include measures aimed at the reorganisation of the land, accommodational organisation of the land, land consolidation, and land consolidation by agreement.\textsuperscript{85}

The Act determines that where more than 50% of the parties concerned vote in favour of a land consolidation scheme, the whole area will be subject to such a scheme.\textsuperscript{86} It may be argued that this constitutes a drastic interference with the rights of the owners who do not support the land consolidation scheme, but on the other hand it is argued that the scheme serves to promote the public welfare and that individuals are required to bear this burden to serve the collective interest. On approval of the scheme the land will be redivided to ensure the most effective and best possible use of the land, and general services will be provided. The Act further provides that no more than 5% of the value of the land may be appropriated by the state in order to finance the building of

\begin{itemize}
\item \textsuperscript{84} De Cloe \textit{Landinrichtingswet} XV.
\item \textsuperscript{85} Article 13 of the \textit{Landinrichtingswet}. To qualify for such a scheme in terms of the Act the land in question has to fulfill a mainly agricultural function, but it also has to serve, or ought to serve, some non-agricultural purpose. See article 15 of the \textit{Landinrichtingswet}. Thus, in terms of the \textit{Landinrichtingswet} land consolidation entails not only the mere reorganisation of agricultural land, but also measures and provisions pertaining to all facets of the use of land in a specific area, including agriculture, forestry, horticulture, nature conservation, the landscape, infrastructure, open air recreation and socio-historical aspects. See article 5 of the \textit{Landinrichtingswet}.
\item \textsuperscript{86} Article 51 of the \textit{Landinrichtingswet} determines that the decision to introduce a land consolidation scheme must be taken by voting. The parties who vote against such a scheme will be forced to submit to the effects of the land consolidation scheme. The \textit{Landinrichtingswet} has broadened the base of people eligible to vote when a decision has to be taken whether to accept a land consolidation scheme or not. In terms of the old \textit{Ruwverkevelingswet} only owners and users of the land in question were eligible to vote, but in terms of the \textit{Landinrichtingswet} article 54 to 61 all parties concerned may participate in the process.
\end{itemize}
public roads, canals, and other provisions relating to the conservation of the natural environment.\textsuperscript{87} If an owner loses some of his/her rights as a direct result of the land consolidation scheme, he/she may apply for compensation.\textsuperscript{88}

The Act also provides for land consolidation by agreement. In terms of this process three or more owners may consolidate their land and redivide the total landmass by way of notarial deed.\textsuperscript{89}

De Cloe\textsuperscript{90} points out that the need to include measures in the Act to prevent a degeneration to the position before the land consolidation scheme was executed, did not exist in this case. Land consolidation in the Netherlands seem to be permanent, and no preventative measures were thus included in the Act.

Although both the \textit{Leegstandwet} and the \textit{Landinrichtingswet} entail measures which have a direct effect on the owner's rights to use his/her property as he/she sees fit, these measures are justified in terms of the public purpose they serve. These legislative measures illustrate the fact that the owner's rights may be subjected to the public interest. In the Netherlands, where there is a housing shortage as well as a shortage of agricultural land, it is justified that measures which aim to address these issues radically interfere with and restrict the owner's rights.

13.8 Conclusion

The land-reform related measures discussed in this chapter were all implemented in jurisdictions without an official, large-scale land reform programme. Although land reform is not regarded as a major issue in these jurisdictions, the case law dealing with

\begin{itemize}
\item \textsuperscript{87} Article 150 of the \textit{Landinrichtingswet}.
\item \textsuperscript{88} Article 140 of the \textit{Landinrichtingswet}.
\item \textsuperscript{89} Article 17, 119 and 120 of the \textit{Landinrichtingswet}.
\item \textsuperscript{90} De Cloe \textit{Landinrichtingswet XXI}.
\end{itemize}
different land reform related measures discussed in this chapter clearly illustrate that land reform measures that involve either the regulation of the use of property in terms of the state's police power\textsuperscript{91} or the expropriation of property in terms of the state's power of eminent domain\textsuperscript{92} can be constitutionally acceptable. These cases also illustrate that the possibility of a constitutional conflict, as illustrated by the Indian experience, can be avoided.

The implementation of land reform measures are generally aimed at improving the position of the non-owner by securing his/her rights with regard to the owner and to create a just and equitable situation with regard to the distribution of land. The tenure reform measures discussed in this chapter are mostly aimed at the improvement of the relationship between landlords and tenants. These reform measures are effected in terms of the state's police power and do not require the payment of compensation.\textsuperscript{93}

The possibility does, however, always exist that the regulation of the use of property may be regarded as a compensable taking of property in that it 'goes too far' and places a burden on the individual property owner that should be borne by society as a whole. The discussion above seems to illustrate that most courts are lenient in their approach to land reform measures, and that land reform measures are regarded as a valid exercise of the state's power to limit private property rights. In most developed countries the social function of property (especially land) is emphasised and the courts generally expect the owner to suffer the limitation or restriction of his/her rights in the public interest, provided that an equitable balance is established between the interests

\textsuperscript{91} X and Y v The Netherlands No 6202/73 1 DR 66 (1975); Pennell v City of San Jose 485 US 1 (1988); Yee v City of Escondido 503 US 519 (1992); X v Austria No 8003/77 17 DR 80 (1980); BVerfGE 37, 132; BVerfGE 68, 361; BVerfGE 38, 248; BVerfGE 91, 294; BVerfGE 79, 292; BVerfGE 89, 1; BVerfGE 52,1. Also see the Dutch Leegstandwet of 21 May 1981, Stb 337. See in general Balk 1980 R&K 390; Van der Walt 1991 R&K 329; Kleyn Leegstandbestrijding. De Leegstandwet, tijdelijke verhuur, vorderen en kraken 9; Kleijn, Van Velten and Kleijn Overheidsingrijpen in de eigendoms- en gebruiksrechten van onroerend goed 39 et seq.

\textsuperscript{92} James v United Kingdom 8 EHRR 123 (1986); Hawaii Housing Authority v Midkiff 467 US 229 (1984).

\textsuperscript{93} Pennell v City of San Jose 485 US 1 (1988); Yee v City of Escondido 503 US 519 (1992); X v Austria No 8003/77 17 DR 80 (1980); BVerfGE 37, 132; BVerfGE 68, 361; BVerfGE 38, 248; BVerfGE 91, 294; BVerfGE 79, 292; BVerfGE 89, 1; BVerfGE 52,1.
of the individual and the public interest.

Land reform measures which effect the expropriation of property (land) are mostly aimed at the equal (re)distribution of land among all the members of a particular society. Due to the fact that land reform is regarded as a legitimate public purpose in most developed countries, the courts seem to allow for land reform where property is expropriated, even in cases where the expropriated property is eventually transferred to other individuals. It is, however, important that an equitable balance should be struck between the rights of the individual and the public interest, and if it is found that the land reform measures impose on an individual property holder a burden which should rather be borne by society at large, the property holder should be compensated.

The principles which govern land consolidation could also be applied to measures aimed at the redistribution of land. Land consolidation is generally aimed at the creation of a situation where available land is put to its optimum use. The implementation of such a scheme is usually dependent on the decision of the majority of landowners in a particular area. The dissenting minority is forced to accept the decision of the majority and has to submit to the effects of the scheme. The redistribution of land also aims to ensure that all land is distributed just and equitably between all members of society, and the landed minority has to accept the needs and wishes of the landless majority.

This chapter illustrates that the introduction of land reform measures need not cause friction between the legislature and the judiciary. It is widely accepted, even in jurisdictions where land reform is not regarded as a major issue, that property has a social function and that the state may legitimately restrict the individual's rights in order to serve the public interest. Land reform qualifies as a legitimate public purpose, and


95 James v United Kingdom 8 EHRR 123 (1986); Hawaii Housing Authority v Midkiff 467 US 229 (1984).

96 See in general De Cloe Landinrichtingswet XIV; Edwards Planning betwist 61.
as long as the judiciary takes cognisance of the social role and function of property, the
question of land reform need not pose a problem. The role of the judiciary would then
be to make sure that the land reform measures comply with the principles for and
boundaries of constitutionally legitimate land reform, and to ensure that the legislature
does not impose a too heavy burden on individual property holders in its
implementation of land reform. However, the possibility of friction between the
legislature and the judiciary might become a reality in jurisdiction where the courts hold
the view that the constitutional property guarantee provides an absolute guarantee of
existing individual property rights and that existing property rights may not be limited
or infringed upon for social and/or political reasons (as is illustrated by the Indian
experience and the Australian decision in Clunies-Ross v The Commonwealth of
Australia and Others).\textsuperscript{97}

\textsuperscript{97} (1984) 155 CLR 193.
14.1 Introduction

In this chapter the aims and implementation of formal or official land reform programmes in different jurisdictions are looked at. In most of these jurisdictions the implementation of land reform was necessitated by a history of discrimination and the consequent inequitable distribution of land. The land reform programmes devised to deal with these inequalities encompassed a variety of measures to ensure the equal distribution of land and to provide all citizens with security of tenure.

It is pointed out in the previous chapter that land reform measures in jurisdictions without an official land reform programme may cause friction between the judiciary and the legislature, depending on the judiciaries view on existing property rights and the role and function of the national Constitution. The constitutional conflict between the courts and the legislature is usually the result of the courts' narrow and conservative interpretation of the property clause. This is illustrated by the situation in India and Australia. In these jurisdictions the courts interpreted the property clause in such a manner that the existing property rights are afforded strong protection, and the social function of property is not regarded as an inherent part of the property clause. However, it is pointed out that in other jurisdictions, where the courts emphasise the social and political role and function of property (Germany, the United States of America, the Council of Europe and Ireland) land reform measures need not be regarded as in conflict with the constitutional property guarantee. In most of these jurisdictions the social and political context within which property rights are interpreted and applied plays a decisive role, and the courts attempt to establish a just and equitable balance between the public interest and the interests of the affected individuals.
In this chapter the position in jurisdictions with an official land reform programme is investigated. Firstly, mention is made of a variety of jurisdictions where provision is made in the Constitution for land reform in general or a specific form of land reform. The implementation of land reform in these jurisdictions usually does not cause any problems. The land reform programmes in Zimbabwe, Namibia, Botswana and Mexico are investigated with special reference to the type of reforms introduced, and the particular circumstances under which these reforms were implemented to cater for the needs of that specific society.

The implementation of the respective land reform programmes in Namibia, Botswana and Mexico did not cause friction between the judiciary and the legislature in the sense that the land reform programme was in conflict with the constitutional property clause. In Zimbabwe the possibility of a constitutional conflict still exists, notwithstanding the fact that the court's jurisdiction to determine the amount of compensation had been removed from the constitutional property clause.

14.2 Developing countries that make provision for land reform in their constitutions

The property clause in the South African Constitution contains a number of provisions which specifically provide for the implementation of land reform measures. These provisions are discussed in chapter 11 and chapter 15. In a number of other jurisdictions provision is also made in the national Constitutions for land reform measures. Due to the fact that no case law exists on the land reform measures provided for in the Constitution, these provisions will not be discussed in any great detail in this section.

Nationalisation of all or specific land as a means to effect land reform is recognised in various jurisdictions. The Constitutions of Chile and Nigeria provide for the

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1 See in this regard King Land reform - a world survey 34 et seq.
nationalisation of all mines and minerals. In Lesotho all land vests in the Basotho Nation. The King of Lesotho, who holds the land in trust for the Nation, has the right to allocate land, make grants of interests or rights in or over the land, and to terminate or restrict any interest or right that has been granted. The Parliament makes provisions regulating the principles according to which and the manner in which the King may execute his powers. Similarly, the Ethiopian Constitution, the Mexican Constitution and the Constitution of Mozambique determine that the ownership of all land vests in the state, and that citizens have a right to use the land.

2 Article 42(3) of the Constitution of the Federal Republic of Nigeria determines that: "Notwithstanding the foregoing provisions of this section, the entire property in and control of all minerals, mineral oils and natural gas in, under or upon any land in Nigeria or in, under or upon the territorial waters and the Exclusive Economic Zone of Nigeria shall vest in the Government of the Federation and shall be managed in such a manner as may be prescribed by the National Assembly".

3 Section 107 to 109 of the Constitution of Lesotho determines that: "107. Without prejudice to any allocation of land that was made before the commencement of this Constitution .... all land in Lesotho is vested in the Basotho Nation.

108. (1) The power to allocate land that is vested in the Basotho Nation, to make grants of interests or rights in or over such land, to revoke or derogate from any allocation or grant that has been made or otherwise to terminate or restrict any interest or right that has been granted is vested in the King in trust for the Basotho Nation. (2) The power that is vested in the King by subsection (1) of this section shall be exercised in accordance with this Constitution and any other law ...

109. Parliament may make provision prescribing the allocations that may be made and the interests or rights that may be granted in exercise of the power conferred by section 108 of this Constitution, the grounds upon which and the circumstances in which such allocations or grants may or shall be so made or may or shall be revoked or derogated from the interests or rights which may or shall otherwise be so terminated or restricted, appeals in respect of the allocation or refusal to allocate land or the revocation of interests to or in land and, generally, regulating the principles according to which and the manner in which the said power shall be exercised".

4 Article 40(3) and (4) of the Constitution of the Federal Democratic Republic of Ethiopia states that: "3. The right to ownership of all rural and urban land, as well as of all natural resources, is exclusively vested in the State and in the peoples of Ethiopia. Land is a common property of the nations, nationalities and peoples of Ethiopia and shall not be subject to sale or to other means of transfer.

4. Any Ethiopian who wants to earn a living by farming has a right, which shall not be alienated, to obtain without payment, the use of the land".

Article 27 of the Constitution of Mexico determines that: "Ownership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the
It is pointed out above that the fixing of a maximum limit on land ownership (as applied in Namibia and Mexico) is an acceptable means of effecting land reform. The Constitution of Egypt contains a special provision (among the articles dealing with the right to property) which allows for the fixing of a maximum limit on land ownership. This provision states that the law shall fix the maximum limit of land ownership with the view to protect the farmer and the agricultural labourer from exploitation and to assert the authority of the alliance of the people's working powers at the level of the village.

The Constitution of Kenya contains an interesting provision. This provision determines that the non-discrimination guarantee will not apply to the giving or withholding of consent to a transaction in agricultural land. The possible effect of this provision is that the state may be in a position to control the alienation and transfer of agricultural land without fear of violating the landowner's right not to be treated in a discriminatory manner.

Article 46 and 47 of the Constitution of the People's Republic of Mozambique states that:

"46. 1. Ownership of land is vested in the State. 2. Land may not be sold, mortgaged, or otherwise encumbered or alienated. 3. As a universal means for the creation of wealth and social well-being, the use and enjoyment of land shall be the right of all the people of Mozambique.

47. 1. The State shall determine the conditions for the use and enjoyment of land. 2. The right to use and enjoyment of land shall be granted to individual or collective persons, taking into account its social purpose. 3. The terms for the establishment of rights in respect of land shall be governed by law and shall prioritise direct users and producers. The law shall not permit such rights to be used to favour situations of economic domination or privilege to the detriment of the majority of citizens."


See 14.6.

Article 37 of the Constitution of the Arab Republic of Egypt.

Article 82 (2) of the Constitution of Kenya determines that:

"(2) ... no person shall be treated in a discriminatory manner by a person acting by virtue of any written law or in the performance of the functions of a public office or a public authority."

Article 82(6)(b) states that subsection (2) shall not apply to the giving or withholding of consent to a transaction in agricultural land by any body or authority established by or under any law for the purpose of controlling transactions in agricultural land.
In Guyana the process of reform is authorised, not by specific provisions in the property clause itself, but by a set of provisions which establish a political, economical and social system within which the property clause assumes a co-operative, social meaning. These provisions embody the constitutional goals of socio-economic reform and reconstruction and have an obvious effect on property rights. In the Guyanan situation the goals of socialism and co-operativism are attained through the regulation of the use of property and not through nationalisation of all property. Although these provisions emphasise socialism and co-operativism, they still leave room for the recognition of private property.

9 The relevant sections of the Constitution of the Co-operative Republic of Guyana determines that:

"14 The supreme goal of the economic system which is being established in the State is the fullest possible satisfaction of the people's growing material, cultural and intellectual requirements, as well as the development of their personality and their socialist relations in society.
15(1) In order to achieve economic independence as the imperative concomitant of its political independence, the State will revolutionise the national economy. (2) The national economy of the State will be based upon the social ownership of the means of production and the eventual abolition of internal arrangements and relationships which permit the exploitation of man by man. (3) The economy will develop in accordance with the economic laws of socialism on the foundation of socialist relations of production and development of the production forces. (4) National economic planning shall be the basic principle of the development and management of the economy. It shall provide for the widest possible participation of the people and their socio-economic organs at enterprise, community, regional and national levels, and shall also provide continuous opportunity for the working people to exercise initiative and to develop a spirit of creativity and innovation.
16 Co-operativism in practice shall be the dynamic principle of socialist transformation and shall pervade and inform all interrelationship in the society. Co-operativism is rooted in the historical experience of the people, is based on self-reliance, is capable of releasing the productive energies of the people, and is a unifying principle in the total development of the nation.
17 The existence of privately owned economic enterprises is recognised. Such enterprises must satisfy social needs and operate within the regulatory framework of national policy and the law.
18 Land is for social use and must go to the tiller.
19 Every citizen has the right to own personal property which includes such assets as equipment, motor vehicles and bank accounts.
20 The right of inheritance is guaranteed.
21 The source of the growth of social wealth and of the well-being of the people, and of each individual, is the labour of the people.
26 Every citizen has the right to proper housing accommodation.
36 In the interests of the present and future generations, the State will protect and make rational use of its land, mineral and water resources, as well as its fauna and flora, and will take all appropriate measures to conserve and improve the environment".
In Tanzania an Act which extinguished customary law land rights in a land-reform related process was invalidated by the High Court because it violated the affected parties' right not to be discriminated against. The Regulation of Land Tenure (Established Villages) Act of 1992 was declared null and void in the High Court of Tanzania decision in Aakonaay and Another v Attorney General of Tanzania. The Act extinguished all customary law rights which were held with relation to land that fell within villages established in terms of the Act. The Act excluded payment of compensation for the land taken, and provided that no proceedings could be instituted in any court or tribunal in relation to the extinction of any right by the 1992 Act or in relation to any village land under customary law. The court held that the Act violated article 13 of the Constitution in that it amounted to discrimination. Article 24 of the Constitution was also violated in that the Act disregarded the lawfully acquired and exercised land rights of the affected parties. Lastly the court held that the provisions of the Act promoted the exercise of the rights and freedoms of certain individuals in such a manner that it terminated or infringed upon the rights and freedoms of others.

10 [1993] 4 LRC 327 (HC).
11 Section 3.
12 Section 4.
13 Sections 5 and 6.
14 Article 13 of the Constitution of the United Republic of Tanzania determines that: "13(1) All people are equal before the law, and have the right, without discrimination of any kind, to be protected and to be accorded equal justice before the law. (2) It is forbidden for any law ... to impose any condition which is of a discriminatory nature of which is obviously to one’s disadvantage".
15 [1993] 4 LRC 327 (HC) at 332 et seq.
16 Article 24 of the Constitution of the United Republic of Tanzania determines that every one has the right to own property and the right to keep his property in accordance with the law.
17 [1993] 4 LRC 327 (HC) at 334 et seq.
18 This was found to be in violation of article 30 of the Tanzanian Constitution which determines that human rights and freedoms may not be used by one person in a way that will result in interference and curtailment of the rights and freedom of others or of the interests of the public. See [1993] 4 LRC 327 (HC) at 332 et seq.
Land distribution patterns in Zimbabwe are distorted as a result of the country's colonial past. Before the political transformation in 1980 Zimbabwe (then Rhodesia) was ruled by a white minority government and land was distributed along racial lines. Most of the best arable land was allocated to whites, while blacks were localised in so-called tribal reserves comprising mostly of infertile land. In fact, just prior to the political transformation in 1980, more or less 6000 white farmers occupied 39% of the total land area in Zimbabwe. This portion of the land comprised the most fertile land in the country. At the same time 750 000 blacks were allocated 42% of the total land area of the country, which were for the most part the least fertile land available. This situation led to dissatisfaction amongst the black majority and is recorded as one of the reasons for the war for political transformation.

The political transformation of Zimbabwe came as a result of the Lancaster House agreement reached in December 1979 between the United Kingdom (as the erstwhile colonial power), the Rhodesia regime and the rebel Patriotic Front. The Lancaster House agreement determined that certain provisions of the new Constitution would be entrenched for a period of ten years. Among these provisions was section 16 of the Constitution which guaranteed the right to property. In terms of this guarantee white landowners were entitled to keep their property, and if their property was expropriated, compensation had to be paid in foreign currency. Section 16 made comprehensive land reform almost impossible.

Towards the end of the ten year period the Zimbabwean government amended the Constitution. The Constitution of Zimbabwe Amendment (No 11) Act of 1990 amended the Constitution to allow for compulsory acquisition of land for the purpose of...
resettlement. The 'prompt' payment of 'adequate' compensation was changed to 'fair compensation' paid in a 'reasonable time'. The Amendment Act also provided that Parliament has the power to specify the principles in terms of which compensation was to be determined and paid, and to fix the amount of compensation in accordance with those principles. Section 6 of the Act furthermore amended the Constitution to include a provision which states that no law could be called into question by any court on the ground that the compensation provided by that law was not fair. Two subsequent Acts amended the Constitution to ensure that the courts would have no jurisdiction at all with regard to the determination of compensation. The Constitution of Zimbabwe Amendment (No 12) Act deleted a clause enabling a claimant for compensation to apply to the High Court 'for the determination of any question relating to compensation', and the Constitution of Zimbabwe Amendment (No 13) Act amended section 16 of the Constitution to allow only claimants for compensation with property other than land to apply to the court for the determination of a question relating to compensation.

\[\text{Ng'ong'ola 1992 Int \\& Comp LQ 117 at 134 et seq.}\]

\[\text{Naldi 1998 CILSA 78 at 79 et seq; Ng'ong'ola 1992 Int \\& Comp LQ 117 at 134 et seq. For purposes of reference, the relevant part of section 16 of the Constitution, after the amendments, is provided here:}\]

"(1) No property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that -

(a) requires -

(i) in the case of land or any interest or right therein, that the acquisition is reasonably necessary for the utilization of that or any other land -

A. for settlement for agriculture or other purposes; or

B. for purposes of land reorganisation, forestry, environmental conservation or the utilisation of wild life or other natural resources; or

C. for the relocation of persons dispossessed in consequence of the utilisation of land for a purpose referred to in subparagraph A or B; or

(ii) in the case of any property, including land, or any interest or right therein, that the acquisition is reasonably necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the utilisation of that or any other property for a purpose beneficial to the public generally or to any section of the public; and

(b) requires the acquiring authority to give reasonable notice of the intention to acquire the property, interest or right to any person owning the property or having any other interest or right therein that would be effected by such acquisition; and

(c) subject to the provisions of subsection (2), requires the acquiring authority to pay fair compensation for the acquisition before or within a reasonable time after acquiring the property, interest or right; and

(d) requires the acquiring authority, if the acquisition is contested, to apply to the
In line with the constitutional changes the government announced its land policy in 1990. The Zimbabwean land policy focuses on five issues: (a) to acquire five million more hectares in land blocks to resettle 110 000 more households; (b) to review the land tenure situation in communal and resettlement areas; (c) the selection of settlers and land use models in resettlement areas were to be reviewed towards emphasising economic rather than social or subsistence criteria; (d) it intended to promote blacks in capitalist farming through training and agricultural support services; and (e) it intended to introduce a land tax. These issues identified by the land policy statement were not linked together in a coherent, rational implementation sequence, but attempted to provide a comprehensive position on various land policy concerns and problems implemented since independence ten years earlier.23

With a kind of land policy in place, and after the Constitution had been amended to ensure that land reform measures would not constitute a breach of or be blocked by the provisions contained in the Constitution, the government proceed to enact legislation for the purposes of the redistribution of land and the resettlement of the rural population. The Land Acquisition Act was adopted by Parliament in 1992 with an overwhelming majority. The main aim of the Act was to enable the government to acquire land on which it could resettle approximately 162 000 communal farming

High Court or some other court before, or not later than thirty days after, the acquisition for an order confirming the acquisition; and
(e) enables any person whose property has been acquired to apply to the High Court or some other court for the prompt return of the property if the court does not confirm the acquisition, and to appeal to the Supreme Court; and
(f) except where the property concerned is land or any interest or right therein, enables any claimant for compensation to apply to the High Court or some other court for the determination of any question relating to compensation and to appeal to the Supreme Court.

(2) A law referred to in subsection (1) which provides for the compulsory acquisition of land or any interest or right therein may -
(a) specify the principles on which, and the manner in which, compensation for the acquisition of the land or interest or right therein is to be determined and paid;
(b) fix, in accordance with the principles referred to in paragraph (a), the amount of compensation payable for the acquisition of the land or interest or right therein;
(c) fix the period within which compensation shall be paid for the acquisition of the land or interest or right therein;

23 Moyo The land question in Zimbabwe 245.
families. With the Act in place, the government was able to plan for and target the type, location and scale of land required for its land reform programme in order to increase access to prime lands for new settlers, to broaden the scope of agricultural enterprises in the resettlement areas, and to improve the efficiency of prime land utilisation.

In terms of section 3 of the *Land Acquisition Act* the President of Zimbabwe may compulsorily acquire *any land* where the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning, or its utilisation for a purpose beneficial to the public. Section 3 also permits the acquisition of *rural land* where it is reasonable necessary for its utilisation: (a) for settlement for agricultural or other purposes (including among others forestry, fruit growing and animal husbandry); or (b) for purposes of land reorganisation, forestry, environmental conservation, or the utilisation of wildlife or other natural resources; or (c) for the relocation of persons dispossessed as a result of the foregoing. The acquisition of derelict land is also authorised by section 3.

The procedure for the compulsorily acquisition of land is set out in section 5 which determines that prior notice must be given of any proposed acquisition. Upon such a notice the affected owner may submit written objection to the proposed acquisition or claim compensation. After notice has been given the owner of the land loses certain rights in that he/she cannot dispose of the land or make any permanent improvements. The prior notice remains in force for a period of one year. Section 8 determines that the

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26 Section 2 of the *Land Acquisition Act* determines that rural land does not include communal land, state land, land in municipal, town and local government areas or in rural district council or rural council areas.

27 Section 42 (4) of the *Land Acquisition Act* sets out the principles according to which the derelict status of land is to be determined: whether the land is or has been occupied; whether the land is being worked or cultivated; whether the owner can be found; the control which the owner has exercised over the land; and the extent of compliance with laws regarding the payment of rates, levies, or taxes in respect of the land.
state may acquire the land in not less than 30 days after the publication of the prior notice and that ownership of the land immediately vests in the acquiring authority upon publication of the notice to acquire the land, even in the case where the question of compensation may be unresolved.  

The Act furthermore provides for a procedure according to which the Minister of Lands, Agriculture and Rural Settlement may designate any rural land as land that can be acquired under the terms of section 3. In terms of this procedure the Minister has to specify the purpose for which the rural land is required, the acquiring authority, and the period within which it intends to acquire the land. The period for a designation may not exceed ten years. Public notice of such a designation has to be given and reasonable steps has to be taken to notify the owner of the land. Once land has been designated in terms of the Act, the owner may not sell, lease or dispose of the land in any manner without the permission of the relevant Minister. Designation does not, however, affect the owner's right to use the property. The designation of rural land in terms of the Act has been the subject of constitutional litigation. In Davies and Others v Minister of Lands, Agriculture and Water Development the Supreme Court confirmed the distinction between expropriation, for which compensation is required, and the deprivation of property, for which no compensation is required. The court ruled that a designation of rural land as land that can be acquired under the Act does not amount to an expropriation of the land because nothing is taken from the owner and the state does not acquire anything, and as such compensation is not payable for a designation. The court held that the owner is indeed deprived of his/her right to freely sell, lease or dispose of his/her rural land by a designation of the land, but that this right is not

28 Section 9 of the Land Acquisition Act provides for the eviction of the previous owner.

29 See section 12.

30 Section 12(2).

31 Section 12(4).

32 Section 14. Any sale, lease or disposal of the land without the required permission is regarded as void.

33 1997 (1) SA 228 (ZS).
passed on to the acquiring authority, and as such a designation does not constitute a
compulsory acquisition or expropriation of the land. The Supreme Court did not refer
to the social and political impact or implications of land reform or the 'public purpose'
question in its decision. Roux criticises the Supreme Court's neutral approach to the
sensitive issue of land reform in post-colonial Zimbabwe, and the political and social
context within which the judgment was delivered. He argues that the court has to reflect
on, emphasise and justify the social and political importance of land reform in a
developing country. However, the court a quo discussed the question of whether the
acquisition of land by the state in order to redistribute the land satisfies the public
purpose requirement. The court held that:

"... the facts that make land acquisition for resettlement a matter of public
interest in Zimbabwe are so obvious that even the blind can see them.
These facts make the resettlement of people a legitimate public
interest". 37

This decision expressly states that land reform constitutes a legitimate public interest.

With regard to the amount and payment of compensation the Land Acquisition Act
determines that the acquiring authority has to pay fair compensation to the owner of the

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34 The court relied on the decision in Hewlett v Minister of Finance 1982 (1) SA 490 (ZS) at
503 where it was decided that although the state benefited from the cancellation of a state
debt incurred in terms of pre-independence legislation, the state did not 'get' anything and
as such property was not 'acquired'. The appellant was not entitled to any compensation.
Also see Chairman, Public Service Commission, and Others v Zimbabwe Teachers' Association and Others 1997 (1) SA 209 (ZS). For a discussion see Roux 1996 Afr J Int & Comp L 755 at 762 et seq; Naldi 1998 CILSA 78; Van der Walt The constitutional property clause 38.


36 Davies and Others v Minister of Lands, Agriculture and Water Development 1995 (1) BCLR 83 (Z).

37 1995 (1) BCLR 83 (Z) at 93 et seq, with reference to the US decision in Hawaii Housing Authority v Midkiff 467 US 229 (1984).
land within a reasonable time. A Compensation Committee is established by the Act. This Committee has to determine the amount of compensation payable in case of a compulsory acquisition of designated rural land in terms of the Act. A valuation officer has to draft a preliminary estimate of the Committee's assessment. Both the Compensation Committee and the valuation officer have to consider a number of factors and principles in their determination of the amount of compensation. These factors include the size of the land, the type of soil to be found on the land, the nature and condition of the buildings and improvements on it, the agricultural and other activities that are or can be carried out on it, the variety and yield of crops, the use of non-arable land including grazing, water supplies, fencing, and the availability of electricity supply.

With regard to land which has not been designated as rural land, the Act requires fair and reasonable compensation to be paid for the loss of the land, balancing the right of the claimant with the general public interest, regard being had to the nature, location, and quality of the land.

Section 23 of the Act provides that compensation disputes may be referred to the Administrative Court. This court has jurisdiction to adjudicate cases where the claimant's right to, or the amount of compensation is disputed. The Administrative Court has the same jurisdiction as the High Court in instances of judicial review, and may set aside an assessment of the Compensation Committee if it finds that the Committee did not consider all of the relevant factors. The court has to ensure that fair compensation is paid within a reasonable time. Appeals from decisions of the Administrative Court may be directed to the Supreme Court. Thus, although the validity of the Act as such may not be called into question by the courts on the ground that the compensation

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38 Section 16.
39 Section 19.
40 Section 20. See Ng'ong'ola 1992 Int & Comp LQ 117 at 133.
41 Section 46(3).
provided by the Act is not fair, the courts nevertheless have jurisdiction to review the compatibility of the decisions of the Compensation Committee with the principles prescribed under section 19.

In *May, Thomas, Cairns and Frogmore v Reserve Bank of Zimbabwe* the Supreme Court interpreted 'fair compensation' (as required by section 16 of the Constitution) to include the following principles:

"(i) the compensation is to be determined by reference to the value of the expropriated property to the person from whom it is taken and not by reference to the value of that property to the expropriating authority - the question is what the owner has lost and not what the State has gained; (ii) the compensation should not be less than the money value into which the expropriated property could have been converted if there had been no expropriation; and (iii) any increase or decrease in the value of the expropriated property due to the scheme of expropriation should be ignored".

This case involved the expropriation of all foreign securities. The holders of these securities had to pay a 30% premium when they bought the securities. The court held that 'adequate compensation' included only the value of the securities on the appropriate stock exchange (in this case the Johannesburg Stock Exchange) and thus not the 30% premium. The court interpreted 'adequate compensation' to mean 'sufficient compensation' and that the interests of the affected individuals had to be weighed against the interest of the public from whom the money paid in compensation came. Roux points out that, in absence of a clear indication in the Constitution as to how the quantum of compensation should be determined, the court applied a version of the balancing principle in terms of which the interests of the affected individual is

\[\begin{align*}
42 & \quad 1986 (3) SA 107 (ZS) at 135. \\
43 & \quad 1986 (3) SA 107 (ZS) at 135 at 119. \\
\end{align*}\]
weighed against the public interest. In the application of this principle the court watered down the value of the affected shareholder's rights by referring to those rights as ' speculative', 'risky' and 'precarious', and in doing so the court ensured that the public interest would weigh heavier than the expropriated parties' interests.

According to Naldi\textsuperscript{45} the terms for the calculation and determination of compensation as provided for in the Act seem to comply with the principles identified by the Supreme Court as well as with international human rights standards.

The implementation of the land reform programme in Zimbabwe began at a snail's pace in 1992 when 13 farms were designated and acquired to resettle 900 families. The other land reform measures announced in 1990 on tenure reform, land tax, the subdivision of land and settler selection and finance are still being formulated and planned.\textsuperscript{46} By the end of 1993 only 90 farms have been designated. Despite fierce criticism from the commercial farmers' union that the designations undermined the productive capacity of the agricultural sector, analysis indicates that the majority of farms designated were situated outside or merely on the fringe of the region suited for extensive farming.\textsuperscript{47} The general perception was, however, that the government had used political rather than technical criteria in selecting land to be designated for acquisition.\textsuperscript{48}

\textsuperscript{45} Naldi 1993 \textit{J Mod Afr Stud} 585 at 598. But see Van Horn 1994 \textit{JAL} 144 at 150 et seq where it is contended that the limitation the court's powers of judicial review has placed the issue of compensation (and land redistribution) in control of a political elite. According to Van Horn this issue cannot be subjected to the court (as an un-elected body) or the legislature (which represents only the political elite), but should be the subject of political debate until the nature and extent of property has been redefined in a post-independent Zimbabwe.

\textsuperscript{46} Moyo \textit{The land question in Zimbabwe} 256.

\textsuperscript{47} Moyo \textit{The land question in Zimbabwe} 248.

\textsuperscript{48} Criticism included the absence of skilled land use assessors, the lack of adequate involvement of representatives from the farming community (including both black and white farmers), the direct involvement of politicians, and the growing pressure to exercise political patronage through the delivery of land. See in general Moyo \textit{The land question in Zimbabwe} 257 et seq.
It is interesting to note that the slow pace of land redistribution and the absence of tenure reform have led to increased demand for individual title rather than communal property rights amongst rural families. As a result of the insecurity of land rights in communal areas an informal system of individual tenure has developed on communal lands whereby families establish full control over land and its transfer. Land control and land transfer have become individualised through various measures such as inheritance and informal private sales of land. According to Moyo\(^{49}\) the government has generally turned a blind eye to these developments.

The land reform programme in Zimbabwe seems to lack public approval and legitimacy in that it is not perceived as a transparent and honest attempt to bring about fundamental change in land holding patterns in Zimbabwe. Since the promulgation of the *Land Acquisition Act* in 1992 the pace of land reform has been very slow and this has led to a situation where many people lost faith in the government's commitment to serious and effective land reform. This may be ascribed to the fact that the measures introduced are not implemented rapidly or efficiently. The slow pace of reform, the lack of transparency and efficiency in implementing the reforms, and the ascendance of political over technical criteria in land acquisition have created a perception that the programme is unable to bring about fundamental change and that it only benefits government officials.\(^{50}\)

Mounting pressure from the more or less 100,000 families waiting to be resettled and 50,000 former guerrilla fighters compelled the government to speed up the land reform program. Thus, in 1997 1734 farms were designated for acquisition. The government has pointed out that compensation for these farms will not include compensation for the land itself, but only compensation for the buildings on the land. The compensation paid to landowners in terms of the 1997 designations would thus be substantially less than the amount previously paid in compensation. Although this may seem unfair, it is legal.

\(^{49}\) Moyo *The land question in Zimbabwe* 269 et seq.

\(^{50}\) Moyo *The land question in Zimbabwe* 253 et seq.
in terms of the Constitution and the *Land Acquisition Act*.\(^{51}\)

The land reform measures introduced thus far are mainly aimed at the equitable (re)distribution of land among all the people of Zimbabwe. Judged in its entirety the land reform programme in Zimbabwe seems to be founded on sound principles. Although the court's power to review the amount of compensation has been removed, the court nevertheless declared that land reform constitutes a legitimate public purpose, and that land reform is not in conflict with the provisions of section 16 of the Constitution. The acquisition, against just compensation, and designation of rural land for the purposes set out in the Act (including the fair redistribution of arable land) are in line with the principles of land reform in most other comparable jurisdictions. However, due to the fact that most of the land designated in terms of the *Land Acquisition Act* is in the hands of an economically strong minority, the government's designation and acquisition of land remains an explosive political issue. In view of the government's statement in 1997 that compensation will not be paid for the land itself, but only for buildings on the land, it remains to be seen if the compensation awarded to the owners of the land which has been designated in 1997 will comply with the principles of 'fair compensation' as set out by the Supreme Court in *May, Thomas, Cairns and Frogmore v Reserve Bank of Zimbabwe*\(^{52}\) as well as with international human rights standards.\(^{53}\) The possibility also exists that the question of the court's jurisdiction with regard to the determination of the quantum of compensation may cause friction between the judiciary and the government when the land designated in 1997 is finally expropriated.

**14.4 Namibia**

Similar to the situation in Zimbabwe, the first post-independence government of Namibia was confronted by the problem of redressing the inequalities in the distribution

\(^{51}\) *SA Sunday Independent* 23 November 1997 8; *SA Sunday Times* 23 November 1997 28.

\(^{52}\) 1986 (3) SA 107 (ZS) at 135.

\(^{53}\) See Naldi 1993 *J Mod Afr Stud* 585 at 598.
of land. Due to the fact that the land issue was central to the struggle for national liberation, the land issue had to be addressed with some urgency. Land plays a central role in the economy of Namibia. More than 90% of the population is dependant on land for its livelihood, either as owners of commercial land, as workers on the commercial farms or as farmers in communal areas. The uneven distribution of land is directly attributable to the country's history of colonialism and the effects of the policy of apartheid. During the period of German colonialism most of the arable land was reserved for the exclusive use by whites, while blacks were forced into the so-called reserves (later known as communal land). During the apartheid years the size of these reserves was further diminished in order to enable the apartheid government to use it for the settlement of white farmers. At the time of independence in 1990 almost 50% of all usable land was concentrated in the hands of less than 2% of the population.  

In terms of the Constitution of Namibia all citizens are entitled to acquire, own and dispose of all forms of property (including land). The state may, however, expropriate property in the public interest subject to the payment of just compensation. No specific provision is made for the regulation of the use of property.

The Namibian land reform programme is contained in and effected by means of the

54 See in general Development Strategy and Policy Unit of the Urban Foundation Urban Foundation Research Report 4 and 5 - Land ownership and conflicting claims: studies from Germany 1937-1991, and from Kenya, Zimbabwe, and Namibia 1950-1991 et seq; Office of the Prime Minister Report of the technical committee on commercial farmland 42; Biesele Democracy in Namibia - the view from 'the Bottom Rung' 1 et seq.

55 See in general Naldi Constitutional rights in Namibia 82 et seq.

56 Section 16 of the Namibian Constitution determines that:

"(1) All persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirements and procedures to be determined by Act of Parliament".
Agricultural (Commercial) Land Reform Act of 1995. According to the long title of this Act, the purpose of the Act is to provide for the acquisition of agricultural land by the state for the purposes of land reform and for the allocation of such land to those citizens who do not own or otherwise have the use of any or of adequate agricultural land. The Act specifically aims to benefit those citizens who have been disadvantaged socially, economically or educationally by past discriminatory laws of practices. In order to achieve the purposes set out in the Act, it provides (a) the state with a preferent right to purchase agricultural land, (b) for the compulsory acquisition of certain agricultural land by the state, and (c) for the regulation of the acquisition of agricultural land by foreign nationals.

In order to redress the inequalities in the distribution of land the Act mainly targets commercial agricultural land. It was decided that the ownership and control of communal land should remain with the government, and that only commercial land should be targeted by the land reform measures introduced. In terms of section 14 of the Agricultural (Commercial) Land Reform Act the Minister of Lands, Resettlement and Rehabilitation may acquire agricultural land in order to make such land available to citizens who do not own agricultural land or who do not have use of agricultural land. The land which may be acquired by the relevant Minister includes: (a) agricultural land offered for sale to the Minister in terms of section 17; (b) any land classified as under-utilised land or (c) excessive land; and (d) any agricultural land acquired by a foreign national in contravention of section 58 or 59.

In terms of Part III of the Act the state has a preferent right to purchase agricultural land

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57 Act 6 of 1995.
58 In its report the technical committee investigating the possible land reform measures recommends the following prioritisation in terms of the categories of beneficiaries: beneficiaries should either be effectively landless; or be a San left behind by the South African occupation forces; or be an ex-combatant; or be a returned Namibian refugee; or be a war victim and disabled and able to practice agriculture; or be the head of a household, and female; and be unemployed and without any income; and be poor. See Office of the Prime Minister Report of the technical committee on commercial farmland 177 et seq.
59 See section 14(2).
whenever the owner of such land intends to sell it. The owner is obliged to offer the land to the state before he/she offers it to anyone else. Only in the case where the state provides the owner with a certificate of waiver may the owner sell the land to another interested buyer.  

Section 14 determines that the state may compulsorily acquire land for the purposes of the Act if the land is declared as under-utilised land or excessive land. Land may be declared as under-utilised land with reference to the level of economic activity on the land, if it is apparent that no investment is being made in the land, and if the infrastructure on the land is deteriorating. With reference to excessive land the Act provides for the division of certain parts of Namibia into agro-ecological zones and within each of these zones the size of an economic unit will be determined. Whenever someone owns agricultural land in excess of more than two economic units, whether in the same agro-ecological zone or in different zones, the state may classify such land as excessive land and may consequently acquire such land for the purpose of redistribution.

Part VI of the Act restricts the acquisition of agricultural land by foreign nationals and provides for the expropriation of land owned by foreign nationals. The Act also prohibits Namibian citizens from acquiring and holding agricultural land on behalf of or in the interest of any foreign national.

Where the relevant Minister wants to acquire land for the purposes of redistribution as contemplated by the Act, but is unable to negotiate with the owner the sale of such property by mutual agreement, the Minister may expropriate the property subject to the

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60 Section 17.

61 Office of the Prime Minister Report of the technical committee on commercial farmland 15 et seq.

62 Section 58 and 59. Section 16 of the Namibian Constitution provides Parliament with the power to regulate the right to acquire property by non-citizens.
payment of compensation. The purpose of the Act clearly constitutes a 'public purpose' as required by the Namibian Constitution. Ownership of the land will vest in the state on the date of expropriation. The owner is, however, required to take care of and maintain the land from the date of expropriation to the date upon which the state takes possession of the land. The owner will be entitled to use the property during this period and he/she is entitled to any income derived from the property during this period.

In terms of the Act the state may only expropriate property subject to the payment of just compensation. In the absence of an agreement between the state and the affected owner, the amount of compensation will be determined by the Lands Tribunal. In order to ensure that the amount of compensation is just, the Act prescribes that the following considerations have to be taken into account when the amount of compensation is determined: (a) if the value of the property was enhanced in consequence of the use thereof in a manner which is unlawful, such enhancement shall not be taken into account; (b) improvements made after the date of notice of expropriation will not be taken into account, except where they are necessary for the proper maintenance of existing improvements; (c) no allowance will be made for any unregistered right in respect of any other property or any indirect damage done with the object of obtaining compensation therefor; (d) any enhancement or depreciation in the value of the property which may be due to the purpose for which the property is being expropriated will not be taken into account; (e) account will be taken of any benefit which will enure to the person to be compensated from any works which the state has built or constructed on behalf of such person to compensate in whole or in part any financial loss which such person will suffer in consequence of the expropriation, or in consequence of the expropriation of the property for the purpose for which it was

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63 Section 20.
64 Section 21.
65 Section 27.
expropriated. 66 In the case of agricultural land, the amount of compensation may not exceed the aggregate of the amount which the land would have realised if sold on the open market by a willing seller to a willing buyer, and an amount to compensate any financial loss caused by the expropriation. 67

Land acquired by the state in terms of the Act may be distributed to any person or group of persons for agricultural purposes by way of alienation, lease or in any other manner which may be prescribed. 68 In the case where a farming unit is leased the lessee is obliged to use the farming unit beneficially in that he/she has to take up effective residence on the farming unit, practise sound methods of good husbandry and take proper care and maintain improvements on the farming unit. 69 The lessee of a farming unit in terms of this Act will be entitled to purchase the unit not earlier than five years after the commencement of the lease. 70

It is clear that the main aim of the Agricultural (Commercial) Land Reform Act is to increase the accessibility of land. A distinct need existed in a post-independent Namibia to introduce land reform measures. As was stated above more than 90% of the Namibian population is dependent on the land for their livelihood, and it is therefore of the utmost importance that the people must have access to land. The Act introduced a number of measures, mainly aimed at redistributing usable land, to be implemented rapidly by the state. The Act succeeded in distributing land equally amongst all the people without jeopardising the agricultural sector of the economy. By only targeting commercial farmland, the Act ensured that communal land is kept intact and in doing so the large number of people living on communal land is ensured security of tenure and of their livelihood. The acquisition of under-utilised land, excessive land (that is

66 Section 25(5).
67 Section 25(1).
68 Section 37.
69 Section 44.
70 Section 47.
land held in excess of the permitted maximum size), and land held by foreign nationals enables the state to ensure the equal distribution of arable land. Lastly, the detailed provisions in the Act concerning compensation contribute to enhance security of tenure.

The land reform programme in Namibia seems to meet most of the requirements for an effective land reform programme set out in chapter 12. The programme stems from recognition by the people for whose benefit the reforms are implemented, the government plays a decisive role in the drafting and implementation of the programme, and the programme is capable of effecting rapid change in land holding patterns in Namibia.

The land reform measures introduced in Namibia are all aimed at the redistribution of land. Although the property clause does not specifically provide for land reform the land reform measures seem to be valid in terms of section 16 of the Constitution. The property clause provides for the right to acquire, own and dispose of all forms of property and for the expropriation of property in the public interest subject to the payment of just compensation. It also provides for the regulation of the right of foreign nationals to acquired land in Namibia. Although existing property rights are affected by these reforms, the effects are limited to under-utilised and excessive land. The reforms do not target large productive farms, as is the case in Zimbabwe, and consequently the land reform programme is not regarded as politically or economically controversial.

14.5 Botswana

Land in Botswana is governed by one of three land tenure systems depending on whether it is tribal land, state land or freehold land. These three land tenure systems existed before independence in 1966, but have since undergone changes to accommodate the needs of society. Tribal land currently comprises 71% of the total

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71 See in general Naldi Constitutional rights in Namibia 82 et seq.
land area, state land 23% and freehold land 6%.

The land reform measures introduced by the government of the post-independent Botswana were primarily aimed at reforming the land tenure system on tribal land. Measures to regulate and control the use of state and freehold land were also introduced. Land reform in Botswana differs from the land reform measures introduced in the other jurisdictions discussed in this chapter in that no large scale redistribution programme was implemented. Reforms centred around the provision of security of tenure to all citizens of Botswana. Thus, although the right to property is protected in the Constitution of Botswana, there does not seem to be any conflict between the protection of existing property rights and the implementation of the land reform programme.

Tribal land comprises mostly of land which originally formed part of the native reserves or tribal territories during the colonial era. Land in these areas is held in terms of customary law. Ownership of the land initially rested with the tribe under the leadership of a chief. The chief was not the absolute owner of the land but only held the land for the tribe. He allocated land to the individual members of the tribe. The tribesmen did not own the land, but only had exclusive use rights to their plots either for residential or farming purposes. Communal grazing land and land which had not been allocated to anybody was used collectively. Although these use rights were perpetual and inheritable the tribesmen were not allowed to sell the land or use it in a manner detrimental to the interests of the tribe.

The Tribal Land Act was introduced in 1968 to reform the tribal land tenure system.

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73 Sections 3 and 8.

74 Schapera A handbook of Tswana law and custom 196 et seq; Mathuba Land policy in Botswana Paper prepared for the workshop on Land Policy in Eastern and Southern Africa Maputo February 1992 4; Ng'ong'oia 1996 SAPL 1 at 16 et seq.

75 54 of 1968.
These reforms included the introduction of modern institutions to deal with the administration of tribal land, the introduction of common law rights (in addition to customary land rights) with relation to tribal land, and the introduction of measures relating to expropriation of tribal land. Probably the most important change effected by the *Tribal Land Act* was the introduction of Land Boards for each of the traditional tribal reserves. The Act in effect transferred the customary land administration functions from the chiefs to the Land Boards. All rights and title to tribal land vested in the Land Boards in trust for the benefit and advantage of the tribesmen of that specific area and for the purpose of promoting the economic and social development of all the people of Botswana. In terms of the Act all powers vested in the chief of a particular tribe under customary law in relation to land were transferred to the Land Board. These powers included powers pertaining to the granting of land use rights, the cancellation of such rights, dispute resolution and the imposition of restrictions on the use of tribal land.

Tribal affiliation remained the primary qualification for a land grant. The Act determined that a land grant could only be made to a tribesman. The primary aim of the *Tribal Land Act* was to improve the land administration of tribal land and to make the administration of land more democratic. The establishment of modern independent Land Boards did not uproot the customary land tenure system, but left it intact.

The composition of the Land Boards attempted to balance tribal interests, political control and the object of democratising the tribal land tenure system. The members of

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76 Nine Land Boards were established to roughly correspond with the nine tribal reserves, but the number of Land Boards was later increased to twelve.

77 Section 10(1).


79 Section 20(1). Section 2 defined a tribesman as "a citizen of Botswana who is a member of a tribe occupying tribal land".

the Boards included the chief or tribal authority for the area, a nominee, two ministerial appointees, and two members elected by the district council. The low level of education of Board members and their lack of understanding the Tribal Land Act necessitated the recomposition of the Land Boards in 1986. Although chiefs were no longer members of the Board, they retained the right to have a nominee. The other members of the Board included three members to represent the tribe, two representatives of the district council, three appointees of the minister responsible for lands, one representative of the Minister of Agriculture and one representative of the Minister of Commerce and Industry. The recomposition of the Boards reflected the objective of confirming the independence of the Land Boards while strengthening the hand of government in matters of land administration at the same time.

The Tribal Land Act proposed the modernisation of the customary land tenure system by providing for the allocation of land under both customary and common law. Section 24 determined that ownership or long leases could be granted to both citizens and non-citizens for such purposes and under such conditions as determined by the Land Boards. The relevant minister had to provide written consent of any such grant. These rights were registrable, thus confirming the transformation from customary law to common law. The Tribal Land (Amendment) Act of 1993 amended these provisions so that a grant of the common law right of ownership may only be made to the state, and that ministerial consent for the granting of common law leases was only required for non-citizens. To some extent the allocation of land rights in terms of both customary and common law contributes to the fragmentation of land rights in order to

81 Ng'ong'o 1996 SAPL 1 at 18.
82 Ng'ong'o 1996 SAPL 1 at 22; Mathuba Land institutions and land distribution in Botswana Paper presented at the Conference on Land redistribution options Johannesburg October 1993 5.
83 Section 24(2).
84 Ng'ong'o 1996 SAPL 1 at 20.
provide for a wide range of differentiated land rights.\textsuperscript{87}

The section 24 leases were utilised in the implementation of the government's Tribal Grazing Land Policy. In terms of this policy grazing land is individualised in order to ensure the conservation of Botswana's range resources, and the increase in productivity and commercialisation of the livestock industry. Lessees have to take responsibility for the pastures used by their cattle. According to the lease the individual farmer has to practise modern methods of cattle management such as controlled breeding and rotational grazing. The lease gives the lessee several rights which he did not possess under customary law such as the right to exclusive possession, the right to fence and the right to mortgage the land. The lease is inheritable and valid for 50 years. It can be renewed for another 50 years.\textsuperscript{88}

Before the implementation of the \textit{Tribal Land Act} tribal land was not subject to expropriation in terms of Botswana's expropriation laws. The \textit{Tribal Land Act}, however, provided for the expropriation of tribal land where such land was required for a public purpose.\textsuperscript{89} The specific Land Board affected by the expropriation was not entitled to compensation for the loss of its right and title. The holder of a customary right to use the land was, however, entitled to a customary grant of land of equivalent value and to compensation for the value of standing crops.\textsuperscript{90} The Act did not provide for the prompt payment of adequate compensation as is required by the Constitution, nor did it provide for a situation where no suitable land of equivalent value can be found elsewhere. The

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\textsuperscript{87} Van der Walt \textit{The constitutional property clause: finding the balance between guarantee and limitation} paper read at a conference entitled 'Property and the Constitution' presented by the New Zealand Institute of Public Law 15.
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\textsuperscript{89} Section 32 sets out the procedure to be followed in the case of expropriation of tribal land.
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\textsuperscript{90} Section 33.
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Tribal Land (Amendment) Act\textsuperscript{91} of 1993 amended section 33 so that it now determines that the affected Land Board may grant the occupier of the expropriated land rights to use other land if available, and that he shall be entitled to adequate compensation from the state of the value of standing crops, for the value of improvements, for the costs of resettlement, and for the loss of the right to use the land.\textsuperscript{92}

It is interesting to note that the Tribal Land (Amendment) Act replaced the word 'tribesman' as used in the Tribal Land Act with the phrase 'citizen of Botswana'. The implication of this amendment is that tribal affiliation is no longer a required qualification for a customary grant and that the title to tribal land vests in the Land Boards for the benefit of all citizens of Botswana.\textsuperscript{93}

Freehold land can be described as land owned by individuals - the state permanently alienated its title to areas of land to private persons. Section 3 of the Land Control Act\textsuperscript{94} of 1975 determines that the citizens of Botswana have a statutory right of pre-emption in the acquisition of agricultural land in the freehold sector. Prior ministerial consent is required for every transaction involving agricultural land (including sale, transfer, lease for more than five years, exchange, partition or other disposal or dealing) where the acquiring party is not a citizen.\textsuperscript{95}

State land is land owned and controlled by the state. In urban areas state land is allocated to individuals for residential, commercial and industrial purposes. In rural

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{91}] 14 of 1993.
\item[\textsuperscript{92}] Ng'ong'ola 1996 SAPL 1 at 26.
\item[\textsuperscript{94}] 23 of 1975.
\item[\textsuperscript{95}] Ng'ong'ola 1996 SAPL 1 at 6; Mathuba Overview of land administration systems in Botswana Paper prepared for the Conference on Land Administration Reform Pretoria July 1995 7; Mathuba Land institutions and land distribution in Botswana Paper presented at the Conference on Land redistribution options Johannesburg October 1993 4.
\end{enumerate}
\end{footnotesize}
areas state land is either leased to individuals for grazing purposes or used as game reserves. In terms of the State Land Act the President has the power of disposal of all state land. He is, however, permitted to authorise any person to exercise this power on his behalf. Any disposal of state land has to be in writing and has to bear the signature of the president or an authorised person. The interests granted upon the allocation of state land to private persons or groups include a Fixed Period State Grant and a Certificate of rights. The Fixed Period State Grant (which can be described as something between ownership and a lease) entails the vesting of title in a private person for a fixed period (50 years for business premises and 99 years for residential premises). These grants are not renewable and after the expiry of the term the title reverts back to the state. No compensation is payable for any improvements on the land. Rent is paid in a lump sum on allocation of the land and not periodically. Ng'ong'ola points out that the non-payment of compensation may be judged to be unconstitutional, but since none of these Fixed Period State Grants have expired yet, it remains to be seen what the government will do to resolve this situation. The probable scenario will be that the state will renew the grants on expiry of the fixed period to avoid unnecessary disruption. The Certificate of Rights was developed between 1972 and 1976 to deal with the squatter problem in some urban areas. The rights conferred by such a certificate resemble a usufruct, but with the difference that the holder's rights are perpetual and inheritable. The holder of a Certificate of Right may possess, occupy and use the property. It may also be ceded, assigned, pledged or transferred with the consent of the local council. Ownership of the property remains

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97 29 of 1966.

98 Sections 3 and 4.

99 Ng'ong'ola 1996 SAPL 1 at 12 et seq.
14.6 Mexico

Land reform in Mexico may be described as an ongoing and organic process. Since the first land reform measures were introduced in 1915 the process continued for a number of decades. Although land reform was not a major goal of the revolution to overthrow the Diaz regime in 1910, it was one of the direct results of the revolution. Prior to the revolution 1% of the population owned 97% of all land in Mexico and 92% of the rural population were landless. This situation was the direct result of a 1856 law (Leyes de Desamortización or Law of Expropriation) that stripped the church and the traditional peasant communities of their right to landownership in an attempt to promote commercial homestead farming.

The first land reform measures were introduced in terms of a land reform decree issued in 1915. The decree contained two main points: firstly it provided that all alienation of village land in terms of the 1856 law would be null and void and secondly, that villages needing land, but lacking proof of former title, would qualify to receive land which was expropriated from adjacent properties. This decree was incorporated in the 1917 Constitution as Article 27. Article 27 determines that:

"[o]wnership of the lands and waters within the boundaries of the national territory is vested originally in the Nation, which has had, and has, the right to transmit title thereof to private persons, thereby constituting private property.


101 World Band Staff working paper no. 275 Land reform in Latin America: Bolivia, Chile, Mexico, Peru and Venezuela 17 et seq; King Land reform 92 et seq; Chua 1995 Col LR 223 at 230; Otero in Thiesenhusen Searching for agrarian reform in Latin America 276 et seq; Meyer Land reform in Latin America 11.

102 Whetton Rural Mexico 75.
Private property shall not be expropriated except for reasons of public use and subject to payment of indemnity".\(^{103}\)

The main purpose of the initial reform measures was to effect the restitution of land to the peasant communities who were unjustly dispossessed of their land. Later on the policy of restitution of land to dispossessed communities was extended to include the redistribution of land by means of an endowment or grant to communities. This applied when a community or village petitioned for land to meet its needs rather than to have its former possession restored.\(^{104}\)

Due to the fact that the ownership of all land vested in the state, landowners were generally not compensated for expropriated land, but they were permitted to retain relatively large portions of their land.\(^{105}\) It is interesting to note that the estate land which was expropriated for the purposes of land reform was not distributed to the estate workers, but rather to the neighbouring peasant communities. It was argued that most estate workers were residents of the estates and that they would continue to work on the estates. The government did not initiate the restitution and redistribution process, but it was left to the peasant communities to petition for restitution or a grant in order to obtain land for their community. The communities were not required to pay for the land they received. They received the land as a community and not as individual members.\(^{106}\)

The rights to the land were given to an *ejido*, a specially formed communal unit which

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\(^{103}\) Peaslee Xydis in Peaslee *Constitutions of Nations* 891. Also see Chua 1995 *Col LR* 223 at 230.

\(^{104}\) King *Land reform* 98.

\(^{105}\) The estate owners were allowed to keep a reserve of 100 hectares of irrigated land, or in the case where the land was not irrigated cropland the owner was allowed more or less two hectares of rainfed cropland and up to 500 hectares of arid pasture land per hectare of irrigated cropland. See World Band Staff working paper no. 275 *Land reform in Latin America: Bolivia, Chile, Mexico, Peru and Venezuela* 18.

\(^{106}\) King *Land reform* 102 et seq; World Band Staff working paper no. 275 *Land reform in Latin America: Bolivia, Chile, Mexico, Peru and Venezuela* 18; Otero in Thiesenhusen *Searching for agrarian reform in Latin America* 282 et seq.
held title to the land, administered it and allocated parts of the land to individual members of the ejido for farming purposes. The ejido was not a completely new concept, but in effect it was little more than the recreation of the traditional village communities which disappeared as a result of the nineteenth century expansion of the large estates or haciendas. The size of an ejido could vary from less than a hundred members to over a thousand. Two different forms of the ejido existed with regard to crop land: the collective ejido and the individual ejido. Members of the collective ejido had no individual ownership or use rights outside the house plot. Members of the individual ejido received a usufruct from the ejido to use a particular portion of the land. Although this right was hereditary, it could not be sold, leased, rented, mortgaged or alienated in any way. The land was lost by non-use for two years. The members of an ejido chose by majority vote which form of ejido they would adopt. Generally all pastures, woodlands, plantations, haciendas which were expropriated as large single units, and other non-cultivated land were held in common.107

The process of land restitution to peasant communities affected only those haciendas within a seven kilometer radius of the villages. Consequently haciendas which were not situated within close proximity of peasant villages were not subjected to the land reform measures because it was never the intention of the government to do away entirely with large commercial farms. The pace of the distribution of land to ejidos declined towards 1931, but the process was revitalised in 1934 with the adoption of the Agrarian Code. The Code solidified and clarified the ejido policy and provided for speedier processes to accelerate the distribution of land. In 1936 the policy of only expropriating land within a seven kilometer radius of villages was changed and a ceiling was placed on landownership. All cropland in excess of 150 hectares (especially land in the larger cotton plantations) were expropriated for redistribution purposes. Between 1934 and 1940 the process of redistribution was accelerated and extended more widely.

107 Whetten Rural Mexico 141 et seq; King Land reform 103; Otero in Thiesenhusen Searching for agrarian reform in Latin America 282 et seq; Meyer Land reform in Latin America 11.
throughout the country. Special collective *ejido* communities were set up and they received the land expropriated in terms of the new policy. The *ejido* became the pillar or the agricultural community and the government committed itself to the development of the rural infrastructure. By 1940 22% of all agricultural land had been distributed to more than 50% of Mexico's agricultural population.

Although the process of redistribution continued, the pace of land redistribution dropped sharply in 1940. Between 1940 and 1960 the redistribution of land was extended to areas of low population density and effected mostly pastures and arid land of low productive capacity. During this period the Mexican government centred its agricultural policy on productivity rather than equity. A firmer commitment to individual ownership became apparent during this period. Private owners of productive farms selectively received guarantees from the government that their land (within the legal land ceiling) would not be expropriated. Credit, technical support and other public services were concentrated on the more productive *ejidos* and the productive private sector. The poorer *ejidos* and the private landowners of small farms were largely excluded from state support. Whereas newly irrigated land was previously distributed only to *ejidos*, it was now distributed to *ejidos* and private landowners alike. The new production oriented policy of the government yielded good results and produced faster agricultural growth than in any other Latin American country. Renewed pressure from the peasant community led to an increase in the pace of redistribution from 1960 onwards, and by 1970 43% of all agricultural land was held by *ejido* communities, which constituted 66% of the rural population.

Since the mid 1960's Mexico has been experiencing a major economic crisis. Due to

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108 Otero in Thiesenhusen *Searching for agrarian reform in Latin America* 282 et seq; Chua 1995 *Col LR* 223 at 232.

109 World Band Staff working paper no. 275 *Land reform in Latin America: Bolivia, Chile, Mexico, Peru and Venezuela* 19; King *Land reform* 99.

110 King *Land reform* 101.

111 World Band Staff working paper no. 275 *Land reform in Latin America: Bolivia, Chile, Mexico, Peru and Venezuela* 20; Chua 1995 *Col LR* 223 at 234.
the enormous increase in Mexico's population the agricultural sector is unable to sustain production levels needed to provide adequately for the domestic needs. Agriculture is also unable to provide foreign exchange. This has led to calls for effective agrarian reforms. The distribution of land has, however, been ruled out as a means to solve Mexico's agrarian problems. The focus has shifted to the importance of the private sector and pressure is put on the ejidos to increase production on their land. The state has to a large extent utilised its resources to sponsor capitalistic agriculture and this in turn has led to the decimation of the ejido sector. However, the ejido as an institution has become an integral part of the Mexican landscape and it has shown that it is capable of greater production per hectare than private agricultural enterprises when aided by the state. Even if the ejidos are to be organised on an individual basis the ejido as an institution cannot be eliminated without causing a major social upset.\textsuperscript{112}

The land reform measures in Mexico were originally aimed at the restitution of land, but this was later extended to include measures aimed at the redistribution of land. Although Mexico has a constitutional property clause, the property clause was never seen as a stumbling block in the way of comprehensive land reform. The 1917 Constitutional declared that all land vested in the nation and that the nation has had and has the rights to transfer the land to private individuals in private ownership. Once land is held in private ownership, the state may not expropriate the owner's land without the payment of compensation.

14.7 Evaluation

A variety of different forms of land reform is discussed in this chapter. In Zimbabwe the land reform measures introduced up to the present were mainly concerned with the redistribution of land. The implementation of land reform in Zimbabwe is of special importance because the court's jurisdiction relating to the amount of compensation for expropriation has been removed from the Zimbabwean Constitution. Land reform in Namibia is also aimed at the redistribution of land. However, in this case the state does

\textsuperscript{112} Otero in Thiesenhusen Searching for agrarian reform in Latin America 300 et seq.
not target large productive farms for redistributive purposes, but rather acquire under-utilised and excessive land against just compensation. The classification of excessive land is made possible by the introduction of a maximum ceiling on the size of an individual's land holding. Land held by foreign nationals in Namibia may also be acquired by the state for redistributive purposes. In Botswana land reform is concentrated on the provision of security of tenure and is mainly aimed at creating secure rights (in terms of both customary law and common law) on tribal land. Mexico has a long history of land reform which includes measures aimed at the restitution of land and the redistribution of land. The Mexican Constitution determines that all land vests in the state, and that the state has had, and has the power to transfer ownership of the land to private individuals. Consequently no compensation was paid to existing landowners in the initial stage of the land reform programme. A maximum ceiling on the size of landownership was also introduced in Mexico and all land held in excess of the permitted size was used for redistribution.

The implementation of the land reform programmes in the respective jurisdictions discussed in this chapter illustrate that land reform is not necessarily regarded as being in conflict with the constitutional property guarantee. The property clauses in both Mexico and Botswana determine that all land is vested in the state, and that the state may transfer ownership to private individuals. Expropriation of private property is subject to compensation. In Mexico private individuals expropriated during the first stage of the land reform programme received no compensation, because at that stage (after the revolution) all land vested with the state. The non-payment of compensation was not challenged. In Botswana there also does not seem to be any conflict between the protection of existing property rights and land reform. Only 7% of all land is held in private ownership in terms of the freehold system and the land reform measures introduced in Botswana are not aimed at that part of the land. Land reform in Botswana is for the main part concerned with the provision of security of tenure, and the land affected by these measures is held by the state.

Although the property clause in both Zimbabwe and Namibia protect existing property
rights in the sense that compensation is required when an individual's property is expropriated, the introduction of land reform measures have been such that the courts found it not to be in conflict with the constitutional guarantee of property. In Namibia the categories of land which may be expropriated for the purposes of redistribution (under-utilised land, land held in excess of the maximum ceiling on the size of land held by an individual, and land held by foreign nationals) are such that the public interest will almost always be regarded as more important than the interests of the individual with regard to that property (land). The Namibian Constitution requires the payment of just compensation for expropriation, and up to this point in time no cases have been decided on the question of the quantum of compensation. In Zimbabwe, where existing property rights are also protected, the question of compensation was raised in Davies and Others v Minister of Lands, Agriculture and Water Development. The courts are not constitutionally permitted to rule on the quantum of compensation. In this case, the High Court ruled that land reform is in the public interest and that the state may acquire land for redistribution purposes. The Supreme Court held that compensation will only be due where the state actually acquires the property. In view of the government's statement in 1997 that it intends to acquire land against less compensation than in the past (compensation will only be paid for buildings on the acquired land and not for the land itself), it may be expected that the courts will challenge the provision in section 16 of the Zimbabwean Constitution which removed their jurisdiction to determine the amount of compensation.

In most post-colonial countries the courts run the risk of becoming involved in a constitutional conflict between themselves and the legislature where social reform legislation is concerned. A too conservative interpretation and application of the property guarantee would inevitably frustrate attempts by the legislature to effect comprehensive reform. Murphy suggests that the constitutional conflict in India was the result of the court's inability to fashion an appropriate model of review with

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113 1997 (1) SA 228 (ZS).
114 1995 (1) BCLR 83 (Z).
115 Murphy 1994 SAJHR 385 at 395.
proportionality as an essential ingredient of review. The social function of property should be recognised and property should be interpreted and applied in view of the social and political context within which property functions. Roux\textsuperscript{116} suggests that the model of review applied in most developed countries is not suitable for the specific situation in post colonial countries and that a different model of review should apply in post colonial countries. According to Roux\textsuperscript{117} a bipartite property clause is needed, a distinction between ordinary and social reform legislation. In respect of ordinary legislation, the Court's review power should approximate that exercised by courts in the developed world. In respect to social reform legislation, on the other hand, its power should be adapted in line with the perceived illegitimacy of certain property rights (most notably those in land) in the post-colonial context".

Civil society should be allowed to participate in the policy formulation process with regard to the property rights order and social reform legislation. In terms of the adjudicative model suggested by Roux, the courts should simply be given the power to ensure that the political process operated fairly in cases concerning social reform legislation.

A completely new model of review is not needed in the South African context. The South African Constitution clearly sets out the social and political framework within which the courts have to interpret and apply the fundamental rights which are guaranteed in chapter 2 of the Constitution. The property guarantee in section 25 specifically provides for land reform and this obliges the courts to take cognisance of the social and political function of property. In the event of land reform, the courts have to interpret property within the social context within which it functions and it is clear from the phraseology of section 25 that existing property rights cannot be protected absolutely. The courts have to establish an equitable balance between existing

\textsuperscript{116} Roux 1996 \textit{Afr J Int & Comp L} 755 at 782 \textit{et seq.}

\textsuperscript{117} Roux 1996 \textit{Afr J Int & Comp L} 755 at 783.
property rights and land reform in the public interest.
LAND REFORM IN SOUTH AFRICA SINCE 1991

15.1 Introduction

The policy of apartheid had an enormous influence on the social, political, cultural and economic order in South Africa. In order to understand and evaluate the land reform process which started in 1991, it is necessary to briefly consider the main events that led to and the causes of the unequal land distribution that characterised the apartheid system, as well as is the influence of the system of racial segregation on property law and the distribution of land in South Africa.

Certainly the most notorious of the statutes that entrenched apartheid in land law were the Land Acts of 1913 and 1936. In 1913 the Black Land Act 27 of 1913 was promulgated. The aim of this Act was to identify and reserve land for the exclusive use and occupation of black groups. All other land was available for use and occupation by white people. This situation was further entrenched by the Development and Trust Land Act 18 of 1936. This Act aimed at extending the existing black land by adding land which was released in terms of this Act. Private land in the vicinity of these designated areas was expropriated in order to consolidate the land held by the different ethnic groups. The idea was that these areas had to develop into independent political areas (the infamous homelands). Similarly, land held in full ownership by blacks within white areas (so-called 'black spots') was expropriated and the occupants were moved to reserved areas (so-called 'forced removals'). These removals were often effected by force and as such aggravated the harsh and unjust effects of the policy of racial segregation. The practical effect of this policy was that large groups of people were confined to areas much too small to fulfill their needs. The land was simply not enough

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1 See in general Van der Walt 1995 SAPL 1 at 2; Kleyn and Borraime Silberberg and Schoemen's The Law of Property 493; Cross and Haines Towards freehold 73 et seq; Van der Merwe 1989 TSAR 665; Olivier and Du Plessis 1991 De Jure 285.
to sustain the people living on it. The lack of facilities and the growing number of people living on the land aggravated the situation and made it impossible for these people to lead a normal life.²

Rights to the land within the reserved areas hardly ever amounted to full ownership, and land was usually held in terms of customary law or special rights created by the Land Acts. These rights, if not held in terms of customary law, usually took the form of statutory permits which were subject to the legislative and administrative whim of the government. With regard to rural areas a distinction was made between land in towns and rural land. As far as towns in rural areas are concerned, Proclamation R293³ provided for the following forms of land tenure: ownership units, certificates of use, lodger's permits, building permits, trading permits and leasehold. Proclamation R188,⁴ which regulated land tenure of rural land, provided for quitrent and permission to occupy.⁵

The apartheid policy determined that the presence of blacks in urban areas was seen as temporary and land rights in these areas reflected this situation. A number of temporary land rights were created and controlled by regulations issued in terms of the Black (Urban Areas) Consolidation Act 25 of 1945, the Black Communities Development Act 4 of 1984 and the Black Local Authorities Act 102 of 1982. A number of permits were introduced by GN R1036,⁶ none of which amounted to either ownership or limited real rights. These permits included site permits, lodger's permits, hostel permits, certificates of occupation and residential permits. The Conversion of Certain Rights into Leasehold Act 81 of 1988 replaced this system by converting some of the

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² Van der Walt 1995 SAPL 1 at 2.
³ Government Gazette 373, 16 November 1962, issued in terms of the Black Administration Act 38 of 1927.
⁵ Kleyn and Borraine Silberberg and Schoeman's The Law of Property 494; Van der Walt 1990 De Jure 1 at 16 et seq.
⁶ Government Gazette 2096, 14 June 1968.
rights held in terms of the permits into leasehold\textsuperscript{7} and others into contracts of lease.\textsuperscript{8}

The acquisition, occupation and alienation of land in the remainder of South Africa are regulated by the Groups Areas Act 36 of 1966, which was promulgated in 1966. Group areas were proclaimed in terms of this Act for the exclusive benefit of either whites, coloureds or Asians\textsuperscript{9} (the Act did not create group areas for blacks, but simply excluded them from white, coloured or Asian land). In essence, residential areas were proclaimed within the white areas for coloureds and Asians respectively. Full ownership of land in these areas could be obtained by a member of the particular group for which the group area had been proclaimed. Occupation of land in contravention of this law was a criminal offence.\textsuperscript{10}

Customary land law fulfilled an important role in black areas. This system has a communal character and ensures that groups and families stay together. In many instances the rules and principles of customary law ensure the survival of groups and individuals. Customary law was, however, infiltrated and discredited by apartheid land law. This led to a situation where customary law was seen as an inferior system. Customary land rights were never recognised as 'proper rights' and were thus never regarded as a secure form of tenure. The western civil law land rights were perceived as the ideal system, because of the fact that rights held in terms of this system afforded the holder of these rights with a secure form of tenure.\textsuperscript{11} Security of tenure was at least one area which deserved urgent attention in any future land reform programme.

\textsuperscript{7} Section 2 to 5 of the Conversion of Certain Rights into Leasehold Act 81 of 1988 determine that site permits and certificates of occupation will be transformed into leasehold, but only after an investigation by the provincial secretary and once the land has been surveyed.

\textsuperscript{8} Kleyn and Borraine Silberberg and Schoeman's The Law of Property 494; Van der Walt 1990 De Jure 1 at 16 et seq. These include residential permits, lodger's permits and hostel permits. See section 6 of the Conversion of Certain Rights into Leasehold Act 81 of 1988.

\textsuperscript{9} As identified in terms of the Population Registration Act 30 of 1950.

\textsuperscript{10} Van der Walt 1990 De Jure 1 at 16 and 26 et seq; Van der Walt 1995 SAPL 1 at 7.

\textsuperscript{11} Van der Walt 1990 De Jure 1 at 6 et seq; Van der Walt 1995 SAPL 1 at 4 et seq.
Apartheid land law extended to the housing policy and the physical planning. The provision of and control over housing was seen as 'own affairs' of each of the different population groups and as such different measures applied to each of these groups.\textsuperscript{12} Land use planning and control was also executed on a racial basis and provision was made for the establishment and development of separate residential areas for the various population groups.\textsuperscript{13}

The \textit{Prevention of Illegal Squatting Act} 52 of 1951 was one of the most draconian laws enacted by the apartheid regime and concerned with the prevention, control and elimination of illegal squatting. This Act provided for the demolition and removal of buildings and structures erected or occupied without the consent of the owner of private land, local authorities and other government bodies. No prior notice to any person was required by the Act, and the courts were not allowed to consider or grant any order or relief founded upon the exercise of powers under the provisions of this Act, unless the applicant could show that the action was undertaken in bad faith. This Act provided the government with the power to enforce its policy of racial segregation by moving or removing groups of people without interference by the courts.\textsuperscript{14}

15.2 Land reform measures introduced in 1991 by the De Klerk government

In 1991 the De Klerk government published the \textit{White Paper on Land Reform} \textsuperscript{15} in an attempt to rectify the imbalances brought about by the discriminatory land policies of the past. The \textit{White Paper} emphasises the importance of land for the well-being of man. It is stated that:

\begin{itemize}
  \item \textsuperscript{12} The \textit{Development and Housing Act} 103 of 1985 controlled the provision of housing for whites, the \textit{Housing Development (House of Delegates) Act} 4 of 1987 applied to Indians, the \textit{Housing Act (House of Representatives)} 3 of 1987 and the \textit{Development Act (House of Representatives)} 3 of 1987 applied to coloureds, and housing for blacks was controlled by the \textit{Community Development Act} 3 of 1966 and the \textit{Housing Act} 4 of 1966.
  \item \textsuperscript{13} The \textit{Physical Planning Act} 88 of 1967 regulated matters pertaining to physical planning.
  \item \textsuperscript{14} See in general Van der Walt 1990 \textit{De Jure} 1 at 26 \textit{et seq.;} Van der Walt 1990 \textit{Stell LR} 26 \textit{et seq.;} Lewis 1989 \textit{SAJHR} 233 \textit{et seq.}
  \item \textsuperscript{15} WP B-91 March 1991.
\end{itemize}
"[L]and is the most precious resource for the existence and survival of man. It provides him with living space and sustenance. Land is the base from which he operates and gains a livelihood and is, indeed, the basis on which his entire economic, social and constitutional order is founded".

The White Paper proposed the abolition of all laws and regulations that regulate the occupation, use and access to land on a racial basis. Private ownership should be extended to land in respect of which it was previously not available. The main idea behind these proposals was to make it possible for all South Africans to have free access to all land. The White Paper did not propose the actual redistribution of land, but suggested that the redistribution of land should be subjected to the forces of the market-orientated economy.\(^\text{16}\) The White Paper emphasised the importance of the continued productive use of land, and the reform measures proposed in the White paper embodies

"the best opportunities to bring about, in a responsible and orderly fashion, a land dispensation which is both economically sound and compatible with the basic values and ideals expressed in the Manifesto for the New South Africa".

In order to effect these reforms the White Paper proposed five Bills,\(^\text{17}\) but due to criticism, only three of these Bills were eventually promulgated: the Abolition of Racially Based Land Measures Act 108 of 1991, the Upgrading of Land Tenure Rights Act 112 of 1991 and the Less Formal Township Establishment Act 113 of 1991. Certainly the most important of these was the Abolition of Racially Based Land Measures Act 108 of 1991. This Act abolished the majority of legislation on which the apartheid land tenure

\(^{16}\) Van der Walt 1995 SAPL 1 at 10 \textit{et seq}; Kleyn and Borraine Silberberg and Schoeman’s \textit{The law of property} 501 \textit{et seq}.

\(^{17}\) The Abolition of Racially Based Land Measures Bill; the Upgrading of Land Tenure Rights Bill; the Residential Environment Bill; the Less Formal Township Establishment Bill; and the Rural Development Bill.
system was built.\textsuperscript{18} Although the mere abolition of apartheid land law did not eradicate the whole apartheid land tenure system or the effects thereof, this Act was the first step to prepare the way for substantial and meaningful land reform. Chapter VI of the Act introduced the concept of restitution of land rights in South African law. In terms of this chapter individuals or groups who were dispossessed of their land could claim their land back in instances where the land was in state control.\textsuperscript{19} Chapter VII of the Act provided for certain measures to ensure the maintenance of norms and standards in residential environments.\textsuperscript{20}

The \textit{Upgrading of Land Tenure Rights Act} 112 of 1991 provided for the upgrading of certain land rights to full ownership.\textsuperscript{21} The rights in question were mostly rights created by apartheid legislation.\textsuperscript{22} The Act also provided for the transfer of land, which was held

\begin{itemize}
\item[18] Amongst others the \textit{Black Land Act} 27 of 1913, the \textit{Development Trust and Land Act} 18 of 1936, the \textit{Groups Areas Act} 36 of 1966, the \textit{Black Communities Development Act} 4 of 1984 and the \textit{Free Settlement Areas Act} 102 of 1988 were repealed.
\item[19] See Van der Walt 1995 SAPL 1 at 12 where it is pointed out that the Act provided for an Advisory Committee on Land Allocation. This was changed into the Commission on Land Allocation by the \textit{Abolition of Racially Based Land Measures Amendment Act} 110 of 1993. The Commission was entitled to hold hearings and investigations in order to determine whether certain individuals or groups were prejudiced by the acquisition of land by the state in terms of apartheid legislation and whether such individuals or groups were entitled to restitution.
\item[20] Section 97 to 103 of \textit{Abolition of Racially Based Land Measures Act} 108 of 1991. According to the Act the majority of owners of residential premises in a neighbourhood may draft by-laws regarding overcrowding, inhabitable premises, maintenance of premises in a clean and hygienic condition, the repair, removal or clean-up of nuisances, the repair and maintenance of buildings, the orderly use of amenities and the prohibition of ant offensive, indecent, unhygienic or dangerous conduct in the use of these amenities. Any by-law that discriminate on grounds of race, colour or religion shall be of no force.
\item[21] It is interesting to note that this Act confirmed the fact that the western civil-law land rights were perceived as the ideal. No provision is made for security of any other statutory or customary-law rights. Thus, if it was impossible to upgrade the rights in question to full ownership, the position of the holders of these rights remained unchanged.
\item[22] These rights are specified in Schedule 1 and 2 of the Act. Schedule 1 rights (deeds of grant, rights to leasehold and quitrent) are upgraded to ownership and Schedule 2 rights (permission to occupy any irrigation or residential allotment, permission to occupy any allotment, rights of occupation and occupation of tribal land granted under the indigenous law or customs of the tribe in question) are converted into ownership upon submission of a certificate of ownership at the deeds registry by the owner of an erf or piece of land. See Van der Walt 1995 SAPL 1 at 11; Kleyn and Borraine \textit{Silberberg and Schoeman's The law of property} 504.
\end{itemize}
in trust for a tribe, to the tribe in full ownership. This will, however, not affect the customary land rights that are in place within the tribe.\textsuperscript{23} The upgrading of land tenure rights were, however, subject to some form of survey, and due to the fact that facilities to provide quick and cheap surveys of land in black areas were insufficient, the Act did not yield adequate results.

The \textit{Less Formal Township Establishment Act 113 of 1991} provided for shortened and less formal procedures for the development of land. Minimum standards with regard to facilities and services are determined by the Act. Van der Walt and Pienaar\textsuperscript{24} point out that this Act recognised the permanence of black people within the so-called white areas.

\textbf{15.3 Policy indications of the Mandela government's approach}

\textbf{15.3.1 The Reconstruction and Development Programme\textsuperscript{25}}

The African National Congress published a policy document on the Reconstruction and Development Programme (RDP) shortly before the 1994 elections. This document specifically makes reference to the need for fundamental land reform. After the elections the RDP became official state policy and it provides the background against which most later reform measures were taken.

The RDP is defined as an integrated, coherent socio-economic policy framework which

\begin{footnotes}
\textsuperscript{23} Section 18 and 19. Tribal land may, however, not be disposed of to a non-tribe member for a period of ten years after the commencement of the Act. The possibility of the alienation of tribal land to non-tribe members may lead to a situation that would be detrimental to the tribe. See in this regard Van der Walt 1995 \textit{SAPL} 1 at 11; Van der Walt 1990 \textit{De Jure} 1 at 11; Cross and Haines \textit{Towards freehold} 36 et seq; Dlamini in Van der Walt \textit{Land reform and the future of landownership in South Africa} 37 et seq.

\textsuperscript{24} Van der Walt and Pienaar \textit{Introduction to the Law of Property} 439. See also Van der Walt 1995 \textit{SAPL} 1 at 12.

\textsuperscript{25} Published as an official ANC policy document 1994. This was later reworked into the \textit{White Paper on Reconstruction and Development}. See WP J-1994 \textit{Government Gazette} 16085, 23 November 1995.
\end{footnotes}
seeks to mobilise all South Africans and the country’s resources towards the final eradication of *apartheid* and the building of a democratic, non-racial and non-sexist future.\(^{26}\) The aim of the RDP is to address the disparities in income distribution, access to urban and agricultural infrastructure, access to land and housing. It is stated that ‘meeting basic needs’ is one of the key programmes of the RDP.\(^{27}\) Land reform forms an integral part of this key programme. The programme recognises the devastating effects of the *apartheid* system and points out that a fundamental land reform programme is needed to address the results of *apartheid*. The land reform programme "must be demand driven and must aim to supply residential and productive land to the poorest section of the rural population and aspirant farmers. As part of a comprehensive rural development programme, it must raise incomes and productivity, and must encourage the use of land for agricultural, other productive, or residential purposes."\(^{28}\)

Three areas of land reform are distinguished. Firstly the land policy must ensure security of tenure regardless of the system of land holding, secondly the policy has to provide for the redistribution of residential and agricultural land to those who need it but cannot afford it, and thirdly the restitution of land to those who lost land because of *apartheid* laws. The three areas of land reform identified here established the framework for land reform in South Africa.

15.3.2 The *Green Paper on South African Land Policy*\(^{29}\)

Due to the fact that the *Green Paper on South African Land Policy* was consequently replaced by the *White Paper on South African Land Policy* (1997), the Green paper will

\(^{26}\) *RDP 1; White Paper 7.*

\(^{27}\) *RDP 7.*

\(^{28}\) *RDP 20.*

\(^{29}\) Published by the Department of Land Affairs, 1 February 1996.
not be discussed in great detail. The *Green Paper on South African Land Policy* set out the government's goals and strategies to deal effectively with the land issue and to bring about necessary change in the land holding patterns in South Africa. In order to enable the land policy to effect these changes a number of factors have to be addressed in both rural and urban areas: the injustices of racially-based land dispossession; the inequitable distribution of land ownership; the need for security of tenure; the need for sustainable use of land; the need for rapid release of land for development; the need to record and register all rights in property; and the need to administer public land in an effective manner.  

The land reform programme is said to be built on the three main pillars of land reform as identified in the RDP, namely restitution of land or rights in land, land redistribution and land tenure reform.

As far as the redistribution of land is concerned, the *Green Paper* proposed that the process of redistribution should provide the poor with land for residential and productive purposes in order to improve their livelihoods, without jeopardising the public confidence in the land market. The *Green Paper* proposed a single, flexible redistribution mechanism which would be capable to adapt to different circumstances. In essence the redistribution process would depend on willing buyers and willing sellers. The state would ensure that the poor are not prejudiced by supplying financial assistance and credit where it is needed. The redistribution programme was supposed to benefit the very poor, labour tenants, farm workers, women, individuals and new entrants to agriculture.

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30 *Green Paper 1 et seq.*
31 *Green Paper 14 and especially 25 et seq.*
32 *Green Paper 32.*
33 *Green Paper 30.*
34 *Green Paper 32.*
With reference to restitution\textsuperscript{35} the \textit{Green Paper} confirmed the objectives of the then already promulgated \textit{Restitution of Land Rights Act} 22 of 1994 and the 1993 Constitution.\textsuperscript{36} The \textit{Green Paper} set the following time limits for the timeous completion of the restitution process: a three-year period for the lodgement of claims, a five-year period for the finalisation of all claims and a ten-year period for the implementation of all court orders. Special mention was made of pre-1913 claims and the claims of labour tenants. The \textit{Green Paper} proposed that preferential status should be granted to pre-1913 claims in land redistribution and development programmes, providing that these claimants are disadvantaged and will benefit in a sustainable manner from a land based support programme. The position of labour tenants was later addressed by the \textit{Land Reform (Labour Tenants) Act} 3 of 1996.\textsuperscript{37}

The \textit{Green Paper} reiterated that restitution could take the following forms: restoration of the land from which the claimants were dispossessed; the provision of alternative land; the payment of compensation; alternative relief including a package containing a combination of the above, sharing of the land or special; budgetary assistance such as services and infrastructure development where claimants presently live; or priority access to state resources in the allocation and the development of housing and land in the appropriate development programme.\textsuperscript{38} Factors which had to be taken into account in the determination of the amount of compensation to claimants and land owners respectively were also discussed.\textsuperscript{39}

The land tenure reform programme,\textsuperscript{40} as set out in the \textit{Green Paper}, aimed to transfer the permit-based and informal systems of landholding and to replace it with registrable, 

\begin{footnotes}
\footnotetext[35]{\textit{Green Paper} 34 et seq.}
\footnotetext[36]{See 15.5.1.1 below.}
\footnotetext[37]{See the discussion below.}
\footnotetext[38]{\textit{Green Paper} 38.}
\footnotetext[39]{\textit{Green Paper} 38 et seq.}
\footnotetext[40]{\textit{Green Paper} 43 et seq.}
\end{footnotes}
long-term rights that are legally enforceable, whether these be in the individual or communal contexts.

15.3.3 The *White Paper on South African Land Policy*\(^{41}\)

The *White Paper on South African Land Policy* embodies the government’s current policy and strategy concerning land use and land reform measures. The *White Paper* incorporates various issues raised in written submissions on the *Green Paper* as well as points of criticism and suggestions following a series of workshops on the *Green Paper* held with interested and affected parties.

The *White Paper* stresses the importance of land for all South Africans. It states that:

"[l]and is an important and sensitive issue for all South Africans. It is a finite resource which binds all together in a common destiny. As a cornerstone for reconstruction and development, a land policy for the country needs to deal effectively with:

- the injustices of racially based land dispossession of the past
- the need for a more equitable distribution of land ownership
- the need for land reform to reduce poverty and contribute to economic growth
- security of tenure for all
- a system of land management which will support sustainable land use patterns and rapid land release for development".\(^{42}\)

The mere redistribution of land and the provision of security of tenure alone will, however, not bring about the necessary change. The provision of support services and infrastructure is essential for the improvement of the quality of life and the employment opportunities resulting from land reform. In order to achieve this, a constructive

\(^{41}\) Published by the Department of Land Affairs, April 1997.

\(^{42}\) *White Paper 7.*
partnership between government on a national, provincial and local level, and the private and non-governmental sectors is needed.

Like the Green Paper, the White Paper focuses on the three different forms of land reform identified in the RDP: redistribution of land, land restitution and security of tenure.

The government's approach towards the redistribution of land, as set out in the White Paper, involves a single redistribution mechanism. This mechanism should be flexible enough to adapt to different situations and circumstances. In effect it is dependent on willing buyers and sellers. Expropriation will be used as a last resort in cases where willing sellers are not available. The redistribution of land in this manner will result in dispersed land acquisition and settlement, as opposed to large block settlement in designated areas. The programme aims to treat all segments of the land market even-handedly.

State support for the beneficiaries of the land redistribution programme is essential for its ultimate success. The White Paper recognises the responsibility of the Ministry of Agriculture and Land Affairs to create an enabling environment with regard to financial services for land reform beneficiaries. The creation of an enabling environment consists of two aspects. The first aspect entails a risk-sharing agreement between both parastatal and private sector financial institutions and the state. In terms of such an agreement the state undertakes to underwrite a percentage of the loan in the event of non-payment. This agreement will act as an incentive as well as a safety net to financial institutions which lend to this particular market. The second aspect entails the so-called 'sunrise' subsidies. These include a graded entry to repayment of the interest on the

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43 See in general White Paper 39 et seq.

44 As proposed by the Presidential Commission of Enquiry into Rural Financial Services (the Strauss Commission).
loan,\textsuperscript{45} a flexible repayment system\textsuperscript{46} and a discount subsidy.\textsuperscript{47}

The \textit{White Paper} also mentions the issues of urban land redistribution, access to land and security of tenure for farm workers, the situation of labour tenants and the question of gender equality in the land redistribution programme. With reference to the redistribution of urban land, the programme consists of two elements: the first entails a pilot programme in conjunction with the Gauteng Provincial Government known as the \textit{Mayibuye} programme. The programme involves making funds available for the acquisition of urban land to alleviate the plight of landless people in urban areas.\textsuperscript{48} The second element of the programme deals with the provision of security of tenure to people in places where they currently reside.\textsuperscript{49}

As far as farmworkers are concerned the \textit{White Paper} mentions two possibilities: off-farm settlement and on-farm settlement. In the case of off-farm settlement farmworkers may apply for assistance to establish an 'agri-village' close to farm employment and other employment opportunities. Several schemes are being piloted by landowners and farmworkers in relation to on-farm settlement of farmworkers. These include that the farmworker uses his/her state grant or subsidy\textsuperscript{50} to enhance the housing or non-bulk

\begin{itemize}
\item \textsuperscript{45} It is proposed that the beneficiary repays 60\% of the interest in the first year, 75\% in the second year, 90\% in the third year and full interest from the fourth year onwards.
\item \textsuperscript{46} The flexible repayment system involves the acceptance of a certain minimum payment of the loan. The repayment is, however, coupled to income flow - the bigger the income in a specific season the larger portion of the loan has to be paid off.
\item \textsuperscript{47} The subsidy is designed to reward performance - timely payment will result in a reduction of the interest rate.
\item \textsuperscript{48} Funds for the acquisition of urban land are acquired from the Settlement/Land Acquisition Grant. See the discussion on grants and subsidies below. A number of conditions for the grant to be allocated are listed in the \textit{White Paper}. These include, among others, that the grant be used by landless people to gain land for settlement, that the grant be used to facilitate the rapid release of land in terms of the \textit{Development Facilitation Act} and that the grant must be used for private land acquisition and the surveying and registration of sites in the name of beneficiaries. See \textit{White Paper} 46.
\item \textsuperscript{49} This element is dealt with in the section on security of tenure in the \textit{White Paper}. See \textit{White Paper} 64 \textit{et seq.}
\item \textsuperscript{50} See the discussion of state grants and subsidies below.
\end{itemize}
service provision on the farm subject to the right of occupancy. Another scheme involves an equity share-holding arrangement between the farmworker and the landowner.\textsuperscript{51}

The position of labour tenants was subsequently addressed by the \textit{Land Reform (Labour Tenants) Act} 3 of 1996.\textsuperscript{52} In relation to gender equality in the land reform programme, the \textit{White Paper} lists a number of factors which have to taken into account in the implementation of the land reform programme. These include, amongst others, that all legal restrictions on women to participate in land reform should be removed. This includes the reform of marriage law, inheritance law and customary law which favour men, and contain obstacles to women receiving rights to land. The land reform programme should also be gender sensitive in its project identification, beneficiary selection and planning.\textsuperscript{53}

The issue of the restitution of land is dealt with by the \textit{Restitution of Land Rights Act} 22 of 1994\textsuperscript{54} which was promulgated prior to the drafting of the \textit{White Paper}. The \textit{White Paper} does not add anything to what was already stated in the \textit{Green Paper}.\textsuperscript{55}

With reference to tenure reform the \textit{White Paper} mentions a few specific areas at which the tenure reform should be directed:\textsuperscript{56}

- \textit{The development of mechanisms for the upgrading of de facto vested interests in land into legally enforceable rights}. These mechanisms are still in the development phase and entail a negotiating process where all stakeholders put

\begin{itemize}
  \item \textsuperscript{51} \textit{White Paper} 47 et seq.
  \item \textsuperscript{52} See the discussion below.
  \item \textsuperscript{53} \textit{White Paper} 50.
  \item \textsuperscript{54} See the discussion below.
  \item \textsuperscript{55} See \textit{White Paper} 52 et seq.
  \item \textsuperscript{56} \textit{White Paper} 64 et seq.
\end{itemize}
forward concrete proposed solutions. The proposals will be assessed against
criteria such as the extent to which they adequately encompass the rights of all
occupants, the cost effectiveness and the public interest. If the criteria is met,
the government will make funding, in the form of settlement subsidies and
compensation, available to implement the proposed solutions. This process will

- **The protection of occupants of privately owned land.** Measures have to be
introduced to secure the informal rights of occupants as well as the rights of the
current owners of the land in question. The holders of the informal rights have
to be protected against evictions. The *Extension of Security of Tenure Act* 62 of
1997\(^\text{57}\) (which was promulgated before the *White Paper* was published) deals
with the relationship between owners and occupiers. It also addresses the
circumstances under which eviction can take place.

- **Forms of ownership.** The *Communal Property Associations Act* 28 of 1996\(^\text{58}\)
(which was also promulgated before the *White Paper* was published) provides
for the registration of group or communal ownership where the democratic
majority of a particular group chooses this form of ownership rather than
individual ownership.

- **Family based ownership.** The tenure reform needed in this area specifically
relates to land which is allocated to individual families. The government should
ensure that it secures the rights of all *de facto* rights holders when it transfers
an asset to these rights holders. Where security vests in only one person
(usually the head of the household), the rest of the *de facto* rights holders can

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\(^{57}\) See the discussion below.

\(^{58}\) See the discussion below.
be adversely affected. A new form of family ownership is currently being investigated to address these problems.

Group based rights. This entails the amendment of the Communal Property Associations Act 28 of 1996 to provide for the subdivision and registration of individual rights to areas within communal property. The implementation of the Act also proved to be too complex in situations where the group or community consisted of too many people.

Rights under communal ownership systems. Legislation will be drafted to ensure that rural communities may hold and use land according to customary land law. The land in question will be transferred in ownership to the group as a whole and ownership will thus not vest in the chief, tribal authority, trustees or a committee. All the members of the group will be co-owners. They may decide by way of a majority decision whether to own the land as a group or to convert their rights into individual ownership. They may also choose to individualise only certain areas. The position of women within such a system will be protected by the said legislation.

Gender equity in tenure reform. The White Paper accentuates the importance of gender equality in all the land reform measures. Special attention is paid to the protection of the position and rights of women.

The Department of Land Affairs offers a number of grants to support the land reform programme. These grants apply to land restitution, land redistribution and tenure

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59 This situation occurred in the process of the upgrading of rights in terms of the Upgrading of Land Tenure Rights Act 112 of 1991. See Mnisi v Chauke and Others; Chauke v Provincial Secretary, Transvaal, and Others 1994 (4) SA 715 (T).

60 White Paper 69 et seq.
reform. Eligible applicants\textsuperscript{61} may apply for one of the following grants:

(a) Settlement/land acquisition grant. This grant is set at a maximum of R15 000 per household and may be used for land acquisition, enhancement of tenure rights, investment in infrastructure, investment in home improvements and farm capital investments.

(b) Grant for the acquisition of land for municipal commonage. Primary municipalities may use this grant to acquire land to extend or create a commonage.

(c) Settlement planning grant. This grant may be used to employ planners or other professionals to assist applicants with the preparation of their applications.

(d) Grant for determining Land Development Objectives. Under-resourced, poor or rural local authorities may use this grant to undertake strategic planning in terms of section 28 of the Development Facilitation Act 67 of 1995 to set land development objectives in order to provide a framework for decision making on the allocation of resources for land reform and settlement.

15.3.4 The \textit{White Paper on Housing}\textsuperscript{62}

The \textit{White Paper on Housing} was one of the early key policy documents of the RDP and set out the problems facing the government and society in the provision of housing as well as the government’s official policy in terms of which the housing question was

\textsuperscript{61} According to \textit{White Paper} 70 eligible applicants include (a) landless people or people who have limited access to land (especially women) who want to gain access to land and settlement opportunities; (b) farm workers and their families who want to acquire land of improve their tenure conditions; (c) labour tenants and their families who want to acquire or improve the land which they hold; (d) residents who wish to improve and secure their conditions of tenure; (e) successful claimants in terms of the \textit{Restitution of Land Rights Act} 22 of 1994; (f) persons who were dispossessed but who fall outside the ambit of the \textit{Restitution of Land Rights Act} 22 of 1994 and (g) Municipal Councils who wish to create or extend commonage.

\textsuperscript{62} Government Gazette 16178, 23 December 1994.
to be dealt with. Due to the fact that the availability of land plays an important role in the provision of housing, brief mention will be made here of the necessity of land reform in order to effect the housing policy.

The *White Paper on Housing* made mention of only two areas of land reform, namely land redistribution and security of tenure. The restitution of land has no direct bearing on the housing question.\(^{63}\)

According to the *White Paper*, the national housing vision entails the

"establishment of viable, socially and economically integrated communities, situated in areas allowing convenient access to economic opportunities as well as health, education and social amenities, within which all South Africa's people will have access on a progressive basis, to:

- a permanent residential structure with secure tenure, ensuring privacy and providing adequate protection against the elements;
- potable water, adequate sanitary facilities including waste disposal and domestic electricity supply".\(^{64}\)

The availability of developed land is essential for the successful implementation of the housing programme and as such the identification, allocation and transformation of undeveloped land into serviced land for residential settlement is critical for the supply of housing to all South Africans. The *White Paper* pointed out that effective land delivery has a direct influence on the rate and scale of housing supply, the potential for housing supply to contribute to the socio-economic development and environment of poor communities and the potential for housing supply to contribute to the racial, 

\(^{63}\) *White Paper on Housing* 54.

\(^{64}\) *White Paper on Housing* 21.
economic and spatial integration of South Africa.\textsuperscript{65} The Department of Land Affairs, in conjunction with the Department of Housing, subsequently tabled the \textit{Development Facilitation Act} of 1995 as a bridging measure in the short term to facilitate the speedy delivery of developed land. The \textit{Housing Act} of 1997 was promulgated later on.

Publicly owned land was identified as a significant national asset and the \textit{White Paper} emphasised the fact that it is essential that the potential use of appropriately located and suitable land for affordable housing should be considered for such use on an equal basis with other competing uses.\textsuperscript{66}

15.4 Constitutional framework

15.4.1 The 1993 Constitution\textsuperscript{67}

The first democratic Constitution provided further impetus for new and effective land reform measures in South Africa. The Constitution mentions property in two different sections. On the one hand rights in property are guaranteed,\textsuperscript{68} and on the other hand the Constitution provides for active steps to effect land restitution.\textsuperscript{69} Although these two references to property seem to contradict one another, this is not really the case. If these sections are interpreted in light of the Constitution as a whole, bearing in mind the underlying principles and values of the Constitution, it is possible to give effect to both, without sacrificing either. The mere fact that individual rights in property are guaranteed does not imply that land reform is impossible, just as the constitutional protection of land reform does not mean that the protection of individual rights is

\textsuperscript{65} \textit{White Paper on Housing} 53.

\textsuperscript{66} \textit{White Paper on Housing} 32 and 56 et seq.

\textsuperscript{67} \textit{Constitution of the Republic of South Africa} Act 200 of 1993.

\textsuperscript{68} Section 28.

\textsuperscript{69} Section 121 to 123.
impossible. It is nevertheless interesting that the land reform measures in section 121 to 123 (which deal with the restitution of land) are not included in the Bill of Rights.

It is also important to note that section 28 guarantees 'rights in property'. This formulation provides for the protection of a wide range of property rights (including land rights). This particular formulation also makes it possible to protect customary law rights in property. The customary law system provides for interests in property rather rights to property and as such section 28 creates the possibility for the protection of these interests.

15.4.2 The 1996 Constitution

Section 25 of the 1996 Constitution replaced section 28 of the 1993 Constitution. As

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70 Constitution of the Republic of South Africa of 1996. The final Constitution is officially numbered Act 108 of 1996, but Van Wyk 1997 THRHR 377 at 378 et seq points out that it is a mistake to number the Constitution in this manner, because, unlike the interim Constitution of 1993, this is not a normal Act of Parliament, but a document drafted by the Constitutional Assembly.

71 The full text of section 25 of the Constitution of the Republic of South Africa Act 108 of 1996 is reproduced here for the convenience of the reader:

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

(2) Property may be expropriated only in terms of a law of general application -
   (a) For a public purpose or in the public interest; and
   (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including -
   (a) the current use of the property;
   (b) the history of the acquisition and use of the property;
   (c) the market value of the property;
   (d) the effect 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 include the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's 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
is the case with section 28 of the 1993 Constitution, section 25 determines that any deprivation or regulation of property has to be in line with certain principles. However, section 25 also explicitly provides for land reform. The property clause is drafted in such a manner that a balance is struck between the protection of existing property rights and the promotion of land reform measures. Thus, although existing property rights are guaranteed and protected, the property clause ensures that the protection of the rights does not impede land reform.

The property clause provides for land reform in several ways. The provisions in section 25(5) to 25(7) deal with the three areas of land reform as identified by the RDP: redistribution of land, the provision of security of tenure, and the restitution of land. Section 25(5) obliges the state to take reasonable measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. This section is clearly meant to provide for the redistribution of land and provide the state with strong protection to implement measures aimed at the redistribution of land. This provision does not place a positive duty on the state to provide every citizen with land, but merely obliges the state to provide access to land. The phrases 'within its available resources' and 'foster conditions' indicate that, although the state has a duty to provide appropriate assistance to people who do not have access to land, the state need not actually provide individuals with land. In terms of section 25(5) the state is under an obligation to take immediate steps towards the

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(6) A person or community whose tenure 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 or 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).
realization of the right to access to land.  

Section 25(6) deals specifically with security of tenure. The state is under an obligation to provide persons or communities, who have legally insecure tenure as a result of past injustices, with secure tenure or comparable redress. Legislation must be enacted to achieve this goal. The obligation of the state to provide citizens with security of tenure may be limited by the provisions of the different Acts which deal with the provision of security of tenure. Much of this legislation was already promulgated prior to the enactment of the 1996 Constitution.

Section 121 to 123 of the 1993 Constitution, that dealt with the restitution of land, have been replaced by section 25(7). This section determines that persons or communities who have been dispossessed of property as a result of past racially discriminatory laws or practices are entitled to the restitution of that property to the extent provided by an Act of Parliament (the Restitution of Land Right Act 22 of 1994). Section 25(7) differs from the provisions in sections 121 to 123 in the interim Constitution in that section 25(7) no longer provides for the restitution of a 'right in land'. This has been changed to 'property'. It may be argued that the term 'property' still makes it possible for persons to claim restitution of personal rights (especially in the case of sharecroppers and labour tenants) which were dispossessed in terms of apartheid laws. The term 'racially discriminatory law', as it was used in section 121 of the interim Constitution, has been

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72 Eisenberg in Chaskalson et al Constitutional law of South Africa 40-1 at 7. Also see Budlender in Budlender, Latsky and Roux Juta's New Land Law 1-1 at 69; Van der Walt Constitutional property clauses: a comparative analysis chapter on South Africa.

73 Section 25(9).

74 Budlender in Budlender, Latsky and Roux Juta's New Land Law 1-1 at 70; Eisenberg in Chaskalson et al Constitutional law of South Africa 40-1 at 9.

75 See the Upgrading of Land Tenure Rights Act 112 of 1991; the Land Reform (Labour Tenants) Act 3 of 1996; and the Interim Protection of Informal Land Rights Act 31 of 1996.

76 Eisenberg in Chaskalson et al Constitutional law of South Africa 40-1 at 10. See also Budlender in Budlender, Latsky and Roux Juta's New Land Law 1-1 at 71; Roux in Budlender, Latsky and Roux Juta's New Land Law 3A-1 at 14 where it is pointed out that the scope of 'rights in land' was already limited by section 1 of the Restitution of Land Rights Act 22 of 1994.
replaced by 'racially discriminatory laws and practices'. Eisenberg\textsuperscript{77} points out that the term 'practices' is much wider than 'laws', and that section 25(7) does not require the law in terms of which people were dispossessed to be racially discriminatory, but merely that the actions of the state be discriminatory.

In view of the positive formulation of sections 25(6) and 25(7) Van der Walt\textsuperscript{78} points out that the rights created by these sections may be regarded as positive claim rights against the state rather than institutional guarantees. The extent of these rights are, however, limited by the relevant legislation and by the availability of state resources.

Section 25(8) is a general provision which states that no provision of the property clause may impede the state from taking measures to achieve land, water and related reform in order to redress the results of past racial discrimination. Any departure from section 25 must, however, be in accordance with the provisions of section 36(1).\textsuperscript{79}

Section 25(2) determines that property may be expropriated for a public purpose or in the public interest. If this is read with section 25(4)(a), which states that the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all natural resources, it is clear that provision is made for expropriation to effect land reform. According to section 25(3) the amount of compensation and the time and manner of payment must be just and equitable. Read with section 25(4)(a), the public interest in land reform should assist in the determination of what constitutes just and equitable compensation. In the calculation of the amount of compensation cognisance should be taken of past practices such as

\textsuperscript{77} Eisenberg in Chaskalson \textit{et al} \textit{Constitutional law of South Africa} 40-1 at 11.

\textsuperscript{78} Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on South Africa.

\textsuperscript{79} See Budlender in Budlender, Latsky and Roux \textit{Juta's New Land Law} 1-1 at 72. Budlender argues that section 25(8) is most probably included in the property guarantee to "act as a directive to the courts that land, water and related reform in order to redress the results of past racial discrimination are a specially valued and protected purpose". This interpretation of section 25(8) is consistent with section 36(1). See also Van der Walt \textit{The constitutional property clause} 143 \textit{et seq}; Van der Walt \textit{Constitutional property clauses: a comparative analysis} chapter on South Africa.
state investment in the property and the history of the acquisition of the property.\textsuperscript{80}

Section 25 provides clear constitutional authority for land reform. The provision in section 25(4), which determines that the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's resources, indicates that the courts have to take cognisance of the social function of property and the public interest when land-reform related cases are adjudicated. This provision, coupled with the provisions in sections 25(5) to 25(7), which provide for specific forms of land reform, as well as the underlying principles of the Constitution create a framework within which the courts have to judge the limitation of property rights with regard to land reform. In view of these provisions section 25 cannot be interpreted as an absolute guarantee of existing individual rights. Where the state imposes a limitation on individual property rights, the courts have to establish an equitable balance between the interests of the affected individual and the public interest. The authorizing and controlling provisions with regard to land reform in section 25 ensure that the public interest is afforded the necessary weight in the balancing process.

Although many of the reform measures contemplated in the 1996 Constitution have been implemented prior to the implementation of the Constitution itself, the Constitution provides a the measures with legitimacy. The drafters of the property clause in the 1996 Constitution ensured that a wide range of land reform measures could be taken without infringing of the individual's property rights. The guarantee of individual rights has been drafted in such a manner as to ensure that, while these rights are adequately protected, it does not jeopardize or restrict the land reform programme. On the other hand, the provision for comprehensive land reform does not jeopardise the protection of individual rights either. The fact that the courts are obliged to balance the protection of existing property rights with measures to effect land reform ensures that the possibility of a constitutional conflict between the judiciary and the legislature is minimized.

\textsuperscript{80} Section 25(3)(a) to (e).
15.5 Land reform laws and programmes

15.5.1 Restitution

15.5.1.1 The Restitution of Land Rights Act 22 of 1994

The Restitution of Land Rights Act 22 of 1994 was promulgated in 1994 in terms of section 121 to 123 of the 1993 Constitution. Any person or community that was dispossessed of land rights not earlier than 19 June 1913 in terms of an Act which would have been inconsistent with the discrimination clause of the 1993 Constitution may claim restitution from the state of those land rights in terms of this Act. Restitution of rights in land which have been expropriated in terms of the Expropriation Act 63 of 1975 do not fall within the ambit of this Act. However, if the claimant is of the opinion that the compensation he/she received in terms of the Expropriation Act 63 of 1975 is not just and equitable, he/she may claim restitution, but has to prove that the compensation was not adequate. Claims in terms of this Act are instituted against the state rather than against individuals or groups.

'Rights in land' are defined widely in the Restitution of Land Rights Act 22 of 1994:

"'right in land' means any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question".

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81 See in general Roux in Budlender, Latsky and Roux Juta's New Land Law 3A-1 et seq; Jaichand in Bill of Rights Compendium 3FA-3 et seq.
82 See section 8(2).
84 See section 1.
This definition of rights in land makes it possible for a wide range of holders of rights to claim restitution in terms of the Act. It provides for all those dispossessed in terms of apartheid law who never had registered rights to land. The rights held in terms of the apartheid land tenure system will thus all qualify for possible restitution in terms of this Act.

The Act provides for the establishment of a Commission on the Restitution of Land Rights and a Land Claims Court. The purpose of the commission is to screen all applications to determine the suitability of the claims in terms of the Act. The commission has to settle the claims if possible (through a process of mediation if necessary), but has to refer cases which they cannot solve to the Land Claims Court.

The Act provides for a variety of different remedies. The Act states that the court:

"may order -
(a) the restoration of land, a portion of land or any right in land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of or a right in land to the claimant in full or in partial settlement of the claim and, where necessary, the prior acquisition or expropriation of the land, portion of land or right in land: Provided that the claimant shall not be awarded land, a portion of land or a right in land dispossessed from another claimant, unless such other claimant is or has been granted restitution of a right in land or has waived his or her right to restitution of the right in land concerned;"

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86 Chapter III.
87 Section 13.
88 Section 14(c) and (d). Also see Blaauwberg Municipality v Bekker and others (LCC). Decision available on the Internet at http://law.wits.ac.za/lcc.
(b) the State to grant the claimant an appropriate right in alternative state-owned land and, where necessary, order the State to designate it;
(c) the State to pay the claimant compensation;
(d) the State to include the claimant as a beneficiary of a State support programme for housing or the allocation and development of rural land;
(e) the grant to the claimant of any alternative relief”.

The following factors have to be brought into the equation when the court considers its decision in a particular case: (a) the desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices; (b) the desirability of remedying past violations of human rights; (c) the requirements of equity and justice; (d) if restoration of a right in land is claimed, the feasibility of such restoration; (e) the desirability of avoiding major social disruption; (f) any provision which exists in respect of the land for that land to be dealt with in a manner which aims to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination; (g) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of the dispossession; (h) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land; (i) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money; and (j) any other factor which the court finds relevant and consistent with the spirit and objectives of the Constitution.

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89 Section 35(1) as amended by the Land Restitution and Reform Laws Amendment Act 63 of 1997. Also see section 123 of the Constitution of the Republic of South Africa Act 200 of 1993. Restitution is not restricted to rights in land. Section 25(7) of the 1996 Constitution provides for “equitable redress” as an alternative to the restitution of specific property. See Dulaah and Another v Department of Land Affairs 1997 (4) SA 1108 (LCC) and Ex Parte North Central and South Central Metropolitan Substructure Councils of the Durban Metropolitan Area and Another 1998 (1) SA 78 (LCC).

90 Section 33 as amended by the Land Restitution and Reform Laws Amendment Act 63 of 1997. Also see In re Macleantown Residents Association: Re Certain Erven and Commonage in Macleantown 1996 (4) SA 1272 (LCC).
In the case where the land in question is in possession of the state and the state certifies that restitution of the right is feasible, the state may be ordered to restore the right to the claimant. If, however, the land in question is in possession of a private owner the state may purchase or expropriate the land and restore it to the claimant. The court will, however, not order the state to purchase or expropriate private land for restitution purposes unless it is just and equitable taking into account factors such as the history of the dispossession, the hardship caused, the current use of the property, the interests of the owner and others affected by any expropriation and the interests of the dispossessed. Compensation paid in the event of expropriation has to be in line with the requirements set in section 25(2) and (3) of the Constitution. In the instance were compensation is paid to the claimant (where restitution of rights in land is not possible or not feasible) the compensation has to be just and equitable in light of all the relevant factors, including the circumstances which prevailed at the time of the dispossession and the payment of any compensation upon such dispossession.

It is important to note that the restitution of rights in land does not necessarily mean that the claimant will be granted full ownership of the land in question. The claimant's position prior to the dispossession may be restored, but the Act determines that 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, and to determine the form of the title under which the right may be held in future.

Where the claimant is a community, the court may determine the manner in which the rights are held or the compensation is paid. A restitution order of rights in land to a

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92 Section 35(5) originally referred to section 28(3) of the interim Constitution, but this section was amended by the Land Restitution and Reform Laws Amendment Act 63 of 1997 to apply to the 1996 Constitution.
93 Section 123(4)(a) of the Constitution of the Republic of South Africa Act 200 of 1993. The payment of compensation to a claimant is not excluded in the case where restitution has been effected by the claimants themselves. See Dulabh and Another v Department of Land Affairs 1997 (4) SA 1108 (LCC).
94 Section 35(4).
community may be subjected to conditions the court deems necessary to ensure that all of the dispossessed members of the community will have access to the land or the compensation in question on a fair and non-discriminatory basis.95

15.5.1.2 The Land Reform (Labour Tenants) Act 3 of 1996

The Land Reform (Labour Tenants) Act 3 of 1996 deals with the restitution of land rights, the provision of security of tenure to labour tenants, and the redistribution of land occupied or used by labour tenants. The general principles of the Act and the provisions relating to the restitution of land are discussed here, while the provisions relating to redistribution and security of tenure are discussed below in the sections on redistribution and tenure reform respectively.

The Act has a limited application and applies only to labour tenants. Farm workers are explicitly excluded from the protection provided by the Act. The Act provides for the protection of the labour tenant's rights with respect to the land in the sense that the labour tenant may occupy and use the designated portion of the farm for housing, cropping and grazing. In return for this right the labour tenant, or his/her associate, provides labour to the land owner or lessee.

The protection provided by the Act applies to any person who was a labour tenant on 2 June 1995. Any such person and his/her family members shall have the right to use and occupy the particular part of the farm which he/she (or his/her associate) was using and occupying on the said date.96 A person who qualifies as a labour tenant in terms of the Act, but who vacated a farm or was evicted for any reason between 2 June 1995 and the commencement of the Act on 22 March 1996, may institute an action for the reinstatement of his/her rights.97 This amounts to the restitution of the labour tenant's

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95 Section 352(c) and 35(3). Also see Ex Parte Elandskloof Vereniging (LCC). Decision available on the Internet at http://law.wits.ac.za/lcc.

96 Section 3(1)(a) and section 12(1)(a).

97 Section 3(1)(b) and section 12(1)(b).
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".  

It was decided in *Mahlangu v De Jager* that the onus is on the applicant to prove that he/she is a labour tenant. The applicant has to fulfill all three the requirements to qualify as a labour tenant. The fact that the three requirements have to be read conjunctively was confirmed in *Zulu and Others v Van Rensburg and Others*. It did, however, prove difficult to discharge the burden of proof, and in *Klopper and Others v Mkhize and Others* it was decided that the definition of 'labour tenant' is obscurely worded. The third requirement provides an additional means by which a person can prove that he/she qualifies as a labour tenant in terms of the Act, and should not be

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98  Section 1(xi).
99  1996 (3) SA 235 (LCC).
100 1996 (3) SA 1236 (LCC).
101 1998 (1) SA 406 (N).
read conjunctively with the first two requirements. The court stated that:

"[i]t may well have been intended that paras (a) and (b) should be read conjunctively, but it seems that the further intention was that para (c) should either be read in its own or conjunctively with para (a) only. There is, in any event, no warrant for reading all three paragraphs conjunctively."\textsuperscript{102}

This approach was followed in \textit{Tselentis Mining (Pty) Ltd and Another v Mdlalose and Others}.\textsuperscript{103} The court, however, modified the approach followed in \textit{Klopper and Others v Mkhize and Others} to some extent to relieve the burden of proof. It was decided that paragraphs (a) to (c) should not be read conjunctively, but that paragraphs (a) and (b) should be read conjunctively and paragraphs (a) and (c) should be read conjunctively, but disjunctively from paragraphs (a) and (b).\textsuperscript{104} The court found that most applicants would comply with the requirements set in paragraphs (a) and (b), but that paragraph (c) creates additional means by which a person who resided or had the right to reside on the farm on 2 June 1995, but who did not have in his own right the rights to use cropping or grazing on such farm can nevertheless qualify as a labour tenant if his/her parents or grandparents had such rights.

It was also decided in \textit{Mahlangu v De Jager}\textsuperscript{105} that the applicant must prove that he/she is not a farmworker. A farmworker is defined by the Act as:

"a person who is employed on a farm in terms of a contract of employment which provides that

(a) in return for the labour which he or she provides to the owner or the

\textsuperscript{102} 1998 (1) SA 406 (N) at 408.
\textsuperscript{103} 1998 (1) SA 411 (N).
\textsuperscript{104} 1998 (1) SA 411 (N) at 419.
\textsuperscript{105} 1996 (3) SA 235 (LCC).
lessee of the farm, he or she shall be paid predominantly in cash or in some other form of remuneration, and not predominantly in the right to occupy and use land; and

(b) he or she is obliged to perform his or her services personally. ¹⁰⁶

The *Land Restitution and Reform Laws Amendment Act* 63 of 1997¹⁰⁷ amended the *Land Reform (Labour Tenants) Act* 3 of 1996 in 1997 to the effect that if it is proved in any proceedings that a person falls within paragraphs (a), (b) and (c) of the definition of a labour tenant, that person shall be presumed not to be a farmworker, unless the contrary is proved.¹⁰⁶ Whenever the court has to establish whether a person is a labour tenant the court must have regard to the combined effect and substance of all agreements entered into between the person who avers that he/she is a labour tenant and his/her parent or grandparent, and the owner or lessee of the land concerned.¹⁰⁹ This amendment further relieves the heavy burden of proof on applicants.

The main distinction between a labour tenant and a farmworker is the fact that a farmworker is paid predominantly in cash or some other form of remuneration and not predominantly in the right to occupy and use land. In the case where the applicant provides labour to the owner or lessee in return for the right to occupy and use land as well as some other form of remuneration (be it cash or some other form of remuneration), the applicant has to prove that the right to occupy and use the land has a larger monetary value than any other form of remuneration.¹¹⁰

The provision of labour is paramount in the definition of a labour tenant. The labour tenant, however, does not have to provide the labour in person (as is the case with a

¹⁰⁶ Section 1(ix).
¹⁰⁷ Sections 2(5) and 2(6) were added to section 2.
¹⁰⁸ Sections 2(5).
¹⁰⁹ Section 2(6).
¹¹⁰ For a discussion see Pienaar 1997 TSAR 131 at 133 *et seq.*
farm worker). The labour tenant merely has to provide labour to the owner. He/she may nominate another person to provide labour in his/her place, provided that such a person is acceptable to the owner or the lessee of the farm.\textsuperscript{111} However, the owner or lessee may not unreasonably refuse the nomination of a person to provide labour in stead of the labour tenant.\textsuperscript{112} The conditions of service of the person who provides labour may not be less favourable than the conditions applicable to farm workers in terms of the Basic Conditions of Employment Act 3 of 1983.\textsuperscript{113}

15.5.2 Redistribution

15.5.2.1 The Development Facilitation Act 67 of 1995

The Development Facilitation Act 67 of 1995 aims to promote reconstruction and development in relation to land by providing for a national framework for land development. The Act does not deal with historical land claims, but aims to increase the availability of land for redistribution purposes. Procedures for the subdivision and development of land in urban and rural areas are introduced to promote the speedy provision and development of land for residential, small-scale farming or other needs and uses. In some cases these measures are of a temporary nature and will be in effect only until more permanent procedures are developed. The Act provides for easier and speedier procedures to facilitate the development of land without getting bogged down by existing, time-consuming procedures. The Act furthermore promotes security of tenure and aims to ensure that end-user finance in the form of subsidies and loans becomes available as early as possible during the land development process. The Act attempts to achieve its goals within a national framework of physical planning. It

\textsuperscript{111} Section 4(1).

\textsuperscript{112} Section 4(2).

\textsuperscript{113} This does not mean that the nominated labourer has to receive additional payment, but merely that the labour tenant's right to occupy and use the land must be in accordance with the provisions of the Basic Conditions of Employment Act 3 of 1983. The working hours and conditions of leave of the nominated labourer, however, have to meet the requirements of the Basic Conditions of Employment Act 3 of 1983.
provides for procedures for the development of land, land tenure issues and general planning and conservation standards.

Chapter I of the Act sets out the general principles for the development of land.\textsuperscript{114} The principles are applicable throughout South Africa and apply to actions of both the national government and local government bodies. This chapter provides for an integrated system of physical planning and is applicable to policy, administrative practice and legislation alike. This integrated system should provide for urban and rural land development and should facilitate the development of formal and informal, existing and new settlements.\textsuperscript{115} The efficient and integrated development of land acts as a guiding principle and should be promoted by integrating the social, economic, institutional and physical aspects of land development; the integration of development of land in rural and urban areas to support of each other rather than being mutually exclusive; making residential and employment opportunities available in close proximity to each other; optimising agricultural, land, mineral, bulk infrastructure, roads, transportation and social facilities; the promotion of a diverse combination of land uses; the discouragement of urban sprawl in urban areas; the correction of historically distorted spatial patterns; the optimum use of existing infrastructure; and the encouragement of environmentally sustainable land development practices and processes.\textsuperscript{116} Sustainable land development should be achieved through the promotion of development which is within the fiscal, institutional and administrative means of the country, the establishment of viable communities, the sustained protection of the environment, meeting the basic needs of all citizens and the safe use of land.\textsuperscript{117} Land development should also promote security of tenure and provide for the widest possible range of tenure alternatives, including individual and communal tenure.\textsuperscript{118} These

\textsuperscript{114} See in general Latsky in Budlender, Latsky and Roux \textit{Juta's New Land Law} 2A-1 at 12.

\textsuperscript{115} Section 3(1)(a).

\textsuperscript{116} Section 3(1)(c).

\textsuperscript{117} Section 3(1)(h).

\textsuperscript{118} Section 3(1)(k).

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measures are specifically aimed at tenure reform.

Chapters V and VI provide for alternative procedures to produce developed land in urban and rural areas respectively. These alternative routes and procedures do not replace or change the existing ones, but offer a cheaper and speedier alternative to increase the rate of redistribution and reconstruction as envisaged by the RDP. 119

Chapter VII relates to land tenure matters. Provision is made for a special registration arrangement 120 which entails that, although a particular piece of land is not yet properly developed and registrable, such land may be registered provisionally, provided that the professional land surveyor that deals with the specific development certifies that there is no substantial risk that a general plan will not be approved 121 and the conveyancer in the particular case certifies that there is no substantial risk that transfer of ownership of erven on that development will not be so registered. 122 This special registration arrangement aims to make it possible to introduce mortgages at an earlier stage in the development without increasing the risk of either users of financial institutions.

A new form of title, known as 'initial ownership', may be registered in a deeds registry in terms of this special registration arrangement. 123 The registration of initial ownership vests in the holder thereof the right to occupy and use the erf as if he/she is the owner thereof. He/she has the right to encumber the initial ownership by means of a mortgage or a personal servitude, but may not encumber the initial ownership in any other way. The initial owner may also sell the initial ownership. 124 The land itself, however, may not

119 Latsky in Budlender, Latsky and Roux Juta’s New Land Law 2A-1 at 45 et seq.
120 Section 61(1).
121 Section 61(4)(a).
122 Section 61(4)(b).
123 Section 62(1). See also Latsky in Budlender, Latsky and Roux Juta’s New Land Law 2A-1 at 84; Van der Walt The Constitutional property clause 154.
124 Section 62(4).
be alienated or further encumbered in any way.\textsuperscript{125} Full ownership will vest in the holder of initial ownership as soon as the land becomes registrable in ownership.\textsuperscript{126}

The Development Facilitation Act 67 of 1995 thus provides alternative procedures to speed up the development of land in line with the RDP, without replacing or sacrificing the general requirements of development standards, security of the registration procedure or environmental conservation.

15.5.2.2 The Land Reform Pilot Programme

The Land Reform Pilot Programme was launched in early 1995. The programme is merely the first step in the process of the redistribution of agricultural land and aims at the acquisition and planning of suitable land, providing it with infrastructure and redistributing it to rural communities. The programme was initially implemented on an experimental basis over a two year period. Between five and ten communities in each province were supposed to benefit from the programme in the initial phase. Once suitable land and beneficiaries were identified, the necessary planning was done with the participation of all parties involved. Participation at the lowest level forms the cornerstone of the programme. After the planning phase the land is acquired through state purchase (or expropriation where necessary) and the community is settled there.

The aim of the Land Reform Pilot Programme is to develop efficient, equitable and sustainable mechanisms of land redistribution on a national level. These mechanisms will be put to use after the completion of the initial phase.\textsuperscript{127}

\textsuperscript{125} Section 62(5).
\textsuperscript{126} Section 62(7).
\textsuperscript{127} See in general White Paper on South African Land Policy 38; Van der Walt and Pienaar Introduction to the Law of Property 445.
15.5.2.3 The Land Reform (Labour Tenants) Act 3 of 1996

Chapter III of the Land Reform (Labour Tenants) Act 3 of 1996 contain special provisions aimed at the redistribution of land. In terms of Chapter III of the Land Reform (Labour Tenants) Act 3 of 1996 the labour tenant or his/her successor may acquire ownership or other rights in either the land which he/she is entitled to occupy and use or any other land elsewhere on the farm or in the vicinity (as proposed by the owner of the farm) as well as such servitudes\(^{128}\) as are reasonably necessary or consistent with the rights he/she enjoys or previously enjoyed.\(^{129}\) If an award is made in terms of Chapter III the land in question will not be subject to the provisions of the Subdivision of Agricultural Land Act 70 of 1970.\(^{130}\) An application for the award of ownership or other rights in the land has to be instituted within four years after the commencement of this Act on 22 March 1996.

A claim in terms of Chapter III of the Act has to be resolved by agreement between the owner of the farm in question and the labour tenant (the applicant). The owner may submit proposals to the Director-General for the equitable resolution of the claim. These proposals may include the acquisition by the labour tenant of rights in land elsewhere on the farm or other land in the vicinity or the payment of compensation to the labour tenant in lieu of the acquisition of such land.\(^{131}\) If the interested parties fail to reach an agreement the Director-General may appoint a mediator to assist the owner and the applicant to discuss the proposals.\(^{132}\) If an agreement is not reached within 30 days, the court can refer the case to an arbitrator.\(^{133}\) The court will make the determination of the arbitrator an order of the court.

\(^{128}\) For instance right of access to water or right of way.

\(^{129}\) Section 16.

\(^{130}\) See section 40 of the Land Reform (Labour Tenants) Act 3 of 1996.

\(^{131}\) Section 18(1).

\(^{132}\) Section 18(3) and section 36.

\(^{133}\) Section 19 and 20.
The court and the arbitrator may make a determination on the following: 134 (a) whether the applicant is a labour tenant; (b) the nature, location and extent of any land or rights in land which may be awarded to the applicant; (c) such servitudes as may be reasonably necessary or consistent with the rights which the applicant or the owner of the affected land enjoys or has previously enjoyed; (d) compensation to be paid to the owner of the affected land or to any other person whose rights are affected; (e) the manner and period of payment of compensation; and (f) compensation which may be paid to the applicant in lieu of the transfer of land or rights in land. On acquisition by the labour tenant of ownership or other rights to land or compensation in lieu of the land, his/her rights as a labour tenant will be terminated. 135 The nature of the order made by the court must have regard to the desirability of assisting labour tenants to establish themselves on farms on a viable and sustainable basis, the achievement of the goals of this Act, the requirements of equity and justice, the willingness of the parties involved to make a contribution to settle the application and the findings of the arbitrator. 136

The acquisition by the labour tenant of ownership of land or other rights in land is regarded as an expropriation and entitles the owner to just and equitable compensation. The amount of the compensation is to be determined with reference to the Constitution. Should the parties be unable to reach agreement, the court or the arbitrator will determine the amount, the manner in which and the period within which compensation must be paid. 137 Should the applicant fail to make any payment, the owner may apply to the court to have its previous order declared null and void. 138

Parliament will appropriate funds for the acquisition of land or rights in land by labour

134 Section 22(4).
135 Section 3(2)(d).
136 Section 22(5).
137 Section 23.
138 Section 24.
tenants and in terms of 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.\textsuperscript{139}

15.5.2.4 The \textit{Housing Act} 107 of 1997

The \textit{Housing Act} 107 of 1997 does not introduce any explicit land reform measures. It does, however, prescribe that one of the general principles which is applicable to housing development entails that the

"national, provincial and local spheres of government must ensure housing development provides as wide a choice as possible of housing and tenure options as is reasonably possible".\textsuperscript{140}

It continues by stating that individuals and communities must be encouraged and supported in their efforts to fulfill their own housing needs by assisting them in accessing land, services and technical assistance.\textsuperscript{141} Although this Act contributes to the process of redistribution of land on an equitable basis to all South Africans, it also has a bearing on the provision of security of tenure.

15.5.3 Tenure reform

15.5.3.1 The \textit{Communal Property Associations Act} 28 of 1996

The \textit{Communal Property Associations Act} 28 of 1996 was promulgated to enable groups of people or communities to hold and manage property\textsuperscript{142} collectively. A group

\begin{itemize}
  \item Section 26 and 27.
  \item Section 2(1)(c)(i).
  \item Section 2(1)(d).
  \item The Act applies to both movable and immovable property and to any right in and to movable or immovable property. See section 1(xii).
\end{itemize}

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or community that wants to hold property collectively has to register itself as a communal property association in terms of this Act. It also has to register a written constitution to regulate the management of the property and to protect the individual members of the association against abuse. The Act forms part of the Department of Land Affairs' restitution and land reform programme in that it enables the court to identify a communal property association as the beneficiary in a restitution or redistribution order. Many people choose to hold and manage property as a group rather than individually because of the economic and social functions it fulfills. The Act provides the necessary structures\(^{143}\) to enable communities to acquire, hold and manage property collectively.

The Act provides for the registration of a provisional communal property association.\(^ {144}\) The provisional communal property association may acquire the right to occupy and use land for a period of twelve months, but may not in any way alienate such a right. A written constitution for the communal property association has to be drafted\(^ {145}\) during this twelve month period.

An association will qualify for registration\(^ {146}\) if the community qualifies for protection in terms of this Act,\(^ {147}\) the association has as its main object the holding of property in common and the constitution of the association complies with the principles prescribed

\(^{143}\) Available institutions such as voluntary associations, share block schemes, companies, sectional title and trusts proved to be inappropriate, particularly for the less experienced and under-resourced communities. See in general the Memorandum on the Proposed Communal Property Associations Act 2 accompanying the Communal Property Associations Bill B 103B-95.

\(^{144}\) Section 5.

\(^{145}\) The Act prescribes certain guidelines for the drafting of the constitution. These guidelines will ensure that the drafting process is transparent, democratic and fair. See section 6, 7 and 9 as well as the Schedule.

\(^{146}\) Section 8(2).

\(^{147}\) Section 2 lays down the requirements for a community to qualify as an association in terms of this Act.
by the Act.\(^{148}\) The constitution has to be consistent with the following general principles: (a) a fair and inclusive decision-making process;\(^{149}\) (b) equality of membership;\(^{150}\) (c) democratic processes; (d) fair access to the property of the association;\(^{151}\) (e) accountability and transparency.

If the Director-General: Land Affairs is satisfied that the association qualifies for registration he/she will send the application, the constitution and his/her written consent to the Registration Officer,\(^{152}\) who will then register the association. Upon registration the association will be established as a juristic person, with the capacity to sue and be sued. It may acquire rights and incur obligations, and acquire and dispose of immovable property and real rights therein and encumber such immovable property by mortgage, servitude, lease or any other manner. The association may, however, only dispose of or encumber its immovable property with the consent of the majority of members present at a general meeting of members. Any disposal, mortgage, or encumbrance which does not conform to this requirement will be voidable. Registration of the association will furthermore provide it with perpetual succession regardless of changes in its membership. The constitution will be deemed to be a matter of public knowledge and will be a legally binding agreement between the association and its members.\(^{153}\)

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148 Section 9.

149 Section 9(1)(a) determines that all members must be afforded the opportunity to participate in the decision-making processes and membership of the association may only be terminated on reasonable grounds after a fair hearing at which the member was given the opportunity to present his/her case.

150 Section 9(1)(b). No direct or indirect discrimination will be tolerated against any member on one of the following grounds: race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language. If different classes of members are created the differentiation must be compatible with the principle of equality and all members within a specific class must have equal right.

151 Section 9(1)(d). The association must manage its property to the benefit of all its members in a participatory and non-discriminatory manner. The association may not sell or encumber its property without the consent of a majority of its members.

152 An officer of the Department of Land Affairs appointed by the Director-General. See section 1(xv).

153 Section 8(6).
The Minister may determine that the laws governing the establishment of a township, and in the case of agricultural land, the *Subdivision of Agricultural Land Act* 70 of 1970 will not apply to land registered in the name of a communal property association.\(^{154}\)

This Act left the nature of the rights to the land open and clearly makes it possible for a community to own land collectively in the civil law sense, while customary law regulates the internal use and management of the land.

### 15.5.3.2 The *Land Reform (Labour Tenants) Act* 3 of 1996

The *Land Reform (Labour Tenants) Act* 3 of 1996 contain provisions which deal specifically with the termination of the labour tenant's rights and the procedure for eviction. These provisions have a bearing of the security of tenure enjoyed by the labour tenant. The rights of a labour tenant can be terminated by the waiver of his/her rights. Such a waiver has to be contained in a written agreement signed by both the labour tenant and the owner.\(^{155}\) The labour tenant's rights will also be terminated if he/she leaves the farm voluntarily or if he/she appoints a person as his/her successor with the intention to terminate the labour tenant agreement.\(^{156}\) In the case where the labour tenant dies, becomes unable to manage his/her affairs due to mental illness or another disability or leaves the farm without appointing a successor, the family of the labour tenant may appoint a successor.\(^{157}\) The rights of a labour tenant will not be terminated in the case where he/she attained the age of 65, or is unable to provide labour personally due to disability and fails to appoint someone to provide labour in his/her place.\(^{158}\) Upon the death of such a labour tenant, his/her associates may be

\(^{154}\) Section 8(8).

\(^{155}\) Section 3(6). Also see section 3(7) which states that the Director-General has to certify that the labour tenant had full knowledge of his/her rights and the implications of the waiver of such rights.

\(^{156}\) Section 3(3).

\(^{157}\) Section 3(4). The family has to inform the owner of the person so appointed within 90 days after the owner requested them in writing to do so.

\(^{158}\) Section 9(1).
given twelve month's notice to leave the farm.\textsuperscript{159} The labour tenancy may also be terminated if the labour tenant refuses or fails to provide labour to the owner or the lessee,\textsuperscript{160} commits a material breach of the relationship between the owner or lessee and the labour tenant\textsuperscript{161} or acquires ownership or other rights in the land.\textsuperscript{162}

The owner of a farm may apply to court for the relocation of the labour tenant and his/her associates if the owner needs the land occupied or used by the labour tenant for agricultural or other development purposes which is of public benefit.\textsuperscript{163} The court will only agree to such a relocation if the hardship suffered by the labour tenant and his/her associates due to the relocation is less than the hardship suffered by the owner if the labour tenant and his/her associates are not relocated.\textsuperscript{164} The court may also order the payment of compensation to the labour tenant and his/her associates to ensure that they are not prejudiced by the relocation.\textsuperscript{165} The owner has to use the land for the purposes he/she submitted to the court within one year after the relocation, for if not, the labour tenant may institute proceedings for the reinstatement of his/her right to occupy and use that land.\textsuperscript{166}

The owner or lessee of the farm is protected in that the Act provides for the eviction of the labour tenant and his/her associates under certain circumstances.\textsuperscript{167} An owner who applies for an eviction order has to prove that the eviction of the labour tenant or

\begin{itemize}
\item \textsuperscript{159} Section 9(2).
\item \textsuperscript{160} Section 7(1)(a).
\item \textsuperscript{161} Section 7(1)(b).
\item \textsuperscript{162} Chapter III.
\item \textsuperscript{163} Section 8(1).
\item \textsuperscript{164} Section 8(2).
\item \textsuperscript{165} Section 8(3). Relocation will take place only after such compensation has been paid. See section 8(4).
\item \textsuperscript{166} Section 8(5).
\item \textsuperscript{167} Section 5 and 6.
\end{itemize}
his/her associates is (a) just and equitable; and (b) that the labour tenant refused or failed to provide labour to the owner or lessee; or (c) that the labour tenant or his/her associate committed such a material breach of the relationship between the owner and the labour tenant and his/her associate that it is practically impossible to remedy it.\textsuperscript{168} The owner may furthermore make an urgent application for the removal of any person from the farm pending the outcome of the final order. Such an order will only be granted if the court is of the opinion that (a) there is a real and imminent danger of damage to the owner or lessee or his/her property if the person is not removed from the farm; (b) the owner or lessee has no other available remedy and (c) the likely harm to the person against whom the order is sought by granting such an order is less than the likely harm to the owner or the lessee if the order is not granted.\textsuperscript{169} The Act provides for the payment of compensation to the labour tenant in the case of an eviction in terms of section 6 and 7.\textsuperscript{170} The labour tenant will be given an opportunity to demolish any structure erected by him/herself and to remove the materials so salvaged. He/she may also tend to the crop until it is ripe and thereafter to reap it. The court may order the owner to pay just and equitable compensation to the labour tenant. In the determination of the amount of compensation the court has to take the following factors into account:\textsuperscript{171} (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.

\begin{footnotes}
\footnote{168}{Section 7.} \\
\footnote{169}{Section 15.} \\
\footnote{170}{Section 10(1).} \\
\footnote{171}{Section 10(2).}
\end{footnotes}
15.5.3.3 The Interim Protection of Informal Land Rights Act 31 of 1996

The Interim Protection of Informal Land Rights Act 31 of 1996 aims to provide protection of certain rights to and interests in land which are not otherwise adequately protected by law. The protection afforded by this Act is of a temporary nature and lapsed on 31 December 1997. The operation of this Act was subsequently extended to 31 December 1998.

Informal rights to land which are protected in terms of this Act include the access to or use and occupation of land held in terms of tribal, indigenous or customary law, the right or interest in land of a beneficiary under a trust of which the trustee is a body appointed in terms of an Act of Parliament or the holder of a public office and beneficial occupation of land for not less than five years prior to the expiry of this Act. The Act specifically excludes the rights and interests of a tenant, labour tenant, sharecropper or employee if such rights or interests are purely of a contractual nature as well as any right or interest based purely on the temporary permission of the owner or lawful occupier of the land. The Act also emphasises that it does not confer on the holder of real rights to land any rights in addition to those which he/she holds in that land.

The Act provides that no person may be deprived of any informal right to land without his/her consent. This general rule is, however, not applicable to the expropriation of land in terms of the Expropriation Act 63 of 1975 or in terms of any other law which provides for the expropriation of land or rights in land, or to a deprivation in accordance with the community's custom, provided that the deprivation is based on a majority

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172 Section 5(2).
174 Section 1(1)(i) defines beneficial occupation as the occupation of land by a person, as if he/she is the owner, without force, openly and without the permission of the registered owner.
175 Section 1(1)(iii).
176 Section 1(2)(a).
decision within the community and that appropriate compensation is paid to the person who is deprived of an informal right to land.\textsuperscript{177}

This Act provides interim protection for formally insecure rights while new legislation is drafted to provide the holders of these rights with permanent security of tenure.

15.5.3.4 The \textit{Extension of Security of Tenure Act 62 of 1997}

The \textit{Extension of Security of Tenure Act 62 of 1997} aims to facilitate long-term security of tenure for occupants who reside on land which belongs to another person. The Act is applicable to occupiers who currently have consent or on 4 February 1997 or thereafter had consent or another right to reside on the land.\textsuperscript{178}

The Minister of Land Affairs may grant subsidies to facilitate the long-term security of tenure to occupiers. These subsidies may be used to facilitate the planning and implementation of developments (both on-site and off-site developments), to enable occupiers, former occupiers or other persons who need long-term security of tenure to acquire land or rights in land and for the development of land which is occupied in terms of on-site or off-site development.\textsuperscript{179} The Act lists a number of criteria which have to be complied with before an application for a subsidy will be granted. The most important of these are that the development must accommodate the interests of both the occupiers and the owners and that the development must be cost-effective.\textsuperscript{180}

An occupier has the right to reside on and use the land and to access to such services as had been agreed upon with the owner. Balanced with the rights of the owner, the occupiers will also have the right (a) to security of tenure; (b) to receive visitors at

\textsuperscript{177} Section 2.
\textsuperscript{178} Section 1(1)(x) and section (3).
\textsuperscript{179} Section 4(1).
\textsuperscript{180} Section 4(2).
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. The occupier may not intentionally or unlawfully harm any other person occupying the land or cause material damage to the property of the owner. He/she may not intimidate others occupying the land or assist unauthorised persons to establish new dwellings on the land in question.181

The right of residence of the occupier may be terminated on any lawful ground, provided that the termination is just and equitable. To determine whether such a termination is just and equitable, a number of different factors have to be taken into account: the fairness of the agreement on which the owner relies; the conduct of the parties that gave rise to the termination; the possibility and extent of the hardship caused to the owner or the occupier when the right to residence is or is not terminated; the possible reasonable expectation of the occupier that the agreement from which the right to residence stems will be renewed; and the fairness of the procedure followed by the owner to terminate the right of residence of the occupier.182 In the case where the occupier's right of residence arises solely from an employment contract, the right of residence may only be terminated if the occupier is dismissed in accordance with the provisions of the Labour Relations Act 66 of 1995 or if he/she resigns from the employment.183 The right of residence of an occupier may not be terminated if he/she has resided on the owner's land for ten years and (a) he/she is older than 60 years or (b) he/she is an employee and as a result of ill health, injury or disability is unable to supply labour,184 unless he/she committed a material breach of the agreement between the owner and the occupier.185 These provisions are aimed at providing the occupier

181 Section 6.
182 Section 8(1).
183 Section 8(2).
184 Section 8(4).
185 Section 10(1)(a) to (c).
with security of tenure.

The owner may apply to the court for the termination of the right to occupy and then for an eviction order against the occupier. The Act differentiates between persons who were occupiers on 4 February 1997 and persons who became occupiers after this date. Different requirements are set for valid eviction orders for the two categories of occupiers. With regard to persons who were occupiers on 4 February 1997 an eviction order may be granted if the occupier committed a material breach of the agreement between the owner and the occupier or he/she resigned voluntarily from the employment of the owner. If none of these circumstances applies, an eviction order may be granted if the court is satisfied that suitable alternative accommodation is available to the occupier. Should suitable accommodation not be available to the occupier within nine months after the termination of his/her right of residence, the court will grant an order for eviction of the occupier if it is just and equitable to do so, having regard to the efforts of both the owner and the occupier to secure alternative accommodation for the occupier, and the interests of the respective parties which will include the comparative hardship the owner and the occupier will be exposed to if an order for eviction is or is not granted.

As far as an order for the termination of the right to occupy and an order for eviction of a person who became an occupier after 4 February 1997 are concerned, the court will grant such 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. The court will only grant an eviction order if it is the opinion of the court that it is just and equitable to do so. In determining whether the granting of

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186 Section 10(1).
187 In terms of section 1(1)(xvii) suitable accommodation means alternative accommodation which is safe and not less favourable to the occupier's previous situation. The accommodation must be suitable with regard to the reasonable needs and requirements of all the occupiers in the household in question for residential accommodation, land for agricultural use and services, their joint earning abilities and the need to reside close to employment opportunities.
188 Section 10(3).
such an order will be just and equitable the court must take the following factors into account: (a) the period for which the occupier resided on the land; (b) the fairness of the terms of the agreement between the parties; (c) whether suitable alternative accommodation is available; (d) the reason for the eviction; and (e) the balance of the interests of all affected parties.\textsuperscript{189}

In the case of an eviction order being granted, the occupier is entitled to compensation for the structures he/she erected, any improvements he/she made and the standing crops he/she planted. The occupier is also entitled to his/her outstanding wages. The court may also order the owner to grant the occupier a fair opportunity to demolish the structures erected and improvements made by him/her, to remove the salvaged materials and to tend the standing crops, harvest and remove them.\textsuperscript{190}

\textbf{15.5.3.5 The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998}

The \textit{Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998} repeals the \textit{Prevention of Illegal Squatting Act}.\textsuperscript{191} The Act determines that no person may evict an unlawful occupier of land except on the authority of an order of a competent court.\textsuperscript{192} The unlawful occupier must receive notice of the hearing of the proceedings by an owner or person in charge of land for the eviction of the unlawful occupier at least 14 days before the hearing.\textsuperscript{193} A court may grant an order for eviction if it is of the opinion that it is just and equitable to do so, after considering all the relevant circumstances, including the rights and needs of the elderly, children, disabled

\textsuperscript{189} Section 11.

\textsuperscript{190} Section 13.

\textsuperscript{191} Section 8(1). Any contravention of this section constitutes an offence (section 8(3)).

\textsuperscript{192} Section 4(2).
persons and households headed by women.\textsuperscript{194} If an unlawful occupier has occupied the land in question for more than six months at the time when the proceedings are initiated, the court has to consider in addition to the relevant circumstances mentioned above whether land has been made available or can reasonably be made available by a municipality or other organ of state or another landowner for the relocation of the unlawful occupier.\textsuperscript{195} The court is obliged to grant an eviction order if it is satisfied that all the requirements of the Act have been complied with and that no valid defence has been raised by the unlawful occupier.\textsuperscript{196} The Act also provides for urgent proceedings for eviction when, (a) there is a real and imminent danger of substantial injury of damage to any person or property if the unlawful occupier is not forthwith evicted from the land, (b) the likely hardship to the owner or any other affected person if an order for eviction is not granted, exceeds the likely hardship to the unlawful occupier if an order for eviction is granted, and (c) there is no other effective remedy available.\textsuperscript{197} The Act furthermore provides for the instance where an organ of state wants to institute proceedings for the eviction of an unlawful occupier.\textsuperscript{198} The court may grant such an order if it is just and equitable to do so. In deciding whether it is just and equitable to grant an order for eviction to an organ of state the court must have regard to: (a) the circumstances under which the unlawful occupier occupied the land; (b) the period the unlawful occupier has resided on the land in question; and (c) the availability of suitable alternative accommodation or land to the unlawful occupier.\textsuperscript{199}

15.6 Evaluation

A wide range of reform measures have been introduced to effect land reform in all three

\textsuperscript{194} Section 4(6).
\textsuperscript{195} Section 4(7).
\textsuperscript{196} Section 4(8).
\textsuperscript{197} Section 5.
\textsuperscript{198} Section 6.
\textsuperscript{199} Section 6(3).
areas identified in the RDP, namely the restitution of land, redistribution and the provision of security of tenure.

The process of restitution of land is aimed at restoring the property rights of individuals who have been dispossessed in terms of apartheid legislation. Possible remedies provided for in the restitution process include the restitution of specific land to the claimant, the provision of alternative land, compensation instead of restitution of land or rights in land or any other form of equitable redress. The restitution process is directed at the state and claims between private individuals or groups are not foreseen in terms of the Act. Where private land is needed for restitution purposes, the land will be purchased or expropriated, against just and equitable compensation.

Redistribution of land is aimed at the equitable redistribution of land among all South Africans. Redistribution is effected by the provision of access to land. In order to facilitate this, the state provides for grants and subsidies to the landless as well as speedy and cheap procedures to deliver developed land. The state will also facilitate the negotiation process between sellers and buyers to ensure that suitable land is distributed to the landless at a reasonable price.

As far as security of tenure is concerned, the land reform programme is aimed either at the upgrading of insecure tenure rights to full ownership, the provision of statutory security for other land rights, or the creation of new rights. Most of the insecure land rights held in terms of old apartheid laws can be upgraded to full ownership in terms of the Upgrading of Land Tenure Rights Act 112 of 1991. The rights of labour tenants and lawful occupiers of land (mostly farm workers who do not qualify for the protection afforded to labour tenants) are afforded security in terms of the Extension of Security of Tenure Act 62 of 1997.

The different reform measures aim to operate in such a way that the rights and interests of all affected parties are protected. Current land owners are protected in that provision is made for just and equitable compensation to be paid to parties who are expropriated.
The land owner’s rights are also protected by the provision of fair eviction procedures against labour tenants or other lawful occupiers of privately owned land, and for procedures for eviction in urgent cases. On the other hand the rights and interests of labour tenants and lawful occupiers of land are protected by these same procedures. The beneficiaries of the land reform programme are also protected in that measures are taken to ensure that the purchase price of privately owned land (in the case of the redistribution process) is just, equitable and reasonable. Provision is made for mediation and arbitration when the conflicting parties fail to reach an agreement on the settlement of a claim. The state furthermore provides for grants and subsidies to the landless to enable them to acquire suitable land or upgrade property of their property rights.

Another interesting feature of the land reform programme is the position which full ownership fulfills. The initial measures taken simply upgraded ‘lesser land rights’ to full ownership. This reinforced the perception created during the apartheid years that all rights which do not amount to full ownership are inferior rights. Some of the later reform measures, however, indicate a possible shift in the ownership paradigm and seem to afford land rights other than ownership with more or less the same protection afforded to ownership. By providing the holders of these rights with security of tenure, the gap between ownership and other land rights is narrowed to some extent. If the perception of a hierarchy of land rights (where ownership is regarded as the ultimate right and all other rights are perceived as inferior or inadequate rights) can be overcome it will be possible to increase the possibilities of land reform to a large extent. This will create

In terms of the Upgrading of Land Tenure Rights Act 112 of 1991.

See in this regard the Land Reform (Labour Tenants) Act 3 of 1996, the Communal Property Associations Act 28 of 1996 and the Extension of Security of Tenure Act. The Land Reform (Labour Tenants) Act and the Extension of Security of Tenure Act 62 of 1997 provides labour tenants and other lawful occupiers with statutory security of tenure. The Land Reform (Labour Tenants) Act 3 of 1996 does, however, provide for the situation where the rights of the labour tenant can be transformed or upgraded to full ownership. This reinforces the hierarchy of land rights perception to some extent. In terms of the Communal Property Associations Act 28 of 1996 a group of people can acquire full ownership of land, but the Act provides for total freedom concerning the land hold and land use patterns within the property association. This creates the possibility of a situation where customary land ‘rights’ may be exercised without compromising the security of these rights.
In a situation where rights in/to land can be (re)distributed, rather than the land itself. In light of the fact that land is a limited resource the distribution of secure tenure rights will alleviate the existing situation and appease the land hunger.\textsuperscript{202}

It may, however, also be argued that by extending full ownership to as wide a range as possible of property holders, the distribution of land (especially agricultural land) will be more equitable. By merely providing security of tenure to different rights holders on agricultural land and not extending the base of landowners, the existing situation where agricultural land remains in the hands of predominantly white owners, will not be rectified to a meaningful extent.

A factor which hampers the successful implementation of the land reform programme is the non-availability of information, especially in rural areas. It is of cardinal importance that the people who stand to benefit from land reform measures are informed accordingly. These measures can only be effective if the people for whom it is intended has knowledge thereof.\textsuperscript{203} The complexity of these measures furthermore impede the successful and speedy implementation of the different reform measures. It was found that the possible beneficiaries often do not understand how to go about to apply for the benefits in terms of the reform measures.\textsuperscript{204} In order to solve these problems the \textit{White Paper}\textsuperscript{205} suggests that a information bank containing land tenure data be created. The Department of Land Affairs is currently in the process of establishing a National Land Information System (NLIS) to provide easy access to information on land tenure data, information on people's entitlements under the various land reform programmes, the availability of land and the progress of land reform in different areas.

\textsuperscript{202} See in this regard Van der Walt 1995 SAPL 298.

\textsuperscript{203} It is suggested in the \textit{White Paper 39} that the Post Office be used as a centre in rural areas to provide information on land reform issues.

\textsuperscript{204} \textit{White Paper 39}.

\textsuperscript{205} \textit{White Paper 106}.
Section 25 of the South African Constitution has been phrased in such a manner that provision is made for both the protection of existing property rights and the implementation of land reform measures. In adjudicating land-reform related cases the courts have to establish an equitable balance between the rights of the individual property holder and the public interest, or put differently, between existing property rights and the public interest. The importance of land reform in the South African context is emphasised by the provision in section 25(4) which determines that the public interest includes measures to effect land reform, and the provisions in section 25(5) to 25(7) which authorise and control the implementation of the different forms of land reform. The emphasis on land reform in the property clause ensures that existing property rights are not afforded absolute protection, and that these rights may be limited or restricted for the purpose of land reform. These provisions create a framework within which the courts have to adjudicate land-reform related cases. The courts have to take cognisance of the social function of property and they have to interpret and apply property rights within the social context within which it functions. This will ensure that the possibility of a constitutional conflict between the judiciary and the legislature is minimized.

The position in South Africa differs from the position in Zimbabwe, Namibia and Botswana in that the South African constitutional property clause specifically authorises and controls the implementation of different forms of land reform. The possibility of a constitutional conflict, as is the case in Zimbabwe (and as it was illustrated by the Indian experience) is almost completely ruled out by the structure of the South African property clause. The courts are obliged to establish a balance between the protection of existing private property rights and the implementation of land reform measures.
Land reform encompasses a comprehensive public programme designed to correct defective land tenure systems and to transform a society on the social, political and economic levels. Measures implemented to effect land reform may include the redistribution of land, land restitution, consolidation of agricultural units, colonisation schemes, the imposition of a land tax and tenure reform. Not all of these measures are always included in a land reform programme and in some jurisdictions, depending on the particular situation and circumstances, the introduction of only one form of land reform may solve existing problems with regard to the manner in which land is held and used. In general land reform aims to bring about an equitable distribution of land, wealth, income and political power, and to create a freer and more equal society where all citizens enjoy security of tenure.

In terms of the traditional view of property rights existing private property rights are afforded strong protection and these rights are seen as socially and politically neutral. According to this view the exercise of property rights should not be limited for 'purely' social and political reasons. Ownership fulfills a central role in the traditional view of property rights, and it is seen as an absolute, in principle unrestricted, exclusive right. The social function of property is disregarded and it is not seen as a juridically relevant aspect of the role and function of property. Property is rather seen as essential for the personal autonomy, freedom and well-being of the individual. In terms of the traditional view the constitutional property guarantee is interpreted as a guarantee of existing rights and the holder of these rights is consequently afforded strong constitutional protection against state interference.

The traditional private law perception of property may cause friction between the judiciary and the legislature in jurisdictions where land reform is implemented. According to the traditional private law view land reform is seen as an invalid social and
political reason for interference with the existing property rights of the individual. The constitutional guarantee of property can thus be interpreted in such a manner that it frustrates attempts by the legislature to effect land reform. A conservative interpretation of the property clause may lead the court to decide that land reform does not constitute a legitimate public purpose. The court may also set the amount of compensation for expropriation at such a high level that it makes comprehensive land reform virtually impossible. In India and Zimbabwe the court's conservative stance on land reform necessitated the amendment of the Constitution. In the case of India the property clause was completely removed from the bill of fundamental rights and in Zimbabwe the Constitution was amended to remove the court's jurisdiction with regard to the determination of the amount of compensation.

Although it might seem that the constitutional protection of property (which aims to protect the rights and interests of the individual) is in direct conflict with the implementation of land reform measures (which aim to promote the public interest), the protection of property as a fundamental right need not prevent or impede land reform. As long as the traditional private-law perception is not allowed to dominate the constitutional process, the legislature would be in a position to effect comprehensive land reform. The conflict between the judiciary and the legislature can be avoided if the courts adopt a more socially conscious approach to property rights and land reform. In most developed countries the social function of property is emphasised and the courts consequently interpret and apply property rights in view of the social context within which these rights are created and function. In most jurisdictions where property rights are protected in the national constitution, the constitution basically determines that the use of property may be regulated (usually for a public purpose or in the public interest) and that property may be expropriated or taken in the public interest subject to the payment of compensation. Although some of these countries do not have an official, large-scale land reform programme, the courts recognise the importance of the social function of property and they have a lenient approach to the implementation of ad hoc land reform measures. The regulation of the use of property to effect land reform does not generally pose problems. As far as the expropriation of property is concerned the
courts interpret the 'public purpose' requirement widely to include land reform. In jurisdictions where the social function of property is recognised and where the courts strive to create a balance between the protection of the rights and interests of the individual and the promotion of the public interest, the implementation of land reform usually does not pose a problem.  

The situation in Namibia, Botswana and Mexico, where an official land reform programme is in place, illustrates that the implementation of land reform in developing countries need not cause a constitutional conflict between the judiciary and the legislature. As long as the courts recognise the importance of the social function of property, and do not allow the traditional private-law perception of property to dominate the constitutional process, it is possible to afford the existing property holder with adequate constitutional protection, while still allowing for land reform in the public interest. The land reform programme can also be planned in such a manner so as to ensure that the implementation of land reform measures do not impose unnecessary restrictions on the existing land owners. The redistribution programme in Namibia is a case in point. Rather than targeting large productive farms, under-utilised land, land held in excess of the maximum ceiling on landownership, and land held by foreign nationals is used for redistribution. In Botswana the land reform programme entails to provision of security of tenure to people living on tribal land and state-owned land. Privately owned land is not affected by the programme. In Mexico the importance of the social function of property is recognised, as land reform is regarded as being in the public interest.

In South Africa the property clause in the Constitution recognises the dual purpose of protecting individual rights and implementing comprehensive land reform. The White Paper on South African land policy clearly states that:

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1 See in this regard chapters 8 (Germany), 9 (United States of America) and 10 (Council of Europe) above, and the discussion of the treatment of issues relating to land reform by the courts in a variety of jurisdictions in chapter 13.

"[t]he new Constitution seeks to achieve a balance between the protection of existing property rights on the one hand, and constitutional guarantees of land reform on the other hand. The property clause itself now provides clear constitutional authority for land reform".

Although section 25 provides for the protection of individual property rights against unwarranted state interference, the social function of property and the importance of land reform as a means to effect social change determine that existing property rights may be limited for the purpose of land reform. Section 25(4) determines that land reform is in the public interest. This provision, read with the authorizing and control provisions of land reform (section 25(5) to 25(9)), obliges the court to take cognisance of the social function of property. Existing property rights can consequently only be protected to the extent that they do not stand in the way of comprehensive, effective land reform. The constitutional goal of creating an open and democratic society based on freedom, equality and human dignity also indicates that the courts have to interpret and apply property rights within a specific framework. This framework dictates that the courts have to be lenient when dealing with measures aimed at effecting social change.

However, this does not mean that the courts have to allow all land reform measures which infringe upon the rights of an individual. The courts have to determine whether there is a proportional balance between the existing property rights of the affected individual and the public interest, and whether there is a proportional balance between the measures implemented and the goal they aim to achieve. The amount of compensation in the case of expropriation may be a deciding factor in the determination of whether such a balance is established. Section 25(3) of the South African Constitution determines that compensation must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected. A number of factors have to be taken into account when the amount of compensation in the case of expropriation is determined. These factors provide for both the interests of the individual and the public interest and include the current use of the property, the history of the acquisition and use of the property, the market value of the property, the
effect of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property, and the purpose of the expropriation.

The phraseology of the South African property clause and the context within which it applies ensure that a constitutional conflict between the legislature and the judiciary relating to issues of land reform can be avoided.
The implementation of a comprehensive land reform programme in South Africa necessitates a new look at property rights and the role of the public interest in the protection and limitation of property rights. According to the traditional private law perception property rights are reduced to abstract, scientific concepts which form part of a hierarchical system of rationally related concepts and definitions. These concepts are treated in an abstract, objective and scientific manner and they are seen as largely unaffected by social and political realities. In this view the constitutional guarantee of property is regarded as a guarantee of existing property rights that may not be infringed upon by the state for social or political reasons. In terms of the traditional, private law view of property rights land reform constitutes an invalid reason for the limitation of property rights.

Land reform measures serve to promote the public interest, and in most cases the implementation of land reform necessitates the limitation of property rights (either by regulation the use of property or by expropriating private property). A conservative judiciary's adherence to the traditional private law view of property may lead to a constitutional conflict between the judiciary (that wants to afford existing property rights with strong constitutional protection) and the legislature (that wants to promote the public interest by implementing comprehensive land reform). A conservative court might interpret the property clause in such a manner that it either does not regard land reform to be a legitimate public purpose for which existing property rights may be limited, or that it sets the amount of compensation in the case where property is expropriated at such a high level that the implementation of comprehensive land reform is virtually impossible. In India the court's conservative stance on the protection of individual rights and the implementation of land and other social and economic reform led to a constitutional conflict between the judiciary and the legislature. The legislature's efforts to implement comprehensive land and economic reforms were frustrated by the court's
strict interpretation of the constitutional property guarantee. In an effort to solve this impasse the legislature removed the property clause from the bill of fundamental rights. In Zimbabwe a possible constitutional conflict was averted when the court's jurisdiction with regard to the determination of the amount of compensation was removed from the property clause to allow the legislature to determine the amount of compensation. In the Australian decision in Clunies-Ross v The Commonwealth of Australia and Others¹ the court also regarded the constitutional property clause as a guarantee of existing individual property rights. This case illustrates the situation where the court adheres to the traditional private law perception of property and consequently refuses to allow the limitation of an individual's property rights for social and political reasons. However, a constitutional conflict is not a necessary consequence of the implementation of land reform measures. It can be avoided if the courts adopt a different, overtly constitutional approach to property rights according to which the social function of property is emphasised, and the constitutional protection and limitation of property rights reflect an equitable balance between the interests of the affected individual property holder and the public interest. In such a constitutional context property is not dealt with in an abstract or conceptual manner. The social function of property fulfills a central role to determine whether a particular right should be afforded constitutional protection, and if it is, the extent of the protection would be determined with reference to the common interest. The recognition of the social and political function of property implies that property rights are created and maintained by the social and political order, and therefore property rights may be altered or limited for social and political reasons.

The traditional private law perception of property is described and explained with reference to the abstract, scientific, conceptual approach to property rights, the concept of absolute property, the continuous development of property rights and the apparent flexibility of property rights. Although these topics are related and form part of the larger problem, they can be distinguished from one another. In terms of the abstract scientific approach property rights are reduced to abstract, context-neutral concepts. The different concepts form part of and fit into a hierarchical system of stronger and weaker

rights. These concepts are rationally and logically related. All limitations or restrictions of property rights are explained and justified, and all legal problems solved, in terms of the relationships between the different concepts. In view of the abstractness of this approach the content and protection of a right are determined with reference to the definition of a particular concept and its place within the system. Social and political realities are regarded as peripheral to the science of law and the different concepts are therefore seen as largely unaffected by the social and political context within which they function.

The abstract, scientific approach to property law is manifested in the concept of absolute, in principle unrestricted property rights. Property rights are regarded as essential to ensure for the property holder a sphere of personal freedom and autonomy, and consequently the property holder is protected against unwarranted state interferences for social and political reasons. In this view property rights can endure limitations or restrictions, but all limitations are seen as unnatural, exceptional and temporary. The continued acceptance of the concept of absolute property rights is justified by the assumption that it is based on Roman law *dominium* and that it enjoyed continuous and uninterrupted development from Roman law to the present. In line with this way of thinking the concept of abstract, context-neutral, absolute property (as the manifestation of the abstract, scientific, conceptual approach to property rights) is regarded as flexible enough to adapt to changing social and political circumstances, and therefore it is able to adapt to suit the needs of post-apartheid South African society. It is pointed out in this thesis, among others, that an adherence to the traditional view of and approach to property has no historical foundation. Neither the abstract, scientific approach to property, nor the concept of absolute, in principle unrestricted property rights is the direct result of the uninterrupted development of Roman property law. The development of property rights is rather characterised by a series of discontinuities or fundamental breaks and the nature of property rights or their social function changed completely with every discontinuity to cater for societal needs in a particular period of its development. Although it may be argued that property rights have always been able to change and adapt to different social and political
circumstances, the changes that did occur were so dramatic that they cannot be regarded as mere adaptations of Roman law *dominium*, but should rather be seen as discontinuities in the development of property rights. These discontinuities illustrate that the traditional private law approach to, and perception of, property are not based on Roman law *dominium*, but are of relevant recent origin. Therefore, there does not seem to be any justification for the argument that the modern civilist perception of property may not be replaced by a new approach in terms of which the social function and political nature of property are recognised. In the constitutional order the social and political nature of property rights is decisive to ensure that the interests of all South Africans are promoted by the use, distribution and exploitation of property.

The perception that ownership in modern South African law (prior to the implementation of the 1993 Constitution) resembles *dominium* in Roman law\(^2\) cannot be supported. Although the same terminology is sometimes used to describe some of the characteristics of 'ownership' in both Roman and South African law, the social circumstances and the social function of ownership in these two systems are completely different. In classical Roman law a distinction was made between *dominium*, possession and other proprietary rights, five different types of *dominium* existed and the possibility of dual *dominium* was recognised. No clear classification of rights was made and in terms of the casuistic approach followed in Roman law the emphasis was on actions rather than on rights. To some extent vulgar Roman law constituted the first discontinuity in the development of ownership. In vulgar Roman law the distinction between *dominium*, possession and other proprietary rights became blurred and only one proprietary right was recognised. Although Justinian reaffirmed the distinction between *dominium*, possession and other proprietary rights, the notion of dual *dominium* was abolished.

Feudal law constituted another discontinuity in the development of Roman law *dominium*. Different forms of *dominium*, namely *dominium directum* and *dominium*

\(^2\) See Van der Merwe Sakereg (1989) 171; Cowen *New Patterns of Landownership* 68 and 70; Kunst *Historische ontwikkeling van het recht* 192; Immink 1959 TR 36 at 41.
indirectum or dominium utile were developed as part of the medieval social order. This development was not the result of the logical and uninterrupted development of Roman law dominium. Roman law texts\textsuperscript{3} were interpreted widely to explain the distinction between the dominus directus and the dominus indirectus. In terms of this distinction the feudal lord had dominium directum and the vassal had dominium utile. The only difference between the two types of dominium was that each had a different content. Whereas dominium directum provided the dominus with the power of disposal, dominium utile merely provided the dominus with the power to use the property. The medieval distinction between different forms of dominium was a social, a-conceptual, practical institution, and property rights were developed as part of the social order in which they functioned. These rights were not approached conceptually or abstractly, but were strongly influenced by the social role and function of property in medieval society. Bartolus' definition of dominium as "[d]ominium est ius de re corporali perfecte disponendi nisi lege prohibeatur"\textsuperscript{4} is often interpreted to mean that Bartolus regarded dominium as an absolute, unrestricted right, and that his definition of dominium constitutes the basis for the current private law concept of absolute ownership. However, this view seems to be unsubstantiated. Bartolus described dominium in these terms (perfecte disponendi) to distinguish between dominium and possession and to indicate that the dominus had the full power to use, consume, and alienate the property.

Roman-Dutch law of the seventeenth and eighteenth centuries moved away from medieval divided ownership. Grotius, who had a substantial influence on the development of Roman-Dutch law of the time (as well as on the direction of the future development of ownership and other property rights) started a process of scientification of property law. He disregarded the concept of divided ownership and created a hierarchical system of rights. Grotius used the distinction between volle and gebrekelicke eigendom to inform his hierarchical system of rights. Gebrekelicke eigendom described the situation where ownership was split up in title and use. Both

\textsuperscript{3} D 6.3.1; C 11.62.12.
\textsuperscript{4} Bartolus on D 41.2.17.1 no 4.
the title holder and the person who had the power to use the property had *gebrekelicke eigendom*. To avoid confusion between the two forms of incomplete ownership Grotius called the one right *eigendom* and the other a *gerechtigheid*. The distinction was made with regard to the value of the rights rather than the benefit thereof - the more valuable one being *eigendom* or ownership and the less valuable one being a *gerechtigheid* or a right (today known as limited real rights). The implications of Grotius' distinction between the different forms of *gebrekelicke eigendom* signalled a break with the past and introduced a new era in the way in which real rights were perceived. Whereas both rights were previously seen as ownership or *dominium* (*directum* and *utile*), only one was now regarded as *dominium* and the other as something less, namely a (limited real) right. This distinction forms the basis on the current distinction between ownership and limited real rights.

Grotius destroyed the feudal forms of divided ownership and emphasised the importance of the individual by reverting to individual, uniform ownership. Although he started out from the medieval distinction between *dominium directum* and *dominium utile*, he used the logical and terminological move set out above to destroy it. Most other Roman-Dutch authors did not emphasise divided ownership and to a large extent they followed Grotius' distinction between *eigendom* and *gerechtigheden*. Grotius also created a hierarchical system of property rights by defining *volle eigendom* as the most complete (real) right and all other rights with regard to property as lesser rights. Grotius set out the whole system of what we now call real rights. Up to this point in history the emphasis was on ownership or *dominium*, but the system of rights created by Grotius can be viewed as the transition of the focus from ownership to property is the sense of a system of rights. This indicates that the current private law perception of property rights is based, not on Roman law, but rather on the work and influence of Grotius and other subsequent influences.

The French Revolution represents another discontinuity in the natural and logical development of property rights. The French Revolution is often regarded as the origin of the concept of absolute ownership. However, this view cannot be supported.
Feudalism and divided ownership were officially abolished in France as a result of the French Revolution. In the changed social order the emphasis moved from society as a whole to the individual. However, although individualism was accentuated, ownership (or property rights in general) was not regarded as an absolute and in principle unrestricted right. The accentuation of individualism must not be interpreted as anything more than a shift in the social function of property as a result of the reaction against the feudal concept of divided ownership. The French Revolution also contributed to the creation and establishment of the distinction between ownership and limited real rights. This strengthened the idea that the institution of property is to be regarded as a hierarchical system of different concepts and rights.

The German Pandectists continued with the conceptual work of Grotius. They perceived law as a positive science which relies exclusively on its rules, concepts, principles and doctrines. Windscheid, one of the most important Pandectists, was influenced by Grotius. He also concentrated on creating a hierarchical system of legal principles and concepts, but in the case of Windscheid the emphasis was not on catering for specific needs of legal practise, but rather on perfecting a system into which all legal concepts, rules and principles fitted. The social function of property was not regarded as important and the creation and alteration of law was approached as a science, uninfluenced by social and political realities.

Once it was realised that divided ownership was not of Roman origin the Pandectists discarded the medieval distinction between different forms of ownership and concentrated on creating a uniform concept of ownership. For this they 'reverted' to what was supposed to be a Roman concept of ownership and a concomitant hierarchical system of property rights. This may be seen as the origin of the idea that ownership (and in a broader sense also property) developed in an uninterrupted line from its inception in Roman law. The Pandectists regarded vulgar Roman law and feudal law (medieval law) as an aberration, and in their view they removed it to restore the uninterrupted line of development from classical to modern law.
In view of German Idealism, according to which individual freedom was accentuated and the autonomy of the individual was accepted as being the focal point of this legal theory, ownership was seen as part of the individual's sphere of freedom. The Pandectist perception of ownership reflected this and ownership was defined as an exclusive, absolute real right. To some extent this was in line with the developments in Roman-Dutch law and the French Revolution in that ownership was freed from the shackles of feudalism, but the Pandectists defined this development in an abstract and scientific manner. The concept of ownership and the distinction between ownership and limited real rights formed the basis of the scientification process of the German Pandectists. This can be regarded as the culmination of the work and influence of Grotius and the French Revolution. However, the Pandectists combined the different aspects and created a single theory, based on the freedom and autonomy of the individual as a moral concept which underlies the complete legal science.

The conceptual approach followed by the German Pandectists had a substantial influence on the legal systems in most of western Europe and also on the legal system in South Africa. In South African law, prior to the implementation of the first democratic Constitution, property law was dominated by the conceptualist approach. All property related questions were regarded as conceptual and institutional questions and were treated in terms of an abstract, scientific, hierarchical system of concepts and definitions based on logic. The social function of property was disregarded and the different concepts were seen as scientific, neutral concepts unaffected by social or political circumstances or questions of justice and reasonableness.

Ownership in South African private law is described in terms of the comprehensiveness of the owner's right. 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 private and public law, act freely with regard to the thing. Ownership is seen as an exclusive, absolute, in principle unrestricted right. All limitations are regarded as temporary and exceptional. This definition of ownership has a dual meaning. It signifies the most
comprehensive collection of entitlements with regard to a thing, and it indicates that ownership provides the owner with the widest possible scope within which these entitlements with regard to the thing can be exercised. The first meaning, which is referred to as the identity aspect of the concept of ownership, says something about the content of the right (the different entitlements of the owner) and the way in which the right is structured, while the second meaning gives an indication of how ownership is exercised. This is referred to as the exercise aspect of the concept of ownership. The identity aspect of the concept of ownership is approached conceptually with reference to the hierarchical system of rights. The exercise aspect is approached in much the same manner, but the social function of property and the relationship between the owner, third parties and the public inform this approach to some extent. The social function of property is, however, repressed in the abstract debate on the absoluteness and characteristics of ownership.

The conceptual approach to property contributed to the inequalities in the way in which land is held and used in South Africa by disregarding the injustices and inequalities embodied in the abstract, scientific approach to property law and by degrading certain limited real rights to permits and other lesser rights. The conceptual approach disregarded the relevance of reasonableness and the social function of property in the abstract, scientific system. In the late 1980's a few South African lawyers started to recognise the importance of the social and political function of property. Although they initially concentrated on efforts to change the concepts of ownership and other property rights, this approach was later discarded in favour of a completely new debate on property in which the social role and function of property was accentuated. They did not attempt to adapt the concept of absolute ownership to cater for the needs of society, but rather moved away from the conceptual approach and propagated a totally new debate on the role and function of property in society. The initiation of the new debate on the role and function of property in society is indicative of the fact that the abstract, scientific and conceptual approach to property is not able to cater for the social and political needs of post-apartheid society. This debate gained momentum with the introduction of the first democratic Constitution and the land reform programme. The
introduction of the new Constitution accentuated the need for a socialised or socially-sensitive approach to property law. The recognition of the social and political nature and function of property rights meant that property rights are recognised as creatures of their socio-political context and are therefore themselves political in nature. Property rights should not be seen as socially and politically neutral concepts that form part of a neutral, scientific and logical system. Each decision relating to property is a social and political decision that has to be taken and justified for each case with full recognition of the context within which the decision is taken and the implications of the decision.

The unsuccessful attempts in Dutch law in the 1970's and 1980's to create a new perception of property within the traditional private law context in order to make it more socially acceptable illustrate the need for a completely new debate in South Africa on the role and function of property in society. A group of Dutch academics attempted to redefine the private law concept of ownership in order to provide for the social function of property. In essence all these attempts amounted to a differentiation between different objects and the nature and extent of the owner's rights with regard to the respective categories of objects. The possible reason for their failure may be the fact that they remained stuck in the conceptual approach and were unable to initiate a completely new property debate outside the confinements of conceptualism.

The introduction of the 1993 Constitution placed South African property law on the doorstep of another possible discontinuity in the development of property. It is pointed out that the current South African private law perception of property is not derived directly from Roman law, but reflects the various discontinuities and fundamental changes in its development. The nature of property rights underwent dramatic changes throughout history, and these changes were so fundamental that it cannot be said that property rights retained its Roman character. Therefore, there does not seem to be a valid justification for the argument that the traditional private law perception of property can or need not be changed or abolished in favour of a different perception of property. The social, political and economic circumstances in the democratic South Africa
necessitates the recognition of the role and function of property in society. A stubborn adherence to the traditional conceptual and scientific approach to property would be counter-productive, because this might frustrate the implementation of comprehensive land reform which aims to limit existing property rights for social and political reasons. It might also lead to a constitutional conflict between the judiciary (that wants to protect existing property rights against state interferences for social and political reasons) and the legislature (that wants to promote the public interest by effecting land reform). The introduction of the Constitution, and with that the constitutional guarantee of property, places property rights within a new context where the social function of property is emphasised. These developments created the ideal situation for South African law to undergo dramatic change.

The nature and extent of constitutional property may differ dramatically from the private law perception of property. In the constitutional context property is interpreted and protected in view of the social and political context within which it functions. It is generally accepted that property rights are created by their social and political context and as such they are subject to social and political adjustments. In the constitutional context an attempt is made to establish a balance between the interests of the individual and the public interest. Property rights in a constitutional context are not regarded as absolute, in principle unrestricted rights, but rather as relative rights which may be limited in the public interest. Thus, although the constitutional property clause affords the individual with adequate protection against unwarranted state interference, it also recognises the social function of property and provides for the limitation of these rights in the public interest. The state has the authority to regulate the use of property in terms of its police power and to expropriate property against compensation in terms of its power of eminent domain. The state is therefore not limited to a choice between leaving existing property rights unaffected or expropriating them against compensation. It is commonly recognised that the state may regulate the use of property (this may include measures aimed at effecting land reform) without having to compensate the affected individual property holder. Whenever constitutionally protected property rights are limited by the state, the courts have to determine whether a proportional balance
has been established between the rights and interests of the affected individual and the public interest. The proportionality principle is not applied in the same manner or to the same extent in all jurisdictions, but it is generally required that some form of the proportionality principle be applied when the state infringes upon individual property rights.

A comparative analysis of the position in Germany, the United States of America and the Council of Europe indicates that the scope of property in a constitutional context is extended beyond the scope of private law (where ownership is seen as the most important right and where rights are held (mostly) with regard to corporeal things) to include all patrimonial rights. This might include real rights, personal rights, immaterial property rights, contractual rights of sale and purchase, customary residential and commonage-use rights, statutory rights in terms of land reform legislation, social security rights, and so on. A range of different objects are recognised as property in the constitutional context. This includes movable and immovable tangible property, immaterial property, rights with regard to debts, claims, goodwill and shares in a company, welfare rights, licences, permits and other rights held against the state which are based on legislation. In each individual case the courts have to decide whether a particular right or object qualify for the protection afforded by the constitutional property clause.

The determination of the amount of compensation in the case of expropriation also reflects the importance of the social function of property. It is generally accepted that compensation need not be set at market value, but that it may also be less than market value, as long as the amount of compensation reflects an equitable balance between the interests of the individual and the public interest. The amount of compensation is thus determined with due regard to all the social circumstances applicable to a particular case.

In the United States of America compensation is not only required for actual acquisitions of property by the state (that is actual expropriations), but also for
regulations of the use of property which limit the rights of the individual to such an extent that they resemble expropriations. This category of limitations is commonly known as regulatory expropriations or regulatory takings. In order to determine whether a regulation qualifies as a regulatory expropriation the court has to determine whether an individual is expected to bear a burden which should rather be borne by society. Compensation may be awarded if the burden is found to be excessive.

Contrary to the traditional position in private law, constitutional property does not over-emphasise personal freedom and autonomy to the exclusion of the public interest. Property is rather interpreted and applied in view of its role and function within society and the property holder is expected to exercise his/her rights in such a manner that it is not detrimental to society. Although no positive duty is explicitly placed on the property holder to exercise his/her rights so as to serve the public interest, the particular situation in South Africa with regard to the inequitable distribution of land may implicitly require such an obligation. (In Germany the Grundgesetz determines that property entails obligations and that it must be exercised so as to promote the public interest.)

Section 25 of the South African Constitution has a dual function. On the one hand it protects individual property rights against unwarranted state interference, and on the other hand, it promotes the public interest by authorising and controlling land reform. The property clause attempts to create an equitable balance between the protection of individual property rights and the promotion of the public interest. The creation of this balance is of cardinal importance, because in the absence of such a balance the property clause would be unable to ensure that property is held, used and distributed in a manner conducive to the establishment of an open and democratic society based on freedom, equality and human dignity. An interpretation of the property clause which attributes more weight to the protection of individual property rights than to the promotion of the public interest might create a situation where the implementation of comprehensive land reform would be virtually impossible. In such a case the courts would be in a position to frustrate or impede the land reform, because land reform
would be seen as an illegitimate, social and political reason for the limitation of individual property rights. On the other hand, an interpretation which favours land reform and the public interest might lead to a situation where the rights and interests of (existing and future) individual property holders are insecure and vulnerable to severe limitation by the state. The judiciary is thus under an obligation to ensure that a just and equitable balance is struck between the protection of existing property rights and the promotion of the public interest.

Land reform may be interpreted to mean different things in different jurisdictions. A wide interpretation of the concept of land reform encompasses a comprehensive public programme designed to correct defective land tenure systems and to transform a society on a political, social and economic level. Land reform can take many forms, including measures aimed at the redistribution of land, the improvement of existing systems of land tenure, resettlement schemes, the imposition of a land tax, land consolidation for the reorganisation of agricultural units, the provision of housing and the restitution of land to people who were unjustly dispossessed. Land reform is a state initiative to modify, redirect or change the rights to, use of and relations to the land with regard to the way in which land is held and used in a particular jurisdiction.

Land reform measures serve to promote the public interest, and in most cases the implementation of land reform necessitates the limitation of property rights. This might lead to conflict between the protection of individual rights and the promotion of the public interest. However, the implementation of land reform measures need not lead to a constitutional conflict. In most developed countries the traditional private law perception of property is discarded in favour of the recognition of the social role and function of property and the courts attempt to establish a balance between the protection of existing property rights and land reform. In jurisdictions, where no official land reform programme is in place, land reform is mostly viewed as a legitimate public purpose for both the regulation of the use of property and the expropriation (taking in the US) of property against compensation. The amount of compensation is used as a means to establish a balance between the interests of the affected individual and the
public interest. The social and political nature of limitations aimed at effecting land reform is recognised and accepted as legitimate reasons for the interference with existing property rights in the public interest. Most of the land reform measures implemented in these jurisdictions amount to the control of the use of property and the courts generally have no difficulty in declaring these measures to be in the public interest. In the US decision of *Hawaii Housing Authority v Midkiff* and the European Court of Human Rights decision in *James v United Kingdom* the respective courts held that the expropriation of private property from one individual and the transfer thereof to another individual to effect land reform constituted a legitimate public purpose.

In some developing countries, where an official land reform programme is in place, the property clause is interpreted, and the land reform programme implemented in such a manner that the possibility of a constitutional conflict is avoided. Both the judiciary and the legislature recognise the importance of the social function of property and the need to eradicate the inequalities which exist with regard to the use, distribution and exploitation of land. In order to avoid unnecessary friction between the judiciary and the legislature the land reform programme is drafted so that individual property rights are not limited unnecessarily. In Namibia, unlike the situation in Zimbabwe where large productive farms are targeted for redistribution, under-utilised land, land held in excess of the maximum ceiling imposed on land ownership and land held by foreign nationals is used for redistribution. This ensures that the public interest is promoted without unreasonable limitation of existing property rights. In Botswana the land reform programme aims to provide security of tenure to people living on tribal or state land and privately owned land is unaffected by the programme.

In jurisdictions where specific constitutional provision is made for land reform, the implementation of land reform does not seem to cause any problems.

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6 8 EHRR 123 (1986).
The possibility of a constitutional conflict in Zimbabwe has led Roux⁷ to the conclusion that a different model of review should be applied with regard to social reform in post-colonial countries. He suggested that the planning and implementation of reform measures should be subjected to public participation, and that the court's only function in these instances would be to ensure that the political process was legitimate.

In South Africa, where the constitutional property clause provides for the protection of existing property rights and authorises and controls land reform, there does not seem to be a need for a special model of review with regard to land reform. The Constitution creates a framework for the interpretation and protection of property rights. The importance of the social function of property is emphasised by this framework. The recognition of the inherent social and political nature of property rights imply that property rights may be adjusted or limited for social and political reasons. The Constitution aims to facilitate the creation of an open and democratic society based on freedom, equality and human dignity, and the proper interpretation and application of the Constitution may avert a constitutional conflict. Section 7(3) determines that all rights in the bill of rights are subject to limitation and section 36, which contains the general limitation provision, provides that 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. The limitation of existing rights has to reflect a just and equitable balance between the extent of the measures imposed and the purpose of the limitation, and ultimately between the interests of the affected individual and the public interest. Section 25 requires that a balance has to be established between the protection of existing property rights and the promotion of the public interest through the implementation of land reform measures. The social function of property is emphasised by the provision in section 25(4) which determines that the

public interest includes the nation's commitment to land reform and to other reforms to bring about equitable access to all South Africa's resources. Sections 25(5) to 25(9) authorise and control the implementation of land reform measures aimed at the restitution of land to people who were unjustly dispossessed in terms of apartheid legislation, the equitable redistribution of land and the provision of security of tenure. The courts are under a constitutional obligation to interpret and apply the property clause within the framework established by the Constitution as a whole, and more particularly by the property clause itself. If the courts recognise the role and function of property within society and adhere to the constitutional framework for the implementation and application of property, the implementation of land reform should not cause friction between the judiciary and the legislature.

The implementation of the 1993 and 1996 Constitutions brought about a new era in South African property law. The constitutional protection of property and the implementation of the land reform programme changed the nature and content of property completely and irrevocably. The traditional view of property rights as scientific, abstract concepts within a hierarchical system of rationally related, socially and politically neutral rights has been replaced by a new approach to property rights. The social function of property within society plays a central role and a variety of different rights are afforded constitutional protection. In the new constitutional order the perception of property rights as abstract, absolute rights unaffected by social and political circumstances has been replaced by a perception of property rights as relative rights which may be limited in the public interest or for a public purpose. The social and political context within which these rights function is decisive for their interpretation and protection.

A different but related issue is the land reform programme's contribution to break down the hierarchical system of property rights. Although the initial measures taken in terms of the land reform programme simply upgraded 'lesser land rights' to full ownership, some of the later reform measures, however, indicate a possible shift in the ownership

8 In terms of the Upgrading of Land Tenure Rights Act 112 of 1991.
paradigm and seem to afford land rights other than ownership with more or less the same protection afforded to ownership.\textsuperscript{9} By providing the holders of these rights with security of tenure, the gap between ownership and other land rights is narrowed to some extent. If the perception of a hierarchy of land rights (where ownership is regarded as the ultimate right and all other rights are perceived as inferior of inadequate rights) can be overcome it will be possible to increase the possibilities of land reform to a large extent. This will create a situation where rights in/to land can be (re)distributed, rather than the land itself. In light of the fact that land is a limited resource the distribution of secure tenure rights will alleviate the existing situation and appease the land hunger. It may, however, also be argued that by extending full ownership to as wide a range as possible of property holders, the distribution of land (especially agricultural land) will be more equitable. By merely providing security of tenure to different rights holders on agricultural land and not extending the base of landowners, the existing situation where agricultural land remains in the hands of predominantly white owners, will not be rectified to a meaningful extent.

Lastly, the new constitutional order ensured that the customary land tenure system is kept intact. The dynamic nature of this system fulfills an important social function in specific rural areas and the retention of and provision for this land tenure system\textsuperscript{10} placed customary land rights on an equal footing with other property rights. These rights are no longer perceived and treated as inferior rights, but are afforded the same protection as all other property rights.

\textsuperscript{9} See in this regard the\textit{Land Reform (Labour Tenants) Act} 3 of 1996, the\textit{Communal Property Associations Act} 28 of 1996 and the\textit{Extension of Security of Tenure Act}. The\textit{Land Reform (Labour Tenants) Act} and the\textit{Extension of Security of Tenure Act} 62 of 1997 provides labour tenants and other lawful occupiers with statutory security of tenure. The\textit{Land Reform (Labour Tenants) Act} 3 of 1996 does, however, provide for the situation where the rights of the labour tenant can be transformed or upgraded to full ownership. This reinforces the hierarchy of land rights perception to some extent.

\textsuperscript{10} In terms of the\textit{Communal Property Associations Act} 28 of 1996 a group of people can acquire full ownership of land, but the Act provides for total freedom concerning the land hold and land use patterns within the property association. This creates the possibility of a situation where customary land 'rights' may be exercised without compromising the security of these rights.
ABBREVIATIONS

African Journal of Modern Law
African Journal of International and Comparative Law
American Journal of Comparative Law
Australian Law Journal
California Law Review
Canadian Journal of law and jurisprudence
Canterbury Law Review
Columbia Law Review
Comparative and International Law Journal of South Africa
Handelingen Nederlandse Juristen-Vereniging
Human Rights and Constitutional Law Journal of South Africa
International and Comparative Law Quarterly
Journal of African Law
Journal of Legal Education
Law and Anthropology
Maryland Law Review
Nederlands Juristenblad
Recht en Kritiek
Rechtsgeleerd Magazijn Themis
Review of Socialist Law
South African Public Law
South African Journal of Human Rights
South African Law Journal
Stanford Law Review
Stellenbosch Law Review
Tijdschrift voor Rechtsgeschiedenis
Tydskrif vir die Suid-Afrikaanse Reg
Tydskrif vir Rege:wetenskap
Tydskrif vir Hedendaagse Romeins-Hollandse Reg
Victoria University of Wellington Law Review
Virginia Journal of International Law
Washington and Lee Law Review
Weekblad voor Privaatrecht, Notariaat en Registrasie
Afr J Mod L
Afr J of Int & Comp L
Am J Comp Law
Aus LJ
California LR
Can J Law & Jur
Cant LR
Col LR
CILSA
HNJV
HR & Comp LJ of SA
Int & Comp LQ
JAL
J Leg Ed
L & Anthropology
Maryland LR
NJB
R&K
RMT
Rev of Soc L
SAPL
SAJHR
SALJ
Stanford LR
Stell LR
TR
TSAR
TRW
THRHR
Vic Uni of Wel LR
Vir J Int Law
Wash & Lee LR
WPNR
William and Mary Law Review
Wisconsin Law Review
Zeitschrift der Savigny-Stiftung für Rechtsgeschichte

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