ABHANDLUNGEN

South African Constitutional Property Protection between Libertarianism and Liberationism: Challenges for the Judiciary

*Hanri Mostert**

1. Introduction

Since the introduction of a new constitutional dispensation in South Africa, attempts have been made to alter the property practices under *apartheid* land law in the face of severe political pressure and in spite of serious financial difficulties. However, the changes to the legislative property order did not bring about a noticeable difference in the division of wealth in the South African society yet. It has to be determined why the task of effecting a more equitable division of wealth

---

* B.A. LL.B. LL.M. (University of Stellenbosch, South Africa). For the time being visiting researcher of the Max Planck Institute for Comparative Public Law and International Law, Heidelberg, I would like to thank Dagmar Richter and Vladimir Djerić for the helpful comments and criticisms made on earlier drafts of this paper, and the directors and staff of the Max Planck Institute for their kind hospitality.

This paper emanates from research for a doctoral dissertation to be defended at the University of Stellenbosch, South Africa. The financial support of the Centre for Science Development in South Africa and the Deutscher Akademischer Austauschdienst, which enabled parts of this research, is gratefully acknowledged. Opinions expressed in this paper should not be attributed to either of these institutions.

Abbreviations: (A) – Decision of the Appellate Division of the South African Supreme/High Court; BCLR – Butterworths' Constitutional Law Reports; BGBl. – Bundesgesetzblatt; BVerfGE – Decision of the Federal Constitutional Court; (C) – Decision of the Cape Provincial Division of the Supreme/High Court; (CC) – Decision of the South African Constitutional Court; CCT – Constitutional Court Trial; FC – Final Constitution; GG – Grundgesetz; HRCLJSA – Human Rights and Constitutional Law Journal of South Africa; IC – Interim Constitution; ICLQ – International and Comparative Law Quarterly; JJS – Journal of Juridical Science; mn – marginal number (Randnummer); (NF) – Neue Fassung; NJW – Neue Juristische Wochenschrift; s – section(s); SA (when quoted as part of case reference) – South African Law Reports; SAJHR – South African Journal on Human Rights; SALJ – South African Law Journal; SAPR/PL – Suid-Afrika Publiekreg/South African Public Law; (T) – Decision of the Transvaal Provincial Division of the Supreme/High Court; THRHR – Tydskrif vir Hedendaagse Romeins-Hollandse Reg (Journal for Contemporary Roman-Dutch Law); (Tk) – Decision of the Division of the High Court in Transkei; UFresearch – Executive Summaries publication series of the (former) Urban Foundation; (ZSC) – Decision of the Zimbabwe Supreme Court.

and resources among the members of the South African society, assigned by the constitution to the courts and legislature, is such a trying one. This necessitates a consideration of the values underlying the constitutional property guarantees in the Interim Constitution[1] and Final Constitution[2] of South Africa.[3] A question related to this issue is that of whether political and economic equality in the sphere of land ownership could be effected by developing a disregard for personal autonomy when the protection of property under the constitution is at stake. This necessitates an analysis of the South African courts' treatment of property in the constitutional context.

The relevant provision in s 25 FC determines that:

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

(2) Property may be expropriated only in terms of law of general application – (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including – (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.

(4) For the purposes of this section – (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

---

[1] S 28, IC Act 200 of 1993. The full text of the Interim Constitution is available on the Internet at http://www.polity.org.za/govdocs/legislation/1993/constit0.html [2000.04.01].

[2] S 25, FC Act 108 of 1996. The full text of the Final Constitution is available on the Internet at http://www.polity.org.za/govdocs/constitution/saconst.html [2000.04.01].

[3] The word Interim is used to denote the Constitution Act 200 of 1993, which was always intended as a temporary measure to be replaced within two years. With the words Final Constitution, reference is made to Act 108 of 1996, which is intended to be of lasting application, even if amended from time to time and therefore not "final" in the absolute sense of the word. G. Budlender, Constitutional Protection, in: G. Budlender/J. Latsky/T. Roux, Juta's New Land Law (service 1, 1998), chapter 1, p. 4, note 2.

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

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

S 25 FC constitutes a considerable deviation from the "interim" property guarantee in s 28 IC, which determined:

"(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.

(2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.

(3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected."

It is apparent from the drafting histories of both these provisions that the considerations upon which the protection of property was first constitutionally entrenched in the Interim Constitution played an equally important role in the drafting of the property clause of the Final Constitution. Thus, in order to better understand the content of the South African property guarantee and its treatment by the courts, one needs some insight into the drafting histories of s 28 IC and s 25 FC.

2. *The Influence of Different Human Rights Ideologies on the Drafting of the Constitutional Property Clauses*

The primary object of the first justiciable Bill of Rights in the Interim Constitution of South Africa was to find the means and methods of transforming an unjust and deeply divided society.[4] Within the negotiation processes[5] preceding the coming into force of both the Interim Constitution and the Final Constitution in South Africa, the protection of human rights – in particular the right to property[6] – turned out to be a site of struggle for political power.[7]

---

[4] J. Murphy, 1994 SAJHR 391, 394.

[5] These negotiation processes are well known and well documented. See M. Bennun/M. Newitt (eds.), Negotiating Justice (1995); M. Chaskalson, 1995 SAJHR 222–240; S. Friedman/D. Atkinson (eds.), Small Miracle – South Africa's Negotiated Settlement (1994); B. de Villiers (ed.), Birth of a Constitution (1994).

[6] W. du Plessis/N.J.J. Olivier, 1997 (1) 5 HRCLJSA 11; L.M. du Plessis, Drafting the Chapter on Fundamental Rights, in: De Villiers (note 5), 97; D. Atkinson, Insuring the Future? The Bill of Rights, in: Friedman/Atkinson (note 5), 134; L.M. du Plessis, 1994 SAPR/PL 17; S.B.O. Gutto, Property and Land Reform (1995), 55.

[7] Du Plessis (note 6), 1.

Since that time, the political role of the South African courts in the constitutional context has become evident, and it is likely to become increasingly important.[8] The primary task of the courts is not to make political decisions. The judiciary is, after all, not accountable to any constituency, not having been elected by the members of such a constituency. Nevertheless, the judiciary sometimes enters the political arena and plays a political role when having to interpret and apply a justiciable constitution.[9] As such, a courts' judgements can have an impact on political life. Legislation aimed at reforming the socio-political order in South Africa could, for instance, be challenged on the basis that it contravenes some of the rights and powers guaranteed in either the Interim Constitution, or the Final Constitution, or both. In cases like these, legislation deemed crucial by Parliament for the establishment of a democracy founded on human rights could be held unconstitutional by the courts. The approach of the courts to these matters, and the reasons underlying such an approach, could be explained by an awareness of the human rights ideologies in which both the Interim and the Final Constitutions are rooted.

Political negotiation[10] preceding the adoption of the Bills of Rights took place in the context of a dialectic interplay between the two opposing, yet complementary human rights traditions of libertarianism and liberationism. It is important to understand and keep these influences in mind when analysing the decisions of the South African courts under the Interim and Final Constitutions.

Libertarianism draws on the ideology of classical liberalism. It tends to rate individual liberty as the core value for purposes of constitutional drafting and interpretation.[11] As such, the value of equality could easily play a subordinate role in libertarian thinking. In South Africa, the libertarian tradition has initially been supported by white liberals who expressed their opposition of the authoritarian government and its *apartheid* regime before 1990 in human rights terms. After the fall of *apartheid*, the ranks of the libertarians were expanded and diversified through the joining of "newcomers" on the human rights scene. Ironically, the "old" South African NP-Government[12] was probably the most significant newcomer to fervently support the libertarian approach in ensuing negotiations, during the period of transition beween 1991 and 1993.

---

[8] J. Sarkin, 1997 SALJ 134–150, provides an interesting discussion of the political role of the South African Constitutional Court.

[9] L.M. du Plessis, 1999 (62) Saskatchewan Law Review 307.

[10] M. Chaskalson/C. Lewis, Property, in: M. Chaskalson [et al.] (eds.), Constitutional Law (1996), chapter 31, p. 1; Du Plessis/Olivier (note 6), 11; Chaskalson (note 5), 229–238; Du Plessis (note 6), in: De Villiers (note 5), 89–91.

[11] Du Plessis (note 6), 2–3.

[12] Their "Proposals on a Charter of Fundamental Rights" (2 February 1993) is framed in the libertarian tradition. See also art. 15 of the proposal of the South African Law Commission, Working Paper 25, Project 58, Group and Human Rights (1989). This document is printed as Appendix B, vol. 21, 1989 Columbia Human Rights Law Review 241–248.

Liberationism, by contrast, is predominantly underpinned by ideologies ranging from social democracy to democratic socialism.[13] Thus, it takes a more decisive egalitarian stance than its libertarian counterpart, but cannot really be described as being by nature "socialist" or "collectivist" in the true sense of the word. Liberationists are, however, usually more prepared to bear with state intervention for the sake of an equal distribution of means among the members of society.[14] As early as 1943, the ANC has adopted a liberationist approach to human rights in South Africa.[15] Strong liberationist elements have also been incorporated into the ANC's proposals[16] presented for negotiations.

Libertarianism and liberationism can to some extent be complementary. They share a fundamental commitment to a quintessence of time-honoured liberal-democratic values, albeit with a marked difference in emphasis. Among these values are[17]

> "an unquestioning deference to human life and human dignity, to freedom and security of the person, to freedom of conscience, religious belief and expression (including freedom of the media), to participatory political institutions and to due process of law in its various forms."

However, liberationism is much more oriented towards the treatment of the Bill of Rights as a vehicle for socio-economic upliftment of the marginalised masses than libertarianism. This becomes particularly apparent in the debate about the inclusion of a property clause in the constitution.[18]

2.1. The Inclusion of a Property Guarantee in the Constitution

The different approaches among the negotiators to the question of whether or not a property guarantee should be included in the constitutional chapter on fundamental rights were in essence underpinned by the divisions in the South African society and the fundamental-rights ideologies linked to these divisions.[19] This would eventually also determine the wording and structure of s 28 IC and s 25 FC.

---

[13] Du Plessis (note 6), 3.

[14] *Ibid.*, 2–3; Du Plessis (note 6), in: De Villiers (note 5), 91–92.

[15] This is apparent from their 1943-document "African Claims in Africa" and the 1955 "Freedom Charter". These documents can be found on the Internet at http://www.anc.org.za/ancdocs/history/keydocs.html [2000.03.12].

[16] "Ready to Govern: ANC Policy Guidelines for a Democratic South Africa" (found on the Internet at http://www.anc.org.za/ancdocs/history/readyto.html [2000.02.13] and "A Bill of Rights for a New South Africa". (See Appendix A, vol. 21, 1989 Columbia Human Rights Law Review 235–239 which formed the basis of the latter document.)

[17] Du Plessis (note 6), 2–3; Du Plessis (note 6), in: De Villiers (note 5), 91–92.

[18] A. Caiger, Protection of Property, in: Bennun/Newitt (note 5), 132; G. Budlender, 1992 SAJHR 303.

[19] Chaskalson (note 5), 222–240, and Atkinson (note 6), 134–140, provide telling illustrations of the drafting of the Interim Constitution's property clause and the ongoing conflict between the ANC and the NP as supporters of different human rights traditions and as representatives of conflicting interest-groups in the South African society.

A peculiarity of the libertarian and liberationist approaches in the South African context should be mentioned at this stage: Normally, libertarians would contend for a minimalist approach towards protection of rights, due to their roots in classical liberalism. In respect of state authority against individual autonomy, for instance, they would assume a "hands-off" attitude. In contrast, liberationists usually would tend to prefer stronger regulatory measures, due to the fact that their approach is ideologically rooted in social-democratic thought. Further, liberationists normally favour a bill of rights providing mechanisms with which to effect claims premised on second and third generation rights. In South Africa, however, the political positioning of the negotiating parties caused liberationists to adopt an a-typical minimalist approach, and libertarians to adopt an a-typical "optimalist" stance.[20] This peculiarity had a noteworthy influence on the drafting of s 28 IC in particular, but also on s 25 FC. It might therefore influence the decisions of the courts in future. The positioning of the parties at negotiations resulted in the NP-government contending right from the start for the inclusion of an extensive guarantee of property and the ANC initially attempting to remove references to a right to property from the text of the Interim Constitution.

The ANC believed that a property guarantee would hamper land restitution projects. They viewed the constitutional protection of property as a legitimisation of the consequences of generations of *apartheid* and dispossession.[21] Therefore, their proposed Bill of Rights for the negotiation process did not provide assurance regarding protection of property. Instead, it set out general principles that seemed to be imbued with a "communal spirit", affording property a more customary character. According to their proposal, property were to be regarded as something people use and cannot own to the exclusion of others.[22] Those who had reservations concerning the inclusion of a property guarantee in the new constitution indicated the unpredictability of consequences flowing from such an inclusion: It could be problematic for the exercise of the government's regulatory functions[23] and legislation aimed at achieving social stability and at addressing the disparities of wealth in the South African society.[24] The situations in Canada[25] and

---

[20] Du Plessis (note 6), 2–3.

[21] Budlender (note 3), 1–3; Caiger (note 18), 113–114; Atkinson (note 6), 135; A.J. van der Walt, 1992 SAJHR 450.

[22] Caiger (note 18), 130–138.

[23] Budlender (note 3), chapter 1, p. 3; Atkinson (note 6), 136–139.

[24] J. Murphy, 1993 JJS 38; Chaskalson (note 5), 223.

[25] In Canada it was decided to exclude property rights from the Charter of Rights and Freedoms (adopted in 1982), after the topic has been debated extensively. Originally the Canadian Constitution of 1960 contained a non-justiciable Bill of Rights, as part of an ordinary statute, which could be revoked by parliament and which did not provide the court with the power to review statutes. This remains in force and contains specific protection for property rights, by providing guarantees for the right to the enjoyment of property and the right not to be deprived of property except by due process of law. It applies to federal parliament, and seems to be restricted to the property of individual persons. Several provincial bills of rights provide explicit protection of property rights. The guarantee of property was apparently excluded from the 1982 Canadian Charter of Rights and Freedoms by reason of (i) the uncertainty of the range of rights that would be included in the category of property

India[26], where the constitutional drafters for various reasons refrained from incorporating a property guarantee in the respective Bills of Rights, were used to justify arguments in favour of the exclusion of property rights from a catalogue of fundamental rights in South Africa.[27]

On the other hand, the NP-government from the outset favoured a property guarantee elevating the rights of owners to such a level that the state's taxing power would be subject to the sovereignty of property. Their initially proposed property guarantee would have had the effect that all taxes on property with a confiscatory effect would be invalid and that expropriation against compensation would be the only authorised state interference with property. They explained their view on the proposition that the individual can first and foremost achieve his or her full potential by acquiring property through hard work, thrift and responsibility.[28] Those in favour of the constitutional protection of property rights pointed out that the protection of property is fundamental to democracy itself and argued that such guarantees are present in most modern constitutions.[29] Some indicated that the function of the property clause would be to ban the fear of

---

protected by a constitutional property clause; (ii) previous experience with the earlier non-entrenched constitutional provisions regarding property; (iii) the conviction that vital aspects of life, liberty and personal security that are often associated with and protected by the property clause are sufficiently covered by the articles dealing with personal rights; (iv) opposition from provincial governments fearing that the inclusion of a property clause might hamper the solution of specific provincial problems; and (v) the controversy of the question whether property is in fact so fundamental a right that it should rank with other rights that are guaranteed in the charter. Owners, however, are at least protected by a number of common law rules and by procedural provisions which guarantee due process of law. Nevertheless, payment of compensation is not guaranteed, but the relevant statues usually provide for payment of adequate compensation. See R.W. Bauman, 1992 SAJHR 345–355; A.J. van der Walt, 1993 Recht/Kritiek 275–277; Budlender (note 3), chapter 1, p. 3. Gutto (note 6), 31, refers to the Canadian approach to securing property rights and land rights as one of "constitutional abeyance", explaining that this approach of a deliberate omission from constitutional protection is a political strategy not to explicitly incorporate that which is unlikely to receive general consensus, however, with the knowledge that such a lacuna would not be fatal to the overall balance of the political and social order in the interests of society. A.J. van der Walt, Constitutional Property Clauses, A Comparative Analysis (1999), 86–87, shows that, even without an express property guarantee, the Canadian treatment of property protection is important for comparative purposes, because of the importance attached to the interpretation of the general limitation clause in the Canadian Charter.

[26] In India, the judges asserted property rights to upset schemes of social reform. The property clauses contained in the list of fundamental rights (art 19(1)(f) read with 19(5); as well as art. 31), were some of the most litigated provisions in the Indian Constitution. Land reform initiatives, nationalisation, motor transport, slum clearances and government take-overs of mismanaged vital industries were struck down in the name of private property. This eventually lead to the deletion of the property clauses in 1978. The Indian experience is relevant for South Africa because of the similar problems of widespread poverty and the aftermath of colonialism that will have to be faced in a democratic order. Murphy (note 24), 38–39; Chaskalson, 1993 SAJHR 389–395; Van der Walt, Recht/Kritiek (note 25), 277–278; Gutto (note 6), 33.

[27] A discussion on the treatment of the right not to be deprived of property in these jurisdictions, which both are connected to the Commonwealth, can be found in T. Allen, 1993 ICLQ 523–552.

[28] Chaskalson (note 5), 224; Du Plessis (note 6), 3.

[29] Budlender (note 3), chapter 1, p. 3.

property confiscation[30] that those whose rights might be infringed by the state could have.[31] It was also argued that a property clause would be an effective way of mediating the conflict between free economic activity and the imperatives of social policy.[32]

The negotiators eventually agreed on a clause protecting existing property rights. They also agreed to the idea that property rights taken away due to *apartheid* regulations had to be addressed by the constitution. However, the underlying ideological divisions resulted in a difference in opinion about the way in which, and standards according to which compensation would have to be determined in the event of expropriation. They also did not agree on a constitutional strategy providing for the restoration of rights in land to persons who had been dispossessed of such rights as a result of racially discriminatory policies.[33]

2.2. Compromises Incorporated in s 28 IC and s 25 FC

With the ANC initially having opposed the idea of including a property guarantee in a justiciable Bill of Rights, and therefore not having included suggestions for a property clause in their proposals for negotiations, the NP-government had somewhat of a head start when it came to the drafting of the property guarantee in s 28 IC.[34] This clause was therefore strongly influenced by libertarian thought. Once it was clear that the bill of rights would indeed contain a property guarantee, the ANC's two crucial requirements for such a clause (that is, that it should not frustrate land restitution programmes and that the state should to some extent have the power to regulate property without incurring the obligation to reimburse owners whose property rights would consequently be infringed) were added to a provision already reflecting the stronger NP influence in initial negotiations.[35]

It was decided to include a positive property guarantee within the chapter on Fundamental Rights, s 28 IC, and to frame the mandate for land reform and res-

---

[30] I.e. the withdrawal of property from its owners by the state or public authorities without remuneration.

[31] Du Plessis/Olivier (note 6), 11; Chaskalson (note 5), 224.

[32] See the application of the principles in S.R. Munzer, A Theory of Property (1990) to the South African context, in: C. Lewis, 1992 SAJHR 419–430. See also the account of the Democratic Party's lobby at the Multi-Party Negotiating Process in Atkinson (note 6), 136, 137.

[33] Du Plessis (note 6), 17; Caiger (note 18), 115–116; Du Plessis/Olivier (note 6), 11; Chaskalson (note 5), 229–238; Atkinson (note 6), 136–140.

[34] Chaskalson (note 5), 222–240; Atkinson (note 6), 134–140.

[35] *Ibid.*; D. Visser/T. Roux, Giving back the Country, in: M.R. Rwelamira/G. Werle (eds.), Confronting Past Injustices (1996), 94, however, discusses the stance of the National Party on the compromise contained in the interim property clause and remarks that the only explanation for their concession in negotiations resulting in a failure to secure the entrenchment of the property and land restitution clauses beyond the life of the Interim Constitution could be that, in view of the National Party's consistent anti-human rights (and therefore also, in fact, anti-libertarian) political tradition, it chose to place more trust in the balance of social and economic power that dictated the political compromise, than in the language of the constitutional text itself.

titution[36] in s 121, 122 and 123 IC,[37] outside the chapter on fundamental rights. Ordinary legislation (more particularly the Restitution of Land Rights Act[38]) would then be passed to give effect to the provisions of these sections.[39] S 28 IC entrenched the right to acquire, hold and dispose of rights in property. It also provided for the protection of existing rights in property as well as for expropriation against payment of compensation and was, thus, the product of strong libertarian influence.

The long debated compromise of the Interim Constitution was followed by another intense debate in the drafting of the Final Constitution. The Final Constitution was drafted by the Constitutional Assembly which comprised the Members of Parliament and the Senate as elected during South Africa's first democratic elections in 1994. In the Constitutional Assembly, the ANC held a majority of the seats and was accordingly in a stronger bargaining position when it came to negotiating the Final Constitution. Thus, the liberationist influence in s 25 FC is stronger than in s 28 IC.

It was agreed relatively early in the drafting process of the Final Constitution that the protection of existing property rights should not make effective land reform impossible.[40] More divergent, however, were the viewpoints as to what effective land reform would constitute, and what measures would make it impossible. Remaining controversial until the very end of the drafting process, the decision to keep the constitutional property guarantee intact was one of the last issues resolved by the constitutional assembly.[41] S 25 FC eventually was phrased to include the protection of property, as well as the objectives of access to land, provision of legally secure land tenure, land restitution and land reform within the constitutional property clause,[42] thereby tending to be rather a product of liberationist constitutional drafting. In general, the Final Constitution is much more outspoken in its emphasis on equality as a basic constitutional value and a fundamental right, as well as on socio-economic rights.[43]

---

[36] Budlender (note 3), chapter 1, p. 4, points out that of all the wrongs, injuries and suffering caused by apartheid and racial discrimination, it is only the dispossession of land rights that the legislature is specifically directed to rectify in the Interim Constitution. (The consequences of other human rights abuses are treated in the Postscript to the Constitution, dealing with National Unity and Reconciliation. As a result of those provisions and the Promotion of National Unity and Reconciliation Act 34 of 1995, victims of serious human rights abuses do not have an enforceable right to compensation if amnesty is granted in respect of those abuses, even if they constituted illegal conduct.)

[37] Text can also be found on the Internet at http://www.constitution.org.za/1993cons.htm [2000.02.28].

[38] 22 of 1994.

[39] Note that s 121–123 IC and the Restitution of Land Rights Act do not, and were not intended to deal with land redistribution. Chaskalson/Lewis (note 10), chapter 31, p. 2.

[40] Budlender (note 3), chapter 1, p. 4.

[41] *Ibid.*, 1–5; Du Plessis/Olivier (note 6), 11.

[42] I.e. equitable access to land in terms of s 25(5) FC; legally secure tenure in terms of s 25(6) FC; restitution or equitable redress for property dispossessed after 19 June 1913 in terms of s 25(7) FC.

[43] Du Plessis (note 9), 318.

The negotiators responsible for drafting the Interim Constitution agreed on thirty-four broad constitutional principles, included in schedule 4 to the Interim Constitution, with which the Final Constitution had to comply. The Constitutional Court had the task of certifying that the text of the Final Constitution complied with all of these principles before the Final Constitution could come into operation. During the process of certification of the Final Constitution by the Constitutional Court,[44] it had to be decided whether s 25 FC complied with the constitutional principles (in particular principle II) in schedule 4 of the Interim Constitution. S 25 FC was not referred again to the Constitutional Assembly for amendment. The court, therefore, in principle approved of the compromise reached in the drafting of it.[45] Yet, the debate concerning the preference to be given to either the libertarian or the liberationist tradition – or the weight to be attached to each of these of human rights ideologies in the interpretation process – continues. Although it might seem as if they only gave rise to minor differences in phrasing of the constitutional texts, the different prevailing human rights ideologies behind s 28 IC and s 25 FC could have far-reaching consequences for the interpretation of the constitutional property guarantee in South Africa. This will be illustrated after the relation between s 28 IC and s 25 FC and the meaning and effect of these clauses have been explained.

2.3. Relation between s 28 IC and s 25 FC

The relation between the two constitutional property clauses is important for a better understanding of their interpretation. S 28 IC was the first entrenched property clause in South African constitutional history. It played an important role in the overall importance of the new constitutional order established after 1994,[46] and therefore remains significant even beyond its own short lifetime. Moreover, the Interim and Final Constitutions are linked through sections 73, 71[47] and schedule 4[48] of the Interim Constitution, which necessitated the establishment of a constitutional assembly[49] in order to pass the Final Constitution. The latter had to comply with certain principles laid down in schedule 4 of the Interim Constitution.

---

[44] Certification of the Constitution of the Republic of South Africa 1996 CCT 23/96 found on the Internet at http://www.constitution.org.za/cert.html [1999.08.06] par. 70–75.

[45] In the five years since the enactment of s 25 FC (and even before that, during the lifetime of s 28 IC), extensive policy declarations have been published by the Department of Land Affairs (see http://land.pwv.gov.za [2000.02.28]) on the property reforms undertaken and intended. Department of Land Affairs White Paper (1997) found on the Internet at http://www.polity.org.za/govdocs/white_papers/landwp.html [1998.12.16].

[46] Van der Walt (1999) (note 25), 324.

[47] These sections can be found on the Internet at http://www.polity.org.za/govdocs/legislation/1993/constit5.html [2000.03.13].

[48] Schedule 4 IC can be found at http://www.polity.org.za/govdocs/legislation/1993/sched4.html [2000.03.13].

[49] Within two years from the date of the first sitting of the national assembly in terms of the Interim Constitution.

This relation between the Interim and Final Constitutions will undoubtedly influence constitutional interpretation of the legal order in South Africa. Both s 28 IC and s 25 FC are relevant for a determination of the theoretical structure underlying the South African constitutional property guarantee. In particular, however, the relevance of s 28 IC which is, strictly speaking, not applicable any more since the enactment of s 25 FC, needs to be elucidated.

Cases initiated between 1994 and 1997 (before the coming into force of the Final Constitution) and which relied upon an inquiry into the constitutional protection of property, had to be decided upon s 28 IC. Moreover, this provision of the Interim Constitution will also continue to be the legal yardstick when determining the constitutional validity of property law;[50] in particular the statutes pertaining to property law passed before the coming into force of the Final Constitution.[51] Statutes enacted before the coming into force of the Final Constitution might be inconsistent with the Interim Constitution even if they are completely consistent with the Final Constitution.[52] In such a case, the court would still be obliged to declare them invalid.[53] The court may, however, then make any order which is just and equitable.[54]

The relation between s 28 IC and s 25 FC makes the dichotomous nature of the values underlying the South African property guarantee all the more apparent. This might in future create problems for the courts that have to deal with issues arising from either of these provisions. What is needed, is a clear directive on the effect and meaning of the property guarantee in the South African context.

2.4. The Search for the Meaning and Effect of the Property Clauses

The meaning and effect of s 28 IC was from the outset not exactly clear. Some approached the positive formulation of the property guarantee in s 28(1) IC as a statement of substantive individual property rights.[55] Others regarded it as a guarantee of the institution of private property, rather than individual property

---

[50] The reason for this can be traced to the cases of *Ferreira* v. *Levin* NO, *Vryenhoek* v. *Powell*, 1996 1 SA 984 (CC), also found on the Internet at http://www.law.wits.ac.za/judgements/ferreira.html [1999.06.09], par. 27–28, where it had to be determined whether a law inconsistent with the Interim Constitution was automatically invalid through the operation of law, or whether such a law would have to be declared invalid by a Court. In this case it was explained that, after the coming into force of the Interim Constitution, laws were either objectively valid or invalid (and therefore of no force and effect in terms of s 4(1) IC) – depending on whether or not they were consistent with the Constitution – even if a dispute concerning inconsistency would only be decided years afterwards (in terms of s 98(5) IC).

[51] 4 February 1997.

[52] Budlender (note 3), chapter 1, p. 6.

[53] S 172(1)(a) FC.

[54] S 172(1)(b) FC. The court can, for instance, issue an order limiting the retrospective effect of the declaration of invalidity. An order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect, would be another possibility.

[55] J. Murphy, 1995 SAPR/PL 107–130.

rights;[56] some others as a socio-economic right; and some as a combination of both.[57] Some saw it as a mere statement of eligibility to hold and deal with rights in property.[58] It is needless to say that the approach followed has a significant influence on the manner in which problems with regard to, for instance, the interaction between general and internal limitations of the constitutional property guarantee; the social function of property; the formulation of the constitutional property concept; and the interaction between the property clause and the equality clause[59] of the constitution will be theoretically disposed of.[60]

The wording of the Final Constitution has been altered not to contain an equivalent to the positive formulation of s 28(1) IC, thereby avoiding the need for a complex debate about the meaning of the property guarantee. Nevertheless, the dichotomous nature of the values underlying the ownership concept in the new constitutional order remains apparent, even in the new formulation. Besides, the link between the Interim and Final Constitutions cannot simply be ignored.

The provisions of both s 28 IC and s 25 FC reflect, apart from their hybridised ideological foundations,[61] a collision between South Africa's unfortunate history of ownership and property rights, on the one hand, and the present disparities of wealth in the society, on the other. This complicates the function of the courts that will be called upon to balance the protection of private property rights against the need for regulation and expropriation of property rights for the sake of the common good.[62] Moreover, in spite of the values shared by the libertarian and liberationist traditions, it is especially in connection with the "new" land rights created or supported by section 25(5) to (8) FC that the different traditions might be difficult to reconcile.[63] Thus, the debate as to whether either the protection of individual property rights or the regulation of property for the public weal should in the case of conflicting interests prevail, has by no means ceased with the reaching of a compromise regarding the contents of the Final Constitution. The discussion is continued in the South African courtrooms, albeit mostly not explicitly.

---

[56] A.J. van der Walt, 1994 THRHR 181–203.

[57] Gutto (note 6); Budlender (note 18), 295–304; See Budlender (note 3), chapter 1, p. 13–14, for a critical approach.

[58] *Ibid.*, chapter 1, p. 14–15.

[59] S 9 FC; s 8 IC.

[60] See Murphy (note 55), 123; Budlender (note 3), chapter 1, p. 11–15.

[61] See 4 *supra.*

[62] The days are over in which the court could shrug off the responsibility to determine whether legislative measures are ultimately intended to serve the common weal of all the members of the South African society, as was the case in *Minister of the Interior* v. *Lockhat and Others,* 1961 2 SA 587602E-F.

[63] Du Plessis (note 6), 3; Budlender (note 3), 1–69. For a discussion on the enforceability and implementation of the right to property as a socio-economic right in the South African context, see E. de Wet, The Constitutional Enforceability of Economic and Social Rights (1996), 129–135; Caiger (note 18), 132–137.

3. The Influence of Different Human Rights Ideologies on the Decisions of the South African Courts

The human rights ideology that enjoys precedence through the interpretation of the constitutional text will necessarily influence, on the one hand, the manner in which existing property rights are treated and, on the other, the approach followed in restitution of land rights. Three specific issues caught in the crossfire of libertarian/liberationist ideology will be discussed. They are: (i) the definition of the constitutional property concept; (ii) the protection of rights created under *apartheid* legislation and (iii) the regulation of property by the state.

3.1. The Constitutional Concept of Property

The dichotomy between individual autonomy and the public weal becomes apparent in an analysis of the extent to which the courts are prepared to protect property under the constitution, and the motivation for their approach. If the courts choose to follow an approach based on libertarianism, individual autonomy will probably prevail in most cases, and the concept of property likewise, if the courts prefer an approach based on liberationism, greater emphasis will probably be placed on the role of the public weal to determine which interests qualify for constitutional protection under the property guarantee. It has to be determined exactly what the courts regard as property for the purposes of the constitutional guarantee, and what entitlements related to this right are protected.

3.1.1. The right to "acquire and hold" property

S 28(1) IC referred explicitly to the right to "acquire and hold rights in property and, to the extent that the nature of the right permits, to dispose of such rights".[64] This indicated that the extent of the entitlements protected are determined by their nature and social function, and was in line with the development of a "socialised" or functional property concept. One of the objections raised against s 25 FC in the *Certification* Case[65] was that, according to its wording, it did not protect the right to "acquire, hold and dispose of property" as was the case with s 28 IC.[66] Accordingly, the argument from libertarian ranks went, s 25 FC could not qualify as a "universally accepted fundamental right", as it did not comply with the requirement in the second constitutional principle[67] that:

> "Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to *inter alia* the fundamental rights contained in Chapter 3 of the [Interim] Constitution."

---

64 Emphasis added.

65 Certification of the Constitution of the Republic of South Africa (note 44), par. 70–75.

66 Par. 71.

67 Principle II, Schedule 4, IC.

This argument was dismissed by the court in the light of the many and varied existing versions of property guarantees in other constitutions and human rights documents. The court concluded that, although s 25 FC was phrased negatively, protection of the right to acquire, hold and dispose of property was implicit. It was remarked that a negative formulation of the property guarantee appeared to be widely accepted as appropriate, and that the lack of an express protection for holding property did not indicate non-compliance with the second constitutional principle.[68] In this manner, the Constitutional Court could reconcile the libertarian preference of full protection of property as illustrated in s 28 IC, and the minimalist liberationist approach to property protection apparent in s 25 FC.

3.1.2. The variety of patrimonial interests protected

It is by now generally accepted among South African lawyers that the constitutional concept of property includes a wider variety of patrimonial interests than the private law ownership concept.[69] For instance, personal or creditor's rights could also be protected by a constitutional property clause. Some authors even see in the broad definition of property provided by s 25(4) FC the possibility of protecting pensions, social and unemployment security, medical benefits and similar grants.[70] It seems, however, as if the courts are cautious to include these interests within the protective ambit of the constitutional property guarantee.

The High Court had opportunity to consider this issue in *Transkei Public Servants Association* v. *Government of the Republic of South Africa*.[71] In pronouncing on the validity of various provisions of the Public Service Staff Code[72] relating to housing subsidies, the court had to deal with the question of whether or not housing subsidy benefits formerly granted to Transkeian civil servants[73]

---

[68] Par. 72.

[69] I. Kroeze, 1994 SAPR/PL 326; Van der Walt (note 56), 193. See also Administrator, *Natal* v. *Sibiya*, 1992 4 SA 532 (A) 539A-B, where Hoexter JA already (*obiter*) anticipated that property could under certain circumstances (here in the context of applying the *audi alteram partem* rule in decisions by public officials) be wider than the traditional concept of ownership.

[70] G.E. Devenish, Commentary (1998), 71; D. Davis/H. Cheadle/N. Haysom, Fundamental Rights (1997), 255; L. Underkuffler, 1990 Yale Law Journal 127.

[71] 1995 9 BCLR 1235 (Tk).

[72] This code was issued in fulfilment of s 42 of the Public Service Act of 1994 (promulgated by Proclamation 103 of 1994) which required the Public Service Commission (established by s 209 IC) to devise a Public Service Staff Code, the provisions of which would be binding upon all government departments and the public servants employed by these departments. This was supposed to establish uniformity in the terms and conditions of employment of all public servants in the whole of South Africa's national territory, therefore also in the formerly "independent" states of Venda, Bophuthatswana, Ciskei and Transkei, which each had its own statute governing the conditions of employment in the Public Service.

[73] These housing subsidies were found to be considerably higher than similar subsidies for Public Service employees in South Africa, Bophuthatswana, Ciskei and Venda. Therefore the Staff Code determined that the higher housing subsidies would still be afforded to the Transkeian civil servants for a period of six months, and that they would thereafter receive the uniform amount laid down in the Code.

were protected by s 28 IC. Although the court refrained from determining whether a state housing subsidy was encompassed within the meaning of "property" in s 28 IC,[74] because the application failed on other grounds,[75] it did make some *obiter* observations about the scope of the constitutional property concept.

It was acknowledged that the meaning of "property" in s 28 IC may well be sufficiently wide to encompass a housing subsidy benefit.[76] The court confirmed that the language of the Constitution had to be given a generous and purposive interpretation.[77] It conceded to the view of authors (in accordance with several foreign jurisdictions) that the constitutional property concept is not restricted to corporeal things, but extends to a variety of social and economic interests and benefits.[78] However, the court also remarked that, even if it would be decided that housing subsidies could be included within the protective scope of section 28, the reduction of the Transkeian housing subsidy by the Staff Code[79] (in order to effect uniformity of the housing subsidy prevailing in South Africa), would comply to the proportionality test of the Interim Constitution,[80] being a reasonable and justifiable limitation of the right, and would not negate the essential content of that right.

These remarks indicate a tendency to consider the constitutional protection of intangible assets as "property" against the purpose and social function thereof. Furthermore, it appears that the less certain it is that an interest indeed qualifies as "property", the greater a consideration upon the social importance of including that interest within the protective ambit of the constitutional property guarantee will be. The court thus, albeit in an *obiter dictum*, indicated its willingness to interpret the concept of constitutional property so as to give effect to a more liberationist approach to property in the sense that a consideration of the social importance of property is imported into the inquiry in order to determine the degree of protection afforded. This becomes even more significant if it is kept in mind that the property clause under discussion was s 28 IC, which (as has been indicated)[81] were influenced much more by libertarian thought than by liberationism. On the other hand, in the face of the optimalist stance adopted by the expo-

---

74 1247A.

75 It was determined (1247B-G) that the Interim Constitution did not intend protecting property rights in the broad sense flowing from the employment relationship between civil servants and the State during the transitional period, on the basis of s 236(4) IC which provided for the enactment of laws to establish uniformity of terms and conditions of employment of civil servants and s 236(5) IC which expressly precluded the reduction of the pensionable salary or pensionable salary scale of civil servants below that which prevailed immediately before the commencement of the Constitution and thus was the only provision affording this kind of protection to civil servants. No other protection was intended by the Interim Constitution. Besides, the court reasoned, certain reductions in benefits were inevitable in order to achieve uniformity.

76 1246J-1247A.

77 1245H.

78 1246B-J.

79 Chapter D XX.

80 In accordance with the limitations clause, s 33 IC.

81 See 7 *supra*.

nents of libertarianism in South Africa, the expansion of the property concept that would be brought about by such an interpretation would probably not meet with severe opposition from libertarian ranks.

3.2. The Protection of Rights Created under *Apartheid*

The recent case of *DVB Behuising (Pty) Ltd.* v. *North West Provincial Government and others*[82] raises (albeit only indirectly) the issue of how the courts should treat legislation which is perceived to be an extension of the racially based property order of the past. The problem is that a blunt dismissal of such legislation could endanger rights created on the basis of it. In the discussion that follows, only the points which might be of interest for the question of how the South African property clause should be interpreted, are highlighted.

The problem in the *DVB Behuising* case arose from the *ad hoc* attempts (between 1991 and 1993) by the pre-transitional government to reform the racially based land ownership system existing because of *apartheid*. In the first place, the Abolition of Racially Based Land Measures Act[83] was passed to deracialise the land control system. It repealed various pieces of primary legislation, wholly or partially, on which the policy of spatial separation of different races within South Africa were based.[84] However, regulations and proclamations issued under those acts remained in force until explicitly repealed or abolished. An example of such subordinate legislation which was not immediately repealed, is Proclamation R293[85] which was promulgated under the Native Administration Act.[86] It made provision for the establishment of a special kind of township by the Minister of Bantu Administration and Development for African citizens in areas of land held by the "South African Native Trust",[87] *inter alia* by creating limited forms of tenure through "deeds of grant" and certificates of "occupation of a letting unit for residential purposes". These tenure rights were precarious and could be cancelled

---

[82] CCT 22/99. Found on the Internet at http://www.law.wits.ac.za/judgements/2000/2299.pdf [2000.04.03].

[83] 108 of 1991.

[84] I.e. Black Land Act 27 of 1913; Development and Trust Land Act 18 of 1936; Group Areas Act 36 of 1966.

[85] Government Gazette 373, 16 November 1962. Chapter 1 of the proclamation makes provision for the establishment of the townships. Chapter 2 provides for the demarcation of sites in the townships for various categories of occupation and regulates their occupation, sale or lease. It makes provision also for the issue of deeds of grant and certificates of occupation, as well as for their assignment or transfer. Chapter 3 relates to trading sites and the control of trading in the townships. Chapter 9 establishes special deeds registries in the office of every "Chief Bantu Affairs Commissioner" and for the registration therein of rights granted under the Proclamation.

[86] 38 of 1927.

[87] The South African Native Trust was established by the Native Trust and Land Act, 18 of 1936. The short title of the statute and the name of the Trust reflect the names used to refer to Africans at the time the statute was promulgated. Africans were initially referred to in statutes as "Natives". This term was later changed to "Bantu", and eventually to "Blacks". Even a cursory reading of the proclamation and the act can leave no doubt as to the distasteful character of the provisions thereof.

by the township "manager" if the holder of the right ceased, for instance, "to be in the opinion of the manager a fit and proper person to reside in the township".[88] The insecure tenure rights established through this proclamation can clearly be regarded as one of the most visible products of the previous government's policy of *apartheid* and racial segregation.

In the second place, the Upgrading of Land Tenure Rights Act[89] was passed to provide for the conversion into ownership of the more tenuous land rights which had been granted during the *apartheid* era to black Africans. For example, leasehold, quitrent and "deeds of grant" could be upgraded into ownership.[90] This had a far-reaching influence on the South African system of land rights. Leasehold, quitrent and "deeds of grant" issued with regard to any piece of land within South Africa,[91] were upgraded into ownership automatically with the implementation of the act. These rights were registered at a later stage.[92] The effect of this act was extended by the amendment of the Conversion of Certain Rights into Leasehold or Ownership Act[93] so as to include other rights in formalised towns, not mentioned specifically in the Upgrading of Land Tenure Rights Act.

The tenure and registration provisions of Proclamation R293, read with the Upgrading of Land Rights Act, constituted a cheap and straightforward mechanism for providing access to land to people in townships. The precarious tenure that could be granted under the proclamation could, in due course, become ownership or at least secure tenure. The *DVB Behuising* case arose out of the enactment of the North West Local Government Laws Amendment Act[94] by the legislature of the North West Province. Section 6 of this act purported to repeal Proclamation R293 in its entirety. This could have the effect that people whose claims to land were based on the "deed of grant" of the proclamation, coupled with the Upgrading of Land Rights Act, would lose any claim they could have had in relation to the relevant land, as the basis of their claim would fall away. Therefore, the applicant *(DVB Behuising)* challenged the constitutional validity of the section 6 of the North West Local Government Laws Amendment Act, contending that the purported repeal of chapters 1, 2, 3 and 9 of the proclamation was beyond the legislative competence of the North West. It was averred that the repeal of those chapters made it impossible for persons to whom the applicant had sold houses in a township established under the proclamation to have their deeds

---

88 Regulation 23(1)(a)(iv) of Proclamation R293.

89 112 of 1991.

90 S 2(1)(a), Upgrading of Land Tenure Rights Act.

91 112 of 1991. The terms of this act were not applicable in the TBVC states (the former "independent homelands" of Transkei, Bophuthatswana, Venda and Ciskei) until 28 September 1998, the date of promulgation of the Land Affairs General Amendment Act, 61 of 1998 (which inserted section 25A in the Upgrading of Land Tenure Rights Act and which made the provisions of this act applicable in the whole country).

92 S 2(2)(a), Upgrading of Land Tenure Rights Act.

93 81 of 1988, as amended by s 24 of the Second General Laws Amendment Act 108 of 1993, by adding "or ownership" into the title of the act.

94 7 of 1998.

of grant registered by the Registrar of Deeds (the second respondent in the case). This was alleged to prejudice its business seriously, in particular, because the purchasers of such houses were not able to secure loans which would normally be offered to them by banks. In the court of first instance,[95] it was held that the purported repeal of these chapters of the proclamation was unconstitutional. Pursuant to the provisions of section 172(2)(a) FC,[96] the declaration of invalidity was referred to the Constitutional Court for confirmation.

The Constitutional Court was confronted with the question of whether the legislature of the North West Province had the competence to repeal the proclamation. It was decided that the legislature of the North West Province did indeed[97] have the competence to repeal all provisions of the proclamation, save for regulations 1 and 3 of chapter 1 and the provisions of chapter 9.[98] These provisions dealt with the registration of "deeds of grant", a matter that is required to be regulated by uniform norms and standards, and thus falls within the competence of the national legislature.[99] In the majority judgement of the court, Ngcobo J[100] remarked:

> "What the North West is in effect saying by the repeal of the Proclamation is that in that province apartheid forms of tenure will no longer be available in future. I should have thought that the provisions of section 25 of the Constitution and the Upgrading Act are a clear indication that apartheid forms of land tenure that are legally insecure are no longer to be tolerated in our new democratic dispensation. The repeal of the tenure provisions is consistent with this policy."

The minority judgement contains grave criticism of this approach. S 25(6) FC is read by the minority to imply that insecure forms of land tenure arising from discriminatory legislation of the past regime could not be abolished or reformed by any legislature other than Parliament.[101] It is contended[102] that the judgement of the majority of the court would have the effect that the speedy and accessible form of registration coupled with the deed of grant tenure is no longer available in the North West, and that this would be in conflict with the constitutional scheme in terms of which land tenure reform and the manner in which it is achieved is a matter reserved for national government. It is then remarked[103] that

> "jurisprudence of the transitional era necessarily involves a measure of contradiction. Fundamental fairness at times requires that aspects of the old survive immediate obliter-

---

[95] *DVB Behuising (Pty) Ltd.* v. *North West Provincial Government and Another*, Bophuthatswana High Court, Case No 308/99, 27 May 1999 (per Mogoeng J) as yet unreported.

[96] Section 172(2)(a) FC: "The Supreme Court of Appeal, a High Court or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."

[97] In terms of s 235(8) IC.

[98] As amended by Proclamation R9 of 1997.

[99] In terms of s 126(3)(b) IC.

[100] Par. 69.

[101] Par. 103.

[102] Per Goldstone, O'Regan and Sachs JJ; par. 109–110.

[103] Par. 110.

ation and are kept alive pending their replacement by appropriate forms of the new. ... In the present matter, the meritorious desire manifested in the majority judgment for a clean sweep of the past in the name of modernisation and de-racialisation has an unintended and ironic consequence. It deprives underprivileged communities from gaining access to a cheap form of land tenure which in terms of national legislation can be upgraded to freehold. The Constitution requires government to foster access to land. The repeal of the Proclamation by the North West province, in one sense at least, does the reverse."

The irony inherent in following the approach suggested by the minority of the court is perhaps as striking as that ascribed by them to the majority judgement. In employing one of the most apparent pieces of racist and sexist subordinate legislation of the previous regime, exactly those people who were previously discriminated against can benefit under the new system. However, the alternative suggested by the majority, in response to this criticism, is also fraught with difficulties.

Ngcobo J,[104] for the majority of the court, reads into the provisions of the Upgrading of Land Tenure Act providing for the upgrading of "limited form[s] of ownership" into "full ownership" the policy that a title which conferred a limited form of ownership was to be phased out. The implication would be that the cheap, speedy method of obtaining ownership would be available only to persons holding rights in terms of the old *apartheid* legislation. The creation of rights in terms of this legislation would no further be possible. Further, Ngcobo J points to the Less Formal Township Establishment Act[105] and the Development Facilitation Act[106] as mechanisms that could be used to continue the cheap, speedy method of acquisition of ownership of land.

Indeed, the Less Formal Township Establishment Act contains an accessible form of land tenure. It makes provision for the development of less formal settlements and townships. It provides, among other things, "for shortened procedures for the designation, provision and development of land, and the establishment of townships [and] for less formal forms of residential settlement" and it also regulates the use of land by rural communities for communal forms of residential settlement. In the case of development of less formal settlements, s 3(5)(e) of the Less Formal Township Establishment Act provides that laws regulating township development and planning are not applicable. In addition, provision is made in s 9(1) of the same act for the acquisition and registration of ownership in respect of an erf allocated to a person. In the case of less formal townships, s 19(5)(a) of the Less Formal Township Establishment Act provides for the exclusion of such laws if their application "will have an unnecessary dilatory effect on the establishment of the contemplated township or will otherwise be inappropriate in respect of the establishment of the township". However, in the case of the Meriteng township,

[104] Par. 8–9.
[105] 113 of 1991.
[106] 67 of 1995.

the establishment of which gave rise to the present case, it is doubtful whether the Less Formal Township Establishment Act could have been used as a substitute for the Proclamation R293/Upgrading of Land Tenure Act procedure. Similarly, situations could also in future arise where the procedure of the Less Formal Township Establishment Act cannot simply be employed as a surrogate for the course of action foreseen by the Upgrading of Land Tenure Rights Act.

The suggestion of Ngcobo J is valuable in as far as it indicates a method of retaining the cheap, speedy way of upgrading lesser rights in land into ownership. Especially the Development Facilitation Act could be useful in this regard, as it is aimed at overhauling the tedious process of rationalising and improving (on provincial level) the content of the laws inherited by the various provinces. The Development Facilitation Act addresses the need for legislation describing a common procedure which could be used nationally, in parallel to existing, inherited land development laws and procedures.[107] The Development Facilitation Act provides a national framework for the development of land in urban and rural areas for residential purposes, and for the grant of land tenure rights. It makes provision for the grant of land tenure rights and their registration with the Registrar of Deeds.[108] It also provides for the upgrading of informal settlements and for the conversion of "informal or unregistered tenure arrangements" into ownership.[109] However, the tenure upgrading function of the Development Facilitation Act, like that of the Upgrading of Land Tenure Rights Act, is based upon the rights created (under the *apartheid* policy) in terms of discriminating legislation. It therefore does not pass the standard that Ngcobo J sets.

It must be kept in mind that the question to be answered in the *DVB Behuising* case pertained to whether or not legislation about land tenure and land reform should fall within the exclusive competence of the national legislature. For the question about the appropriate approach to be followed by the courts in interpreting the property clause, the judgement of *DVB Behuising (Pty) Ltd.* v. *North West Provincial Government and others* can also be relevant. On the one hand, it indicates the inability of pure liberationist ideology to ensure social justice for and socio-economic upliftment of the marginalised masses of South Africans. On the other hand it indicates the anomalies lurking behind the application of libertarian ideology in the South African context.

3.3. The Regulation of Property

Legislative and administrative regulation of property is another element of the constitutional protection of property where the dichotomy between individual autonomy and the interests of the public in general could cause serious difficulties. Both the Interim and Final Constitutions implicitly provide for legislative and ad-

---

[107] J. Latsky, Development Facilitation Act, in: Budlender/Latsky/Roux (note 3), 2A-9.
[108] Chapter VII.
[109] S 63, Development Facilitation Act.

ministrative regulation of property. Before the regulation of property and its treatment by the court can be described, it is necessary to provide a brief description of the different terms used in this regard.

Regulation is the general term which refers to all permissible state interferences with patrimonial interests. The reference to deprivation of property in the South African context usually refers to regulation of property taking place without remuneration of the deprived holder. In contrast, expropriation of property usually takes place against payment of compensation to the deprived holder. It is a very severe form of regulation, through which the property itself (and not only specific patrimonial interests pertaining to it) is withdrawn. Contrary to expropriation, confiscation – which is also a severe form of the regulation of property and which also amounts to a large-scale withdrawal of proprietary interests – is not subject to financial reimbursement. Through confiscation, the holder of property forfeits it to the state (or confiscating public authority). Confiscation of property should be permissible only in a very limited number of cases, as it blurs the distinction between deprivation of property and expropriation.

Two aspects of the issue of regulation of property have enjoyed judicial attention in South Africa already. On the one hand, the circumstances under which legislative regulation of property are to be allowed have been discussed in the case of *Park-Ross* v. *Director: Office for Serious Economic Offences*.[110] On the other hand, an attempt was made at distinguishing legislative regulation of property from expropriation, albeit with little success, in the case of *Harksen* v. *Lane NO*.[111]

3.3.1. Legislative regulation of property

If property is regulated through the exercise of administrative power (as is mostly the case),[112] the deprivations clause[113] has to be read with the administrative justice clause[114] in the constitution for purposes of interpretation and analysis of the regulation. Regulation of property can, however, in some cases also be effected directly through legislation.[115] In *Park-Ross* v. *Director: Office for Serious Economic Offences*[116] this principle has been accepted by the High Court in the context of the Investigation of Serious Economic Offences Act[117] against the

[110] 1995 2 SA 148 (C).
[111] 1997 11 BCLR 1489 (CC).
[112] Chaskalson/Lewis (note 10), chapter 31, p. 9.
[113] I.e. s 28(2) IC; s 25(1) FC.
[114] I.e. s 24 IC; s 33 FC.
[115] Chaskalson/Lewis (note 10), chapter 31, p. 9, refer to these as "non-administrative" deprivations.
[116] See note 110.
[117] 117 of 1991.

background of the Mossgas project for exploration and production of oil and gas off the Mossel Bay coastline.[118]

The case concerned an investigation into the constitutionality of s 5, 6 and 7 of the Investigation of Serious Economic Offences Act, which provided for the seizure and removal of documentation pertaining to alleged economic offences. The applicants *inter alia* averred that s 6 of the Investigation of Serious Economic Offences Act (which provided for search and for seizure of documentation) offended s 28 IC and was therefore unconstitutional. The purpose of the search-and-seizure infringement on the right to property and the right to privacy[119] thus had to be considered by the court. In his decision, Tebbutt J accentuated the provision in s 28 IC that a deprivation may occur in accordance with a law, and found that s 6 of the Investigation of Serious Economic Offences Act [120] is such a law. The discussion concluded with the observation that it had to be accepted that property can be seized and removed pursuant to permissible searches.

Thereby it was indicated that search-and-seizure constitutes a permissible legislative infringement of property rights.[121] Moreover, it has been confirmed that a consideration of the public good is present in the enquiry as to whether or not an infringement of property rights has occurred. Individual autonomy over property must, under these circumstances, give way to the interests of society in matters related to the prevention and sanctioning of economic offences.

3.3.2. The distinction between expropriation and regulation of property

Both the Interim and Final Constitutions in principle provide for the possible deprivation of property, as well as for expropriation of property, leaving the task of circumscribing these concepts to the courts. A rather clumsy attempt at elucidating the distinction between deprivation of property and expropriation has been made by the Constitutional Court in the ruling of *Harksen* v. *Lane NO*.[122]

---

[118] The case resulted from alleged irregularities in an agreement between Soekor (Pty) Ltd. (which was a company involved in the Mossgas project for the exploration and production of oil and gas), and another company, Southern Oceanic Services (Pty) Ltd. Soekor awarded a three-year sub-contract to Southern Oceanic Services for management of an oil drilling rig. It later appeared that a top management employee of Soekor was a shareholder and had an interest in Southern Oceanic Services, without the knowledge of Soekor. This employee, one Oosthuizen, had been instrumental in the conclusion of the contract. Consequent to an investigation in the irregularities by a firm of chartered accountants, an inquiry as contemplated in s 5 of the Investigation of Serious Economic Offences Act was lodged. Upon acquiring the necessary authorisation, the offices of Southern Oceanic Services and the homes of several of its employees were raided and a substantial number of business records and documents were seized and removed.

[119] S 28 IC and s 13 IC.

[120] 117 of 1991.

[121] 168G-I.

[122] See note 111.

The case involved the vesting of the property of the solvent spouse in the Master[123] of the Cape of Good Hope Provincial High Court in terms of s 21(1)[124] of the Insolvency Act. It was contended that s 21 of the Insolvency Act violated the equality guarantee (s 8 IC), and the property guarantee (s 28 IC). The case was eventually decided on the basis of s 8 IC.[125] With regard to s 28 IC, however, the court had to decide whether the applicant's argument held true that s 21(1) of the Insolvency Act amounted to an expropriation in terms of the Interim Constitution. If this were the case, the expropriation would not be justifiable, as the legislation did not provide for compensation.

In deciding that s 21 of the Insolvency Act did not amount to an expropriation of property, Goldstone J described the main difference between deprivation and expropriation as that the former falls short of the requirement that rights in property must be acquired by a public authority for a public purpose,[126] which characterises an infringement in the latter case.[127] Moreover, according to the court a deprivation of rights in property which fell short of including transfer of ownership, did not amount to expropriation. The court held it unnecessary to decide whether the expropriation was for a public purpose as required by s 28(3) IC, and whether the vesting of the property involved a public authority. It nevertheless assumed that the appropriation by a public authority is a constitutional requirement for expropriation. Further, the court took notice of the fact that the limitation in s 21 of the Insolvency Act is only of a temporary nature, and on this basis argued[128] that, even if this section does result in a transfer of the ownership of the solvent spouse's property to the

---

123 I.e. the administrative officer of the Supreme/High Court responsible for, *inter alia*, the interim administration of an insolvent estate until such a time as a trustee can be appointed to handle sequestration or liquidation thereof.

124 S 21(1) of the Insolvency Act: "The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this section." The remaining subsections of s 21 of the Insolvency Act provide for the interests of the solvent spouse to be safeguarded in certain ways. Property of the solvent spouse may be released by the trustee in certain circumstances.

125 It was held that s 21 of the Insolvency Act was not in conflict with the equality guarantee or the prohibition against discrimination, par. 68.

126 On the basis of previous and foreign case law, the court declared that an expropriation amounts to more than a mere dispossession of property, and that appropriation by the expropriator is a requirement. See par. 32. The cases mentioned were *Beckenstrater* v. *Sand River Irrigation Board*, 1964 4 SA 510 (T) 515A-C; *Hewlett* v. *Minister of Finance*, 1982 1 SA 490 (ZSC); *Davies* v. *Minister of Lands, Agriculture and Water Development*, 1997 1 SA 228 (ZSC). These cases contained fundamental differences to the position in the *Harksen* case. It was, nevertheless, decided on the basis of this authority that the temporary vesting of ownership in the Master or trustee did not sufficiently fulfil the requirement of appropriation by the expropriator. See par. 35.

127 Par. 32–34.

128 Par. 35–37.

Master or trustee of the insolvent estate, the purpose of the section is not to acquire the property, but rather to ensure that the insolvent estate is not deprived of property actually belonging to it. Therefore, it was held, s 21 of the Insolvency Act cannot be described as permitting expropriation.

With this line of argument, the *Harksen* decision has only contributed to the dogmatic confusion pertaining to the distinction between deprivation and expropriation of property. For one, it could open the expropriation clause to the interpretation that the constitution requires expropriation to be permanent. Moreover, in setting appropriation by the expropriator as a requirement for expropriation, this decision could restrict the action of expropriation to tangible property only. This approach would be unnecessarily rigid.[129]

Even if a public authority had acquired a benefit from the specific regulatory action (which need not be the case), it does not follow that expropriation has taken place only if the public authority has acquired exactly the same benefit or interest lost by the expropriated party. The scope of the term expropriation or compulsory acquisition in the constitutional context cannot be reduced or restricted to either permanent physical dispossession or actual permanent acquisition by the state.[130] Neither the Interim Constitution, nor the Final Constitution provides the basis for such an approach. In s 28 IC in particular, the distinction between expropriation and deprivation of property is based on the fact that expropriations are subject to additional requirements not applicable to deprivations. The Interim Constitution thus guaranteed that no deprivation of (rights in) property would be permitted otherwise than in accordance with a law.[131] A similar provision is included in s 25(1) FC. In the case of expropriation, further requirements need to be met, according to both s 28 IC as well as s 25 FC: The expropriation has to be for a public purpose[132] and must take place against payment of compensation.[133] Neither permanence nor appropriation by the expropriator, being a public authority, is mentioned as requirements in the Interim Constitution. Not in the Final Constitution either, for that matter.

If expropriation is regarded as such a narrow concept that it includes only "formal" expropriation and requires the state (or expropriating authority) to actually acquire or obtain some benefit,[134] confiscation or forfeiture of property, also effected by the state, would have to be regarded as deprivations of property. This enables the legislature to "regulate" property to such an extent that the property rights of individuals can be completely withdrawn without the duty of compensation arising at all. In this manner, it blurs the distinction between state interference with property that are subject to payment of compensation and those

---

[129] Van der Walt (1999) (note 25), 338.

[130] A.J. van der Walt/H. Botha, 1998 SAPR/PL 20–21.

[131] S 28(2) IC.

[132] S 28(3) IC; s 25(2)(a) FC.

[133] S 28(3) IC; s 25(2)(b) FC.

[134] In other words including only formal expropriation. See the stance in *Harksen* v. *Lane NO* (note 111), par. 32.

that are not. Thus, the question of regulatory expropriation would have to be raised with regard to some kinds of confiscation or forfeiture, especially in the case where the loss affects an innocent owner in an exceptionally harsh and unfair manner.[135]

If the term expropriation is interpreted less restrictively, the fact that the state actually acquires some benefit or gain from a confiscation or forfeiture could be an indication that a specific infringement amounts to an expropriation. Appropriation by the expropriator need not be a requirement for justifiability of the action. Subject to the validity requirements of s 25(3) FC and the proportionality principle as incorporated in the general limitations clause (s 36(1) FC),[136] it might also indicate that compensation is payable (for instance, when the owner whose property is confiscated or forfeited was not involved with (and innocent of) the crime resulting in the confiscation or forfeiture).[137]

The court was not necessarily wrong in finding that s 21 of the Insolvency Act did not constitute an expropriation. However, the essential issue in the case was overlooked. The purpose of the vesting of property in the master or trustee in terms of s 21 of the Insolvency Act resembles the logic of a forfeiture or a confiscation of property more closely than it resembles the logic of an expropriation.[138] Consequently, the fact that the character of these provisions depends largely on their procedural function and their purpose of providing evidence, should have enjoyed more attention. The eminent legal question in the *Harksen* case should have been whether the temporary and preventive vesting of the solvent spouse's property could be regarded as a valid regulation (deprivation) of the rights in that property; and not whether such a temporary vesting amounted to an expropriation.[139]

Instead of elucidating the principles upon which decisions regarding the existence of the state's obligation to pay compensation for infringement on property rights could be tested, the court in the *Harksen* case chose a narrow approach toward expropriation. Thereby the court missed the opportunity to indicate in which ways the interests of society and the individual could be relevant in main-

---

135 Van der Walt (1999) (note 25), 342.

136 For a discussion of the nature of the South African proportionality test, see L. Blaauw-Wolf, 1999 SAPR/PL 178–214.

137 Van der Walt (1999) (note 25), 342.

138 The reasoning of the court in *Harksen* v. *Lane NO* (note 111) already indicates that s 21 of the Insolvency Act has a regulatory, rather than an expropriatory character: Goldstone J explained that the purpose of s 21 was to enable the master or trustee to ensure, for the sake of creditors of the insolvent estate, that property belonging to the insolvent estate should not be transferred unlawfully or fraudulently to the solvent spouse's separate estate. It therefore places the burden of proof of ownership upon the solvent spouse (par. 35). Thus, this section protects the public interest by ensuring that property of an insolvent estate is available for fair distribution, and that property is not disguised or withheld fraudulently.

139 This question was never considered, due probably to the argumentation of the applicant, who did not raise this issue during the proceedings. Instead, the applicant chose to build her attack only upon averments that the vesting amounted to an expropriation. Van der Walt (1999) (note 25), 337–339; See van der Walt/Botha (note 130), 17–41.

taining a distinction between expropriation and other types of regulation of property. This is unfortunate, as a clash between the libertarian and liberationist approaches to property could probably occur in an attempt to decide exactly how much regulation of property would be permissible. After all, it is exactly in this field where the two human rights traditions show the least concurrence.

3.4. Significance of Existing South African Case Law for Property Law Reform

The South African courts have not had many opportunities to formulate an approach towards the interpretation of the property clause. From the decisions that have been handed down, it is not easy to deduct a clear-cut approach either. Most of them were still decided upon s 28 IC, which differs to some extent from s 25 FC. What is clear, however, is that the task of effecting a more equitable division of wealth and resources among the members of the South African society through application and interpretation of the property clause is not a simple one. The compromises between libertarianism and liberationism underlying both the Interim Constitution and Final Constitution in general and s 28 IC and s 25 FC in particular, could make this task even more difficult.

On the one hand, the courts have the duty to protect the holders of patrimonial interests against unjustified interference with their rights by the state. This is the case even under the new, negatively formulated "right not to be deprived of property" of s 25 FC, as the Constitutional Court explained in the *Certification* case. It might, under certain circumstances, entail entrenchment of privileges built on *apartheid*. Moreover, the idea of treating property as a constitutional means to attain liberty creates the problem of continued unequal distribution of wealth in South Africa. This will cause continued political and economic inequality.[140] So it has to be decided sooner or later exactly how important individual autonomy in the context of property rights under the constitution is for the South African context.

On the other hand, the courts are compelled to give effect to the land reform, restitution and redistribution provisions, as well as to the property reform legislation enacted pursuant to s 25(9) FC. The constitutional drafters seemed to have recognised that the existing property law order could not be constitutionally entrenched in unaltered form. The provision made for a programme of land reform, restitution and redistribution within s 25 (5) FC to s 25 (8) FC once and for all confirmed the inability of the existing scheme of property law in South Africa – especially the law pertaining to land ownership – to deal with the injustice that has in the past been part and parcel of the South African legal and societal system. Yet, it will probably be difficult to exclude all historically "tainted" proprietary relations from constitutional protection, as is apparent from the difference in opinion expressed by the minority and majority judgement of

[140] I. Kroeze, Between Conceptualism and Constitutionalism 1997 (unpublished paper), 2.

DVB Behuising (Pty) Ltd. v. *North West Provincial Government and others* indicates.

The restitution of land taken away during the *apartheid* era is an issue which receives quite some attention in South Africa at the moment. The different approaches to "fundamental fairness" as is apparent from *DVB Behuising (Pty) Ltd.* v. *North West Provincial Government and others* might in future place the South African judiciary on the horns of a dilemma, should the issue of individual autonomy and societal interest in the context of land restitution arise for adjudication. Under these circumstances, it might not be easy to clearly delineate the degree of application of the different human rights traditions on a case to case basis. At least, however, the courts should not lose sight of the mixed ideological foundations of the South African Interim and Final Constitutions in general, and s 28 IC and s 25 FC in particular.

From the existing case law, it seems quite evident, for instance, that the right to acquire and hold property will be protected. But it is not at all certain exactly how far the courts will go in protecting a wider variety of proprietary relations. In private law, interests qualifying as property are unconditionally and absolutely insulated against interference and invasion not consented to by the owner.[141] As far as the constitutional concept of "ownership" or "property" is concerned, the inquiry has to go further than merely recognising the obvious protection usually afforded to owners in a private-law context. However, from the *Transkei Public Servants* case it appears as if the courts will be very cautious in expanding the categories of protected interests.

In this regard the land-use rights foreseen to historically disadvantaged communities and individuals by s 25 FC provide a specific challenge to the courts. Already from the decision of *DVB Behuising (Pty) Ltd.* v. *North West Provincial Government and others*, it could be anticipated that the acknowledgement of newly created land rights in reform legislation and the meaning attributed to "fundamental fairness", will be an issue in which it might be difficult to reconcile the views of libertarians and liberationists. Some of the issues that will need attention in future are: (i) how much individual autonomy can be allowed when different persons hold different "rights in" one and the same piece of land; and (ii) to what extent the public weal will determine the content and scope of proprietary interests created by reform legislation that deserve constitutional protection.

The situation with the regulation of property could be even more problematic. It can well be expected that social reform legislation will encroach on existing property rights. Restrictions of property rights in terms of the deprivations clause could, for instance, include rent control legislation, orders of the Land Claims Court creating lesser rights in land without expropriating the land from its present owners, zoning regulations, restrictions imposed under legislation protecting the environment and demolition of buildings presenting health hazards.[142]

---

[141] A.J. van der Walt, The Constitutional Property Clause (1997), 66.

[142] Murphy (note 24), 45.

S 25(4) FC makes explicit mention of land reform and equitable access to natural resources as a public purpose against which extensive regulation of property (in the form of expropriation) can take place. This indicates that land reform and redistribution are important enough to make regulation and expropriation of property possible, even if existing property relations – and therewith also privileges built on *apartheid* – are protected through the property guarantee. In fact, in the *Certification* case,[143] the court also could find no inconsistency with universally accepted approaches to expropriation against an objection that s 25 FC allowed expropriation for purposes of land, water or related reform and not only where the use to which the expropriated land would be put would be in the interests of a broad section of the public.[144] However, it would probably be stretching it too far to attach such a narrow approach to expropriation that permanent physical dispossession or acquisition by the state would be a constitutive requirement, as was propagated in the *Harksen* case. This would show a serious disregard for the autonomy of the individual regarding his or her property, as it would enable whole-scale regulation of property without the payment of compensation. Such an ability of the state at regulatory expropriation should rather be kept at bay.

An analysis of the existing case law on property protection under the constitution creates the awareness that even in a society like that of South Africa – characterised by acute maldistribution of material means and opportunity (of which ownership in land forms an important part) – simplistic arguments along have/have-not lines will not elucidate or promote co-operation and interaction between the different constitutional perspectives of libertarianism and liberationalism. It might be useful, therefore, to turn to other jurisdictions for possible solutions to the problem of finding a workable compromise between the values of individual autonomy and social equality.

4. An Example from Germany

In view of the problems awaiting the courts in the formulation of an interpretative policy pertaining the constitutional protection of property, it might be useful to consider solutions to similar problems reached in other jurisdictions. After all, one of the few guidelines for interpretation provided by the Final Constitution in s 39(1)(c) FC is that

> "[w]hen interpreting the Bill of Rights, a court, tribunal or forum ... (c) may consider foreign law."

---

[143] Certification of the Constitution of the Republic of South Africa (note 44), par. 70–75.

[144] The method of determining compensation was also considered by the court. It was argued that compensation should be determined on the basis of market value, and not by having regard to the factors listed in s 25(3). The court acknowledged that it was not usual for a constitutional document itself to mention specific criteria upon which compensation could be determined. It found, however, that the approach taken in s 25 did not flout the universally accepted view that compensation had to be "fair", "adequate", "full", "equitable and appropriate", or "just", par. 73.

A similar provision was contained in s 35(1) IC for the taking into account of "comparable foreign case law". The use of legal comparison in the interpretation of the constitutional property guarantee certainly has some contributions to make to the solution of the problems in the South African context. A glance at the German system of constitutional property protection will show that the problem of having to deal with different ideological traditions incorporated within a single constitutional provision is not peculiar to the South African property clauses in s 28 IC and s 25 FC.

In the following paragraphs the German example will be briefly considered as a solution that could be applied to the South African problem. Unfortunately, it would go beyond the scope of the current exposition to provide an extensive analysis of constitutional protection of property in Germany. The aim of the following paragraphs is merely to sketch in a few words the German judiciary's approach to the balancing of individual autonomy and public interest in the context of constitutional property protection; and to provide an example of the problems with which the German courts and legislature were faced when they had to deal with the question of restitution of land after reunification of the Federal German Republic and the German Democratic Republic in 1990.

4.1. Balancing Individual Autonomy and Social Responsibility in Germany

The German constitutional order is an important example of a system where a working balance was struck by the courts between a classic-liberal policy (which is generally in favour of the individual) and social responsibility. Having to deal with hybridised ideological foundations to constitutional property protection themselves,[145] the German courts, in deciding whether to include or exclude specific patrimonial interests from the protective ambit of the constitution, orient themselves towards securing a sphere of personal liberty for the individual. Private

[145] The initial constitutional development of the German property concept under the Paulskirche Constitution and later the Weimar Constitution, and even the more circumstantial property concept of art. 14 of the Basic Law after 1949, also combined the function of individual security connected to private property with its social obligation. The Paulskirchenverfassung/Frankfurter Reichsverfassung that was drawn up during the time of the middle-class revolution, played a foundational role in later developments of a fundamental rights culture. Although it never entered into force, it was a positive constitutional development in Germany. Par. 164 of this constitution contained a liberal-naturalist justification of private ownership and set if off against the social function of property. This became characteristic for all consequent German property guarantees. Mention made of the "public weal" ("Wohl der Allgemeinheit") in art. 153 of the Weimar Constitution and the acceptability of infringements on individual property interests for the well-being of the general economy (e.g. infringements in the spheres of agriculture, monopolies and restraints of trade, as well as lease and interest rates) enjoyed quite some constitutional attention during the 1920s and 1930s. Also in the spheres of land utilisation (especially in connection with the protection of historical monuments) and established or exercised commercial activity, the jurisprudence of the courts pertaining to art. 153 of the Weimar Constitution is noteworthy for the manner in which the concept of property was thereby expanded. It provided a solid basis for the drafting of art. 14 GG. See G. Robbers. Introduction (1998), 39;

initiative of the individual must be fostered to such a degree that the individual accepts the responsibility for creating his or her own advantages. Simultaneously, however, participation in the development and functioning of the broader social and legal community must be effected.[146]

Therefore, the Federal Constitutional Court tests constitutional justifiability against a higher standard when the function of ownership as the means through which the individual can secure his material existence, independence and freedom is at stake.[147] In contrast, the court tends to grant the legislature more rope in the enactment of constitutionally justifiable regulating legislation when the social function[148] of ownership – the social responsibility of the state and the power to control the dangers and disadvantages of private autonomous use of property – is involved.[149]

Through the interplay of the liberty function and social function of property and the legislature's fluctuating leeway to regulate property, a system of differentiated protection of various property interests has developed from the constitutional directives of the German Basic Law. As such, property is subject to varying levels of scrutiny,[150] depending on the nature of the object of a specific property right and its importance for the individual as well as for the society at large. However, the social relevance of certain kinds of property has no influence on the concept of property in general.[151] It merely influences the courts' and legislature's

---

H. Rittstieg, Eigentum als Verfassungsproblem (1975), 241, 256–269, 278 et seq.; O. Kimminich, Eigentum – Enteignung – Entschädigung (1976), mn 7; J. Eschenbach, Der verfassungsrechtliche Schutz des Eigentums (1996), 33–37, 45–75; A. von Brünneck, Eigentumsgarantie (1984), 21–26, 32–39, 82 et seq.; S.E. Finer/V. Bogdanor/B. Rudden, Comparing Constitutions (1995), 37 et seq.; K.-B. von Doemming, R.W. Füsslein/W. Matz, 1951 Jahrbuch des öffentlichen Rechts der Gegenwart (NF), 146 et seq.

[146] P. Badura, Eigentum, in: E. Benda/W. Maihofer/H.J. Vogel (eds.), Handbuch (1994), mn 2; Van der Walt (note 25), 151; H.-J. Papier, Art. 14, in: T. Maunz/G. Dürig, GG Kommentar (1994), mn 1.

[147] BVerfGE 50, 290, 340. The legislature's legislative ability is therefore more limited in cases concerning property interests acquired through the holder's own labour or performance, as well as in cases concerning the alienation of property (because the capacity to dispose of property is elementary to the owner's freedom). B. Pieroth/B. Schlink, Grundrechte (1998), mn 933.

[148] An earlier draft by the Parliamentary Council that harbours the intent of this broad language reads: "Ownership entails a social obligation. Its use shall find its limits in the living necessities of all citizens and in the public order essential to society." This suggests that the legislator has been given a wide berth for the regulation of private property in the public interest. D. Kommers, Constitutional Jurisprudence of Germany (1997), 253.

[149] Albeit without giving detailed reasons: BVerfGE 80, 137, 150; BVerfGE 8, 71, 80; BVerfGE 21, 73, 83; BVerfGE 50, 290, 340 and 347. This trend is also echoed in literature on the topic of art. 14. See B.-O. Bryde, Artikel 14, in: I. von Münch/P. Kunig, GG Kommentar (1992), mn 63; W. Leisner, Eigentum, in: J. Isensee/P. Kirchhof, Handbuch VI (1989), mn 60, 61; etc. For example, ownership of means of production, which provides power over third parties, would typically fall into this category. See BVerfGE 79, 29, 41. Pieroth/Schlink (note 147), mn 933. Papier (note 146), mn 298 et seq.

[150] A.J. van der Walt, 1997 SAPR/PL 318; M. Thormann, Abstufungen in der Sozialbindung des Eigentums (1996), 211–225.

[151] *Ibid.*, 211.

duties to consider certain issues when attempting to regulate specific kinds of property.

The court, for example, on occasion struck down a federal statute that sought to limit the right of land owners to terminate garden plot leases.[152] Garden plots situated on the fringes of large cities and rented from land owners were once an important aspect of German social organisation. Therefore, it was argued by the state that limiting the land owners' right to terminate garden plot leases was consistent with the social duty of property and would be a valuable mechanism in resisting urban sprawl. In the light of changed economic conditions and developments in commercial agriculture, however, the court deemed the burden on the property owner to be too heavy in relation to the value of the protected interest. From this example, it becomes apparent that the courts will test legislative regulation of property rights by determining whether the legislature has properly considered either the specific nature of the property interest at stake, or the meaning of the property interest for the right holder, or even both.

4.2. The Challenge Set by Reform Legislation in Germany

Regardless of how well the structure of constitutional property protection has been worked out in Germany, the balancing of individual autonomy against the public weal remains a prickly issue, and the courts' attempts are not always equally successful. A recent example can be taken from the Federal Constitutional Court's treatment of the land restitution issue related to the confiscation[153] of vast amounts of land by the Soviet occupation regime in the eastern part of Germany (between 1945 and 1949) against the background of German reunification.

Large industrial enterprises and all estates larger than 100 hectares (for instance, the Junker estates of the aristocratic large land owners) were confiscated[154] by the Soviet occupation regime, the latter on the basis that owners of such vast landholdings were automatically regarded as enemies of the people.[155] Many thousands of holdings under 100 hectares were also confiscated. All in all, this constituted around 3,3 million hectares, one-third of the entire surface of the Soviet occupation zone.[156] Some 60% of the confiscated land was distributed to poor farmers who did not pose any political threat to the government,[157] and later forcibly organised into farming co-operatives.[158]

---

[152] BVerfGE 52, 1 (*Kleingärten*).

[153] A series of confiscations were effected under the "Bodenreform" programme, in order to lay the foundation for a socialist society. S. Pries, Neubauerneigentum (1993), 13.

[154] No compensation was paid. Pries, *ibid.*, 16.

[155] P.E. Quint, The Imperfect Union (1997), 125; Pries (note 153), 7–12.

[156] M. Southern, 1993 ICLQ 691.

[157] This property was referred to as "Neubauerneigentum", "Bodenreformeigentum" or "Siedlungseigentum". See Pries (note 153), 1–2; Kommers (note 148), 256.

[158] Pries (note 153), 26–34; 36–40.

Technically the confiscated property did not qualify as "foreign assets".[159] Further, the purpose of the confiscation was neither reparation, nor debilitation of the German national economy.[160] Consequently, it did not fall into any of the categories of confiscated property qualifying for compensation which were set earlier[161] by the Federal Constitutional Court.[162] Moreover, the Soviet Union and the German Democratic Republic refused to undo these confiscations during negotiations for reunification. Because of the vast amount of property involved, restitution of the property expropriated in the Soviet occupation period would have been socially counterproductive for reunification.[163]

The political decision not to allow restitution of property confiscated during the time of Soviet occupation from 1945 to 1949, was incorporated into the Unification Treaty[164] and the Joint Declaration on Property Issues.[165] However, this decision met with considerable resistance and was eventually challenged before the Federal Constitutional Court on the basis of art. 14 I GG, art. 19 II GG, art. 3 I GG and art. 20 III GG.

The court affirmed the validity of the provision in the Unification Treaty stating that the 1945 to 1949 expropriations were not to be undone[166] and concluded that the legislature had not exceeded its authority in giving constitutional endorsement to the decision not to return the expropriated property.[167] It argued that the Soviet occupation regime's confiscations deprived the original owners of any legal interest in the property,[168] thereby eliminating possible claims for restitution. However, the court adopted a mediating approach by mentioning the possibility that the Basic Law could be interpreted so as to require affirmative governmental action in favour of the original owners.[169] The social state principle might even, according to the court, require that the legislature provide an equalisation of burdens to some extent: not necessarily return of the property, but some degree of compensation to the former owners.

The core of the court's ruling, on the basis of the equality guarantee, also supported this point. Eventually it was decided that excluding the Soviet occupation

---

159 "Auslandsvermögen".

160 O. Kimminich, Die Eigentumsgarantie im Prozeß der Wiedervereinigung (1990), 81; Pries (note 153), 13.

161 In 1976 in BVerfGE 41, 126.

162 W. Leisner, 1991 NJW 1569 et seq., provides a discussion of the reasons forwarded by the Federal Constitutional Court for not granting compensation.

163 See Quint (note 155), 128.

164 Art. 41(1), Vertrag zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands – Einigungsvertrag – 31 August 1990, BGBl. 1990 II 889.

165 Gemeinsame Erklärung zur Regelung offener Vermögensfragen, 15 June 1990, BGBl. 1990 II 1273.

166 BVerfGE 84, 90.

167 The court sustained the validity of art. 143 over the objection that it amounted to an unconstitutional amendment to the Basic Law. 117–121.

168 BVerfGE 84, 90, 122–125.

169 126.

regime's confiscations from the restitution programme did not violate the principle of equality. However, it was further held that the equality principle also necessitated some kind of compensation to the original owners, albeit not at market value. Lesser compensation was regarded as reasonable in light of the government's other obligations incurred upon unification, such as the cost of economic renewal in the former German Democratic Republic.[170]

It is an open question whether the mediating technique employed by the court in this case, in which it chose no clear winners or losers, but rather sought to strike a compromise between the interests of parties on both sides of the former inner-German border, amounted to an acceptable solution in the specific case.[171] In the aftermath of the decision, disputes about the equitable amount of compensation to be paid to the original owners were worsened by the budget deficit of the state. After a few unsuccessful initial attempts,[172] legislation providing for compensation of owners whose property was expropriated during the period of Soviet occupation of East Germany was eventually enacted during 1994.[173] Fixed property would be compensated for up to a maximum of 10 % of its present market value. Consequently, a discrepancy of 90 % between restitution in money and restitution in kind would exist.[174] It is debatable whether this situation was foreseen or intended by the court and whether the solution is compatible with the equality clause of the German Basic Law.

4.3. Significance of the German Example for South Africa

For South Africa, the example of the German treatment of the restitution issues arising from the time of Soviet occupation indicates the extent of the problems related to balancing the interests of the individual (in freedom and autonomy) against the interests of society (in justice and equality). Sometimes, even a well-

---

[170] 130–131.

[171] See Quint (note 155), 139, for a summary of the polemical discussion that resulted from this decision.

[172] The first proposed statute of 1992 envisaged settlement payments that would not burden the federal treasury. According to this, original owners would be entitled to 1,3 times the worth of the property in 1935. A special tax was also to be imposed on original owners who received a return of expropriated property under the Unification Treaty. The tax, equalling one third of the actual value of the returned property, would be used to help finance compensation under the statute. This proposal was withdrawn in the face of severe attacks on it by some interest groups. A second proposal (in 1993) significantly increased the amounts offered as compensation, and omitted the planned taxation of property restitution. But compensation would not be paid in the form of immediate cash. That would have burdened the treasury too much. Instead, promissory notes payable after the year 2004 would have been issued, and a bonus would be paid if the property were to be used for investment in the east of Germany. This proposal also met with fierce opposition because it did not foresee compensation of the original owners in the form of real property of the state. Quint (note 155), 142.

[173] Gesetz über die Entschädigung nach dem Gesetz zur Regelung offener Vermögensfragen und über staatliche Ausgleichsleistungen für Enteignungen auf besatzungsrechtlicher oder besatzungshoheitlicher Grundlage, 27 September 1994, BGBl. I 2624.

[174] G. Fieberg, Legislation and Judicial Practice in Germany: Landmarks and Central Issues in the Property Question, in: Rwelamira/Werle (note 35), 87.

developed structure for the inquiry into constitutional property, like that of the German legal system, will not provide straight and simple solutions to the question of how individual autonomy should be balanced against the public interest with regard to property. This is particularly true for issues relating to land restitution.

Land restitution is not a matter merely of legal interest. The financial aspect attached to restitution is at least as trying as the legal matters. In Germany, one fifth of the population was involved in land restitution and compensation issues, and those issues were not always solved to the financial satisfaction of those involved. One can only wonder how the much less affluent South Africa will be able to afford restitution and compensation for four fifths of its population.[175]

It would, nevertheless, be wise not to turn a blind eye to the insights to be gained from solutions adopted by foreign jurisdictions after a process of trial and error. The fluctuating balance between individual autonomy and societal interest, that have been established by the German courts through the introduction of different levels of scrutiny of the legislature's leeway to determine the scope and content of proprietary interests and property regulation, could provide the South African courts with solutions to some of the property issues, provided that the German approach can be adapted to fit the socio-economic circumstances of the South African society.

5. The Way Forward

This paper set out to determine the effect of the South African judiciary's approach to the constitutional protection of property on the equitable division of wealth and resources among the members of the South African society. The interplay between individual autonomy and the public weal in the compromise between libertarianism and liberationism underlying s 25 FC and s 28 IC indicates that the courts' task of abstracting from the constitutional property guarantee a set of values according to which property law should function; and of monitoring compliance with these values, is not simple. Apart from the general constitutional principles[176] and the guidelines in the interpretation clause,[177] the court has very

---

[175] See K. Beavon, Land Ownership and Conflicting Claims: Germany 1937–1991, in: A Bernstein, UFresearch Summaries on Critical Issues (1993).

[176] The values on which the constitution is founded are expounded in the Preamble to the constitution. It refers, *inter alia*, to "heal[ing] the divisions of the past", establishing a society "based on democratic values, social justice and fundamental human rights"; and basing government "on the will of the people" and protecting "every citizen ... equally ... by law"; improving "the quality of life of all citizens and free the potential of each person"; and building "a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations".

[177] S 39 FC (Interpretation of Bill of Rights): (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.

little with which to work. Still, major socio-economic issues have to be tackled in South Africa through the chosen method of constitutionalism. Matters arising for constitutional adjudication in terms of the property clause, the equality clause, or the averments of property owners that their lives and liberty have been violated by some economic, social or political regulation, require judicial harmonisation of collective and individual interests.[178]

As far as the constitutional property guarantee is concerned, the basic premise of the South African Constitution is clear: property can be limited in terms of legal norms which are generally applicable, and a person can be deprived of ownership if the legal norm is not arbitrary. In the constitutional framework, an owner might still be free to act with his or her own property, but only within limits set by the interests of society.[179] Thus the constitutional protection of property results in an ongoing tension between the values underlying a democratic society – dedicated to the establishment of social justice and improving the quality of life of all its members[180] – and the privileged position of property right holders within the South African society.

Compliance to the urgent need for reconstruction and reparation (which are even explicitly commanded in the constitutional property clauses) will inevitably disturb existing property relations in South Africa.[181] If an attempt is made to develop the law according to a set of principles, abstracted from the constitutions themselves, in which land restitution and redistribution can take place against a consideration of the constitutional spirit of reconciliation, unity and compromise, but without discarding the importance of the institution of private property, many of the problems related to the constitutional protection of property could be satisfactorily solved.

In achieving such an aim, the courts could focus on the values that the two human rights traditions of libertarianism and liberationism share, rather than on the conflicting political and ideological baggage they carry. This might bring the realisation that political and economic equality in the sphere of land ownership cannot be effected merely by importing a short term policy of redistribution of wealth coupled with a disregard for individual autonomy. In the long term political and economic interests of the larger South African society, the law should still protect the institution of property by attaching fundamental importance to the value of individual freedom.

By interpreting the property guarantee so as to secure personal liberty for the individual, and tempering this liberty with obligatory participation in the development and functioning of the broader social and legal community, it might perhaps

(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.

178 Murphy (note 4), 391, 394.

179 J. Pienaar, Nuwe Sakeregtelike Ontwikkelings 1997 (Inaugural address), 6–7.

180 Preamble, FC.

181 Chaskalson/Lewis (note 10), chapter 21–31.

be possible to strike a working balance between libertarianism and liberationism in the context of s 25 FC. The willingness of the courts to continue the spirit of compromise and reconciliation established during the period of negotiations, will determine whether the attempts at striking such a balance will be successful.