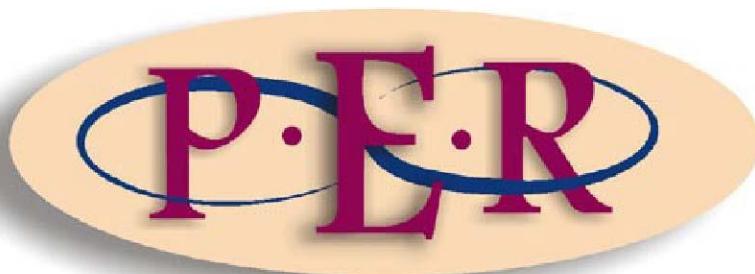


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eISSN 1727-3781



2015 VOLUME 18 No 4

<http://dx.doi.org/10.4314/pelj.v18i4.09>

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

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1 Introduction

Our purpose in this paper is to argue that, as far as the constitutional promotion and protection of social welfare is concerned, there are significant theoretical and systemic differences between property, land rights and housing rights. Our argument is shaped by the fact that these three sets of rights are recognised and protected separately in the *Constitution of the Republic of South Africa, 1996*.¹ but we argue that the theoretical differences go beyond variations between constitutions and bills of rights from different traditions and time periods. In our view, there are sound theoretical, and therefore also systemic, reasons why it is necessary to at least keep the differences between property, land rights and housing rights in mind when analysing, interpreting and applying any of these rights in a specific constitutional text. Above all, we argue that the reduction of housing rights to just another category of property rights might well reduce or even erode the special social, historical and constitutional value and meaning of housing rights. The outcome of such a reduction might very well be that opposing property rights will continue to outweigh and trump housing rights. A similar set of arguments applies to conflating land rights with property rights, at least in certain historical and social settings.

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¹ Hereafter the *Constitution*.

In this paper we first of all consider theoretical arguments concerning the relationship between property, land rights and social welfare. The thrust of our argument in this section is that a proper distinction between property, land rights and housing rights in the constitution should avoid the libertarian view that the constitutional guarantee of property rights is fundamentally opposed to or in conflict with efforts to promote social welfare. Instead, we offer theoretical arguments in support of the view that property rights (especially ownership) are fundamentally and inherently limited, both by constitutional provisions and by legislation promulgated to give effect to them, in ways that create space for the promotion of social welfare. We reject the theoretical perspective that starts out from the premise of absolute ownership and then proceeds to consider the justification of limiting property in favour of social welfare, for instance by way of protecting housing rights. The theoretical approach that we find more attractive starts out from the premise that property rights are inherently limited in various ways, including by way of constitutional and statutory limitations that are designed to promote social welfare, with the result that constitutional analysis is not restricted to the justification of limitations being imposed on ownership. Instead, constitutional analysis might often consist of considering justifications for upholding property rights at the cost of social welfare.

In view of the theoretical analysis, we proceed to consider the constitutional nature and status of property, land rights and housing rights in the South African context. We argue that both land rights (in the form of land redistribution and improved tenure security) and housing rights (in the form of the right of access to adequate housing) should be seen as discrete constitutional rights that stand on their own constitutional foundations and that they do not need to be protected as property rights. On the other hand, they are not fundamentally circumscribed or opposed by property rights either. Instead, the *Constitution* (as interpreted in case law) requires a new, typically constitutional methodology that gives full recognition and effect to all three sets of rights, each in its proper place. Seen from this perspective, property is neither the guardian nor the enemy of social welfare. Nevertheless, the purpose of the property clause in general cannot be isolated from social welfare concerns that relate to improved access to land and housing rights, nor from the constitutional imperative to

provide stronger land and housing rights. Important connections exist between these divergent constitutional imperatives that should be acknowledged to ensure the efficient realisation of social welfare concerns.

2 Theoretical analysis: property, land rights and social welfare

In the normative framework of social citizenship,² the notion of social welfare pivots on the idea that individuals (and, presumably, groups of individuals) have social rights that in some way shape social policy on the global, the nation-state and the non-state levels. Understood in this way, there is an intricate web of tensions between property and social welfare. On the one hand, a system of equitably accessible and distributed property is seen as a requisite for social welfare, while on the other hand proposed state intervention aimed at the equitable redistribution of property may be seen as a threat to extant property rights and thus, indirectly and insofar as security of property holdings from state interference is seen as a substantive liberal value, a threat to social welfare. An oversimplified analysis of these tensions could easily create the false impression that property is either the guardian or the enemy of social welfare.

In libertarian and similar rights-based theories this tension is portrayed in rather simplistic terms, the most extreme of which implies that the promotion of social welfare, as far as it finds expression in redistributive state action, poses a threat to the security and stability of extant private property holdings, which could disrupt economic, social and legal stability.³ From this perspective, the relationship between property and social welfare is probably best expressed in the form "property vs social

² As discussed by Davy, Davy and Leisering 2013 *Int J Soc Welf*, with reference to Marshall "Citizenship and Social Class".

³ In rights-based theory, guaranteeing property is a core reason for adopting a constitution, combined with a defensive understanding of constitutionalism that places a high value on state minimalism. See eg Epstein *Takings* ch 2 ("Hobbesian man, Lockean world") for a natural-rights perspective that regards the constitutional guarantee primarily as a defensive shield against state interference with private property. De Soto *The Other Path* 189-190 describes wasteful state regulation (in the form of state redistribution of resources) in comparable terms. Alexander and Peñalver *Introduction to Property Theory* 56 point out that Nozick and Epstein, the most important current Lockean theorists, "have taken us very far from the circumstances that motivated Locke to write the *Tow Treatises*. Instead of a theory of limited private property rights in the service of an argument for majoritarian government, twentieth-century Lockeans have offered us a theory of limited majoritarian government in the service of private property rights".

welfare",⁴ which indicates that the inherent tension between the two conflicting sets of goals (protecting extant property holdings and promoting social welfare) involves a choice that will favour one side and harm the other.

However, the tension between property and social welfare does not have to be seen in such a pessimistic, confrontational way. From a progressive viewpoint it is said that private property is so important for human welfare that it should be distributed as widely as possible, with the consequence that the equitable distribution of property is just as important as the protection of extant holdings.⁵ This perspective does not eliminate the tension between property and social welfare: insofar as social welfare requires state intervention to ensure a more or less equitable distribution of some or all resources, at least some property will inevitably be taken away from the haves to be redistributed to the have-nots.⁶ However, progressives who favour social-welfare redistribution will present policy-making and administrative and judicial choices between conflicting property and social-welfare interests in terms of a balancing process that is aimed at rationalising the choice between the conflicting interests and minimising the harm that results from it.⁷ The balancing process is intended to remove some of the sting of the redistributive intervention.

In his work on property theory, Alexander⁸ explains the relationship between property and social welfare from a particular iteration of the progressive-property perspective,

⁴ See eg Epstein *Takings* 319: "The fundamental problem in a system of welfare is that it conflicts with the theory of private rights that lies behind any system of representative government"; 322: "The basic rules of private property are inconsistent with any form of social benefits"; 324: "With the possible exception of charitable deductions, the eminent domain clause in principle forecloses virtually all public transfer and welfare programs, however, devised and executed, except in very narrow and limited circumstances captured by the police power and implicit in-kind compensation".

⁵ See eg Barros 2009 *NYU JL & Liberty* 50-51; Amar 1990 *Harv JL & Pub Pol'y* 37.

⁶ At the moment we are not specifying the form that redistribution might assume; as appears below, it can adopt a range of forms such as large-scale regulatory regime changes, expropriation of individual property holdings and individual regulatory title adjustments.

⁷ See eg Merrill "Private Property and Public Rights" 98 (explaining that one of the normative guidelines for choosing between public rights doctrines is subsidiarity, which means that one should select the doctrine that corrects the problem with the least interference with private rights).

⁸ See most recently Alexander 2014 *Iowa L Rev* 1260. Elsewhere Alexander explains that his human flourishing theory rests on two related characteristics, namely that human beings develop the capabilities that are necessary for a well-lived and distinctly human life only in society with other human beings; and that human flourishing at least includes the capacity to make meaningful choices among alternative life horizons, to discern the differences between them, and to deliberate deeply about what is valuable within those alternatives: Alexander and Peñalver 2009 *Theo Inq L*;

which describes what might otherwise be understood as social welfare in terms of a neo-Aristotelian, value-ethics theory of human flourishing. On the one hand, he identifies human flourishing, defined as the opportunity for a person to live a life that is as fulfilling as possible, as the normative foundation of property. On the other hand, he insists that the values that are among the intended ends of private property, such as individual autonomy, personal security, and self-determination, are not incompatible with fundamental public values. In fact, at times the realisation of private-property values requires the recognition of public values.⁹ Human flourishing includes both private and public values; a perspective that at least seems to remove the debate from the binary property-vs-regulation logic of libertarian and rights-based theory. In line with the notion that property's ends are both private and public and in response to the argument that governance strategies¹⁰ feature only on the periphery of the property system,¹¹ Alexander¹² explains that many or perhaps even most property institutions include some kind of governance property that requires governance norms. Human flourishing is promoted by a social-obligation norm that recognises the relational nature of human flourishing in society: to avoid self-contradiction, we must make the same normative commitment to developing the capabilities that are required for human flourishing in others as we commit to developing in ourselves. This social-obligation norm implies a commitment to social welfare that is deeply embedded in the very notion of property:

If human capacities such as survival (including physical health), the ability to engage in practical reasoning, and to make reasoned decisions about how to live our lives are components of the well-lived life, then surely we are all obligated to support and

Alexander 2009 *Cornell L Rev* 760-773. Alexander emphasises that human flourishing is pluralistic (in the sense that there is not a single, irreducible, fundamental moral value to which all other values can be reduced) and objectivist (in the sense that value determinations are not simply a matter of "agent sovereignty").

⁹ Alexander 2014 *Iowa L Rev* 1260.

¹⁰ Defined with reference to regulatory limitations that restrict the property owner's core right to exclude others. See Merrill and Smith 2001 *Columbia L Rev* 791-792 (explaining the choice between exclusion and governance as strategies for regulating the use of resources).

¹¹ Merrill and Smith 2001 *Yale LJ* 359; Merrill and Smith 2007 *Wm & Mary L Rev* 1850; Smith 2009 *Cornell L Rev* 963-971.

¹² Governance property is described as multiple-ownership property and governance norms as devices that regulate the internal relations of ownership: Alexander 2012 *U Pa L Rev* 1856.

nurture the social structures without which those human capabilities cannot be developed.¹³

In practice, this means that private property holding does not take place in an exclusionary private enclave – even individual property holding is deeply embedded in a larger social process of participation in and support for the social structures that develop those human capabilities that make human flourishing possible.¹⁴

Alexander's human-flourishing argument could easily be misconstrued as a variation of the libertarian argument that property is in fact the guardian of all other rights, including social welfare rights. However, that would miss the point of the progressive-property argument. The fallacy is illuminated by another progressive-property scholar, Singer, who argues that although property is important for individual liberty, regulation (including what we might call social-welfare regulation) is an inherent part of property,¹⁵ with the result that there is no room in the progressive-property theory for the notion that liberty is best secured in a system that is as free as possible of state intervention. The security and independence that property ownership brings, Singer explains, increase our individual liberty by giving us the space and the resources to lead our lives according to our own design, but a free market society will very likely

¹³ Alexander 2009 *Cornell L Rev* 769. At 770 Alexander acknowledges that the social obligation cannot be a matter of strict reciprocity, at least not in the particulars of what we give back or to whom. The reciprocal obligation finds expression in the more abstract notion of citizenship (Alexander 2009 *Cornell L Rev* 771).

¹⁴ Alexander 2009 *Cornell L Rev* 773-815 argues that to some extent, albeit partially and confusingly, both private and public American property law has internalised, in the form of legal doctrines that can best be explained as social-obligation practices, the idea that private property owners owe "thick responsibilities" to the communities to which they belong. In support he refers to examples that include eminent domain, nuisance remedies, land reform (in South Africa), historic preservation regulation, environmental conservation regulation, access restrictions on the right to exclude, and some examples from intellectual property law. At 815-818 Alexander analyses examples of two broad limits of the social-obligation norm, namely limits (such as autonomy interests) that are inherent to the norm, and limits that are based on prudential concerns about the proper scope of enforcement of moral norms when a weighty countervailing interest is present to oppose autonomy interests.

¹⁵ Singer 2006 *Harvard Environmental LR* 311 arguably describes the role of state regulation in more expansive terms. Alexander 2014 *Iowa L Rev* 1261 argues that private law "is sufficiently capacious to include public law's values and to operationalize them itself", and that certain disputes involving public-law values can therefore "be resolved solely on private law grounds without resorting to state involvement (other than as the facilitator for dispute resolution through its courts)".

leave many people outside of the ownership class unless state regulation "mitigate[s] the inequalities" that individual ownership and the market society generate.¹⁶

From Singer's perspective, property and regulation are not alternatives between which we choose or that we have to balance against each other – the very property system itself is a form of regulation.¹⁷ Consequently, instead of thinking about the regulation of property in terms of libertarian (defensive) or utilitarian (balancing) metaphors,¹⁸ Singer proposes a model of property that "starts from the idea that owners have obligations as well as rights. The image that supports this notion is that of a citizen in a free and democratic society".¹⁹ In this model, property is "the law of democracy",²⁰ which means that property must reflect and must be accountable to the fundamental choices we make in favour of living in a democracy characterised by dignity and equality. Like the law of democracy, "property law is a constitutional problem because the norms and values of a free and democratic society limit the kinds of property rights that can be created".²¹ In other words, property is circumscribed, defined, by the demands of living in a democratic society – the structure of democracy is both the condition for and the guarantee of property. Instead of characterising it as a *post hoc*, external threat to extant property holdings, Singer's progressive theory portrays the social-welfare regulation of property as the very foundation that makes a system of property holding possible, because it creates the democratic structure within which we choose to live.

In the progressive-property theory espoused by Alexander and Singer, property is inherently defined and limited by fundamental social-welfare values and obligations

¹⁶ Singer 2006 *Harv Envtl L Rev* 311. Singer cites authors who echo a similar view: Michelman 1992 *U Chi L Rev* 99; Singer *Entitlement* 141; Waldron *Right to Private Property* 4-5. In much the same vein on this point see Barros 2009 *NYU JL & Liberty* 50-51.

¹⁷ Singer 2006 *Harv Envtl L Rev* 312: "... government action is needed to allocate initial entitlements, to define the bundles of rights that accompany ownership, and to adjudicate conflicts among owners and between property rights and other legal entitlements. Moreover, many forms of regulation exist precisely because they protect property rights".

¹⁸ Singer 2006 *Harv Envtl L Rev* 314 explains the libertarian metaphor with reference to the owner of a castle who supremely controls all that goes on within its walls, and the utilitarian metaphor with reference to an investor in a market economy who is entitled to the legitimate expectations flowing from his investment.

¹⁹ Singer 2006 *Harv Envtl L Rev* 314.

²⁰ Singer 2014 *Duke LJ*. See also Singer 2009 *Cornell L Rev*.

²¹ Singer 2014 *Duke LJ* 1304.

that are crucial to social citizenship, to life in a social structure, to a democracy, that makes it possible to live the fully human life-in-society they both value. In their theory, the social obligation that defines and limits property finds expression in governance institutions, structures and strategies; in other words in the state regulation (by the common law or legislation) of the acquisition, use and disposal of property. Stated differently, the regulation of property embodies the intricate web of tensions between property and social welfare to the extent that it expresses the complex interplay between the protection of property as a locus of human flourishing and the entrenchment of the social obligations of property owners as a matter of social citizenship. The relationship between property and social welfare is neither dependence (property is the guardian of social welfare) nor opposition (social welfare threatens the liberty inherent in property), but rather a systemic issue of correctly identifying and assessing the proper place of each in the democratic, constitutional and legal system.

This explanation of the relationship between property and social welfare, inspired by progressive-property theory, rejects the over-simplification of libertarian and rights-based theory and implies a definitive choice against absolutist approaches to the dilemma of property and regulation. However, it gets more complicated when one considers the role and effect of constitutional or statutory guarantees of property, land rights or housing rights. On the one hand, a constitutional guarantee of property can create (or reinforce) the libertarian impression that the property interest is in the first place about autonomy-enhancing individual liberty, with the concomitant effect that the regulation of property acquires the air of posing a threat against autonomy and personhood. Both Singer and Alexander explicitly include constitutional issues such as eminent domain and regulatory takings in their analysis, so as to preclude exactly that impression. For the sake of argument we will follow their example and simply assume, on the basis of the preceding overview and without further argument, that the mere presence of a property clause in a constitutional bill of rights does not create a presumptive hierarchy in favour of unlimited property and against state regulation of property. Instead, we take for granted Singer's portrayal of property as the law of democracy, with the implication that both the use- and social-welfare regulation of

extant property rights does not threaten otherwise supposedly unrestricted property holdings but in fact embodies the web of tensions between property and social welfare that both constitutes and circumscribes the possibility of a private property regime embedded in constitutional social structures. We therefore also subscribe to the German Federal Constitutional Court's interpretation of the property clause in the *Grundgesetz (GG)*,²² according to the question of whether the inclusion of a specific object or right under the protection of article 14 *GG* would serve the constitutional purpose of creating and protecting a sphere of personal freedom where the individual is enabled (and expected to take responsibility for the effort) to realise and promote the development of her own life and personality, within the social context.²³ As the Court has shown in its developing case law, the property guarantee does not insulate private property against state regulatory action. Instead, it creates and protects a sphere of personal freedom described in the laws that determine the content and limits of property, within which private property holding is both possible and justified in its proper social context, which explicitly includes the promotion of social welfare.²⁴

It nevertheless becomes more complicated when social-welfare rights, and especially land rights and housing rights, are either explicitly guaranteed in the bill of rights or linked with the property-and-social-welfare debate, especially in a context where land and other social reforms are high on the constitutional agenda. The constitutional guarantee or strengthening of previously non-existent or under-valued land (and

²² *Basic Law for the Federal Republic of Germany (Grundgesetz für die Bundesrepublik Deutschland)* 1949.

²³ The principle was explained in BVerfGE 51, 193 (*Warenzeichen*) 218.

²⁴ The implications of the Court's view for the relationship between private property and social welfare have been worked out in a wide range of decisions. For the present purposes the decision in BVerfGE 89, 1 (*Besitzrecht des Mieters*) is particularly important, but the two *Kleingarten* decisions (BVerfGE 52, 1 (1979); BVerfGE 87, 114 (1992)) are also interesting. After World War II urban landlords (in many cases local authorities or churches) attempted to regain the use of land on which garden allotments had been established during the war, intending to use it for much-needed building and development. The Court argued that the garden allotments were important for lessees who still relied on food grown there for survival. Consequently, the low rentals and anti-eviction measures that applied during World War II were upheld, even where contractual lease periods had run out, as long as the lessees desired to retain the use of the gardens and were willing to pay the nominal rent. When it was argued decades later that the initial reasons for the protection of the lessees of garden allotments were no longer applicable, and after it was demonstrated that only a few lessees still used the gardens to grow food, the Court acknowledged the change in socio-economic circumstances, relaxed the controls on eviction and made it possible to charge reasonable rent, but nevertheless upheld some protection of the lessees because of the new socio-economic importance that the gardens had acquired in the urban context.

housing) rights can paradoxically replicate the absolutism-regulation debate in the context of new (or newly recognised and guaranteed) land and housing rights. Explicitly guaranteeing land and housing rights in the bill of rights also creates the interpretative and strategic problem of sorting out the relationship between the general property guarantee and specific land and housing rights.

Our approach is that a constitutional analysis of land and housing rights granted or upgraded in terms of a constitutionally driven social-welfare programme should not get stuck in the false "property vs social welfare" binary that characterises libertarian and rights-based property theory, nor should it adopt the facile assumption that the constitutional property guarantee is the strongest right and that other rights, such as land and housing rights, should be brought under its protective umbrella. Instead, we propose to discuss land and housing rights in South Africa from a different perspective. Our starting point is that a constitutional text like the South African *Constitution*, which is explicitly transformative in its purpose, structure and individual provisions, must be approached as a deliberate embodiment, in the sense expressed by Alexander and Singer, of a web of transformation-oriented tensions between property and social welfare. To establish the pivot point between property, land rights and social welfare, one has to start with the constitutional text and legislation that has been promulgated to give effect to the relevant social-welfare rights.

In the following section we first consider land rights in the form of land redistribution and improved tenure security in the South African *Constitution*. Our aim is to illuminate the discrete constitutional nature and status of these rights and to demarcate them from both property in general and housing rights. We also highlight overlaps where the constitutional land rights (both redistribution and tenure security) support or reinforce housing rights.

3 Property and land rights in the *Constitution*

3.1 *Introduction*

The most important provisions in the *Constitution* for an analysis of the relationship between property and land rights are section 25 and section 26. Section 25, the

property clause, is somewhat unique in its structure. The first three subsections protect extant property rights against unconstitutional state interference in the form of arbitrary deprivation (subsection 25(1)) and uncompensated expropriation (subsections 25(2) and 25(3)). The final five subsections legitimate and promote land and related reforms (subsections 25(5) to 25(9), read with the interpretation provision in subsection 25(4)).²⁵ The land-reform provisions in subsections 25(5)-(9) reflect the constitutional assembly's intention that land reform should be an inherent part of the property clause, rather than an external limit placed upon it. Land reform, as it is foreseen in section 25, includes the restitution of land rights that were lost as a result of racial policies and laws under apartheid;²⁶ a wider and more general process to

²⁵ The full text of s 25 of the *Constitution*:

Property

25.(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 restitution of that property or to equitable redress.

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

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

For a discussion of the section see Van der Walt *Constitutional Property Law* 15-22.

²⁶ S 25(7) of the *Constitution*.

promote the redistribution of and equitable access to land;²⁷ and a process of amending the laws so as to secure land titles and land-use rights that were insecure because of apartheid laws and practices.²⁸ In all three cases, legislation is required to bring about the changes foreseen in land reform policies.²⁹ On the surface, these provisions may seem to conflict with or even contradict the protective provisions in subsections 25(1)-(3), in the sense that both regulatory limitations imposed on extant property holdings (for instance to promote the security of tenure of non-owners) and the expropriation of private land (for the purposes of restitution or redistribution) will inevitably affect the security of extant land holdings. The first part of the property clause (subsections 25(1)-(3)), which protects extant property rights, may even seem to conflict with the last part (subsections 25(5)-(9)), which authorises land reform.

However, it is possible to read the section as a coherent whole that embodies a creative, transformation-oriented tension without being contradictory. Such a coherent, non-conflictual approach presupposes purposive interpretation of the section.³⁰ The Constitutional Court made it clear in *Port Elizabeth Municipality v Various Occupiers*³¹ that section 25 should be interpreted as such a coherent whole, within its historical and constitutional context. Seen in this purposive perspective, section 25 fulfils a double function, namely to protect property and also to promote land and related reforms, which means that the two elements of section 25 embody a creative tension rather than a fundamental conflict.

The property clause cannot be interpreted purposively without considering the historical and socio-political context. The *Constitution* promotes legitimate efforts to overcome and repair the injustices of the past, including land and related reforms. In

²⁷ Section 25(5) of the *Constitution*.

²⁸ Section 25(6) of the *Constitution*.

²⁹ A wide range of legislation has been enacted to give effect to the constitutional land reform provisions; see eg the *Restitution of Land Rights Act* 22 of 1994 (restitution); *Land Reform (Labour Tenants) Act* 3 of 1996; *Communal Property Associations Act* 28 of 1996 (redistribution); *Extension of Security of Tenure Act* 62 of 1997; *Prevention of Illegal Eviction from and Unlawful Occupation of Land Act* 19 of 1998 (PIE); *Interim Protection of Informal Land Rights Act* 31 of 1996 (tenure security).

³⁰ Du Plessis "Interpretation" 52-56 provides an overview of case law in which purposive interpretation was adopted and explained.

³¹ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

this historical and constitutional context, land reform cannot be seen as an extraordinary imposition on property rights that are basically protected by section 25. Extant property holdings are indeed protected against arbitrary deprivation and uncompensated expropriation, but then in the context of "... the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past", with the result that the purpose of section 25 is "... both ... protecting existing private property rights as well as serving the public interest ... and ... striking a proportionate balance between these two functions".³² Regulatory policies and laws aimed at land and other reforms can therefore not be seen as extraordinary, *ex post* interferences with basically guaranteed extant property holdings simply because they imply that those property holdings are subject to certain limitations. Rather, both the guarantee of the extant rights and the limitations that are imposed by constitutionally-inspired policies and laws must be seen as parts of the same whole.

Section 25 can therefore be interpreted in a way that echoes the progressive-property views of Alexander and Singer, namely that the constitutional protection of property does not contradict or conflict with, but in fact coincides with the promotion of social welfare, at least insofar as social welfare is understood to include land reform. Consequently, legislation enacted to give effect to the land reform provisions in section 25 must be interpreted and applied as part of the intricate web of transformation-oriented tensions that section 25 creates and upholds. The courts have decided several times that specific provisions in land reform laws, if interpreted from this constitutional perspective, do not conflict with the protective function of the property clause.³³ To that extent, section 25 can be said to authorise and require a progressive-property approach to the relationship between extant property rights and land reform.

3.2 *Redistribution and tenure reform*

³² *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 15-16.

³³ See eg *Transvaal Agricultural Union v Minister of Land Affairs* 1997 2 SA 621 (CC) (ss 11(7) and 11(8) of the *Restitution of Land Rights Act* 22 of 1994 are not in conflict with s 28 of the *Constitution of the Republic of South Africa* 200 of 1993); *Nhlabathi v Fick* 2003 7 BCLR 806 (LCC) (s 6(2)(dA) of the *Extension of Security of Tenure Act* 62 of 1997 is not in conflict with s 25 of the *Constitution*).

From both a global social welfare perspective and the domestic welfare-orientated transformation imperative, the state's obligation to enable citizens to gain access to land on an equitable basis is a central mechanism aimed at assisting previously displaced groups and individuals to establish a place to live and participate in larger social structures.³⁴ During the early 1990s the pre-1994 government already identified greater access to land as an important social objective, and a number of laws were enacted to serve this purpose.³⁵ The redistribution strategy was entrenched in section 25(5) of the *Constitution* as part of the land reform programme and has found further support in a number of post-1994 laws.³⁶ Redistribution as a land reform strategy targets the poor,³⁷ in general, and certain rural dwellers, such as labour tenants and farm workers in particular,³⁸ with the purpose of improving their access to land for residential and productive uses.³⁹ The constitutional mandate of increased access to property in the form of land for housing or productive uses has an inherent social-welfare objective, because it is aimed at marginalised individuals and groups. The distribution of this type of property serves the social objective of enabling the

³⁴ Pienaar 2014 *TSAR* 428 mentions that access to land is important to establish social and economic stability in an everyday livelihood.

³⁵ A number of early laws made provision for greater access to land. The *Distribution and Transfer of Certain State Land Act* 119 of 1993 provided that state land could be transferred to a number of persons with the help of a commissioner and that no administrative fees, including registration fees, were due: ss 2, 4 and 15. The *Less Formal Township Establishment Act* 113 of 1991 made provision for the enhanced designation of and establishment of townships, for less formal forms of residential settlement. The Act served as an expedited measure to facilitate urgent settlement needs in terms of which the developer of the land could allocate an erf on the land to a person for settlement, while the local authority owned the land (see specifically ss 3 and 8 of the Act). It is noteworthy that neither of these laws specifically regulated the occupation rights of the occupiers, which leads one to assume that they were in fact of an informal kind. The *Land Reform: Provision of Land and Assistance Act* 126 of 1993 goes one step further and adds that the developer of designated land for settlement purposes may sell or lease a piece of land to any person. In addition, the Minister may provide financial assistance to a prospective buyer or lessee.

³⁶ See for instance the *Development Facilitation Act* 67 of 1995 and the *Extension of Security of Tenure Act* 62 of 1999.

³⁷ Carey Miller and Pope 2000 *JAL* 181.

³⁸ See specifically the Department of Land Affairs *White Paper*.

³⁹ Department of Land Affairs *White Paper* 4.3. It seems that the redistribution strategy is specifically aimed at beneficiaries that reside in rural areas. This is by no means accidental, since the Land Reform Pilot Programme that was released in October 1994 already stipulated that the Reconstruction and Development Programme (RDP) identifies land reform as "the central and driving force of a rural development programme": Department of Land Affairs *Land Reform Pilot Programme* 1. Nevertheless, this does not mean that the redistribution strategy should find application only in rural areas. See specifically Viljoen (part 1) 2014 *TSAR* 362-367 for the argument that redistribution has an important role to play in both rural and urban areas.

previously dispossessed to have a space to live and to flourish as active participants in society.⁴⁰

An integral aspect of this strategy is the manner in which the property for this social objective should be obtained by the state and subsequently redistributed. The property clause explicitly stipulates that the public interest requirement for a valid expropriation includes the nation's commitment to redistribution,⁴¹ which conveys a clear message regarding the link between the extinction of specific extant property holdings and their transfer to land-reform beneficiaries under the auspices of the land-reform commitment to redistributive justice. The institution of private property has a central role to play in both the political agenda of redistributive justice – in the sense of taking from those that have and giving to the have-nots – and the idealistic socio-economic purpose it fulfills in redistributing wealth and ensuring stability for the sake of human flourishing. In this sense the institution of private property is viewed as a mechanism that can correct wrongs of the past. However, the mere acquisition of private property does not necessarily guarantee greater social welfare, since households' actual needs, seen in their proper context, might go well beyond the acquisition of private property.⁴²

⁴⁰ This redistribution mandate was crafted against the backdrop of the entrenched notion of market-based negotiation and settlement, which resulted in the willing-buyer-willing-seller principle: Pienaar 2014 *TSAR* 429. Also see Viljoen (Part 1) 2014 *TSAR* 360-362 for a discussion of this policy and the effects that it has had over a number of years.

⁴¹ Section 25(4)(a) of the *Constitution*. Redistribution is essentially based on "willing buyer, willing seller" arrangements, while the role of the state is restricted to assisting the landless with the purchasing of land without being the purchaser or the owner. Instead, the state takes on an administrative role as the facilitator in land acquisitions – generally making land acquisition grants available and therefore financing the planning process: Department of Land Affairs *White Paper* 4.3. Even though this approach might have had some success, it does not meet the target that the government has set for its redistribution strategy: Carey Miller and Pope 2000 *JAL* 182.

⁴² Part of the ANC's initial housing policy was to introduce and develop a variety of tenure forms that would provide access to housing and grant secure tenure, but individual ownership has been the main form of tenure delivered in urban areas: Royston "Security of Urban Tenure" 176. Conversely, the 1994 White Paper on housing stated that "[o]ne of the most significant and short-term interventions required of the Government will be to provide the widest range of options for the rapid attainment of secure tenure": Department of Housing *White Paper* 3.2.2). The most complete form of such tenure is private ownership, which is why this is the main form of tenure delivered until now. The perception that ownership is the most important and valuable property right (as a right and a question of redress) has prevented a variety of tenure options from being developed and delivered in urban areas: Royston "Security of Urban Tenure" 176-177. It might seem that home ownership is the principal form of tenure for marginalised households, but ownership does not necessarily suit the needs of poor urban occupiers: Watson and McCarthy 1997 *Habitat International* 51-52. The authors state that globally, home ownership is not necessarily the best

The link between the provision of access to land and the broader land-reform objective of tenure security requires a purposive interpretation of the land-reform laws, going beyond the formalism of assuming that the current insecurity of tenure is simply a hangover of apartheid land law.⁴³ Improved access to land would be incomplete and perhaps even futile unless it were accompanied by security of tenure. It is true that weak public-law occupation rights already characterised the apartheid era and that a lack of tenure security assisted the apartheid government in promoting its policies of spatial segregation and oppression,⁴⁴ but that does not mean that newly created land rights would automatically be more secure – land-reform laws have to include positive steps to ensure tenure security. Tenure security enables individuals to live without fear of eviction and homelessness. It is central to the establishment of a place to live with a sense of stability where the individual can connect with her community and create societal relationships that are vital to the well-lived life – that is, a life lived with dignity.⁴⁵ In this light, the constitutional mandate to promote tenure reform must be

tenure option amongst poor urban dwellers. There is a preference among at least some of the urban poor to rent accommodation instead of acquiring ownership: Pienaar 2002 *SAPL* 361. More recently the legislature has introduced a greater variety of tenure forms, but these often lack legally secure tenure. See for instance a discussion of the social housing sector in Maass 2013 *SAJHR* 585-587. Also see Pienaar 2014 *TSAR* 438, where she suggests that a rights-based approach is effective only if the context in which it must function is taken into consideration. A structured approach that is well supervised by the state is therefore crucial to the success of such an approach.

⁴³ Section 25(6) of the *Constitution* seems to suggest that there must be a direct link between occupiers' current insecurity and past racist laws. Nevertheless, it has generally been accepted that s 25(6) applies to all previously disadvantaged persons who currently occupy land with insecure tenure, because their tenure insecurity is either a direct or indirect consequence of the apartheid laws: Budlender "Constitutional Protection of Property Rights"; Alexander *Global Debate* 291.

⁴⁴ The principle aim of the apartheid government was to segregate all the racial groups in South Africa and in order to give effect to this ideal it enacted a range of laws that affected the property rights, and specifically the land rights, of most racial groups, albeit unequally. During the apartheid era the legislature developed and extended a number of civil-law property principles to suit the needs of the affluent white minority who required new property law constructions and more secure property rights. Nevertheless, the civil-law tradition essentially remains scientifically neutral, objective and complacent: Van der Walt 1995 *SAJHR* 203. In terms of apartheid laws, existing black owners and tenants were deprived of their private law rights, while the property rights that they were awarded in the public sphere could be defined as insecure lease rights: Van der Walt 1995 *SAJHR* 187.

⁴⁵ The connection between poverty and tenure status is categorical, since tenure status is one of the core elements in the poverty cycle. Insecurity of tenure exacerbates poverty, which is why numerous governments have repeatedly responded to local housing shortages by implementing both welfare orientated housing policies that aim to make available affordable and secure housing options and legislation that will protect weak property/housing interests: Durand-Lasserve and Royston "International Trends" 7; Van der Walt "Housing Rights" 58. The importance of secure

interpreted widely and purposively to the extent that it should influence the rights associated with the provision of greater access to both land and housing.⁴⁶ However, ensuring tenure security for both old and new land rights will very likely require the imposition of limitations on extant land holdings, at least to the extent that tenure security will detract from landowners' entitlement to dispose of their land and to exclude or evict non-owners. A holistic approach to the land reform provisions, the housing guarantee and the protective provisions of the property clause is therefore required.

A number of pre-1994 and post-1994 laws have been enacted to give effect to the constitutional obligation to improve tenure reform,⁴⁷ but the application of these laws is arguably limited since they seem to apply to current holders of land only.⁴⁸ The laws

tenure has also been reiterated in a number of contexts. In the international framework, the *International Covenant on Economic, Social and Cultural Rights* (1966) (ICESCR) is an important international instrument to consider when considering the provision of land and housing, because article 11(1) of the ICESCR recognises a right to an adequate standard of living, including housing. The right to adequate housing as ensured in article 11(1) is defined in General Comment 4 of the ICESCR. In General Comment 4, the Committee on Economic, Social and Cultural Rights (CESCR) states that the right to adequate housing should not be interpreted narrowly as merely a "roof over one's head", but that it should rather be seen as the right to occupy property with security: United Nations Committee on Economic, Social and Cultural Rights *The Right to Adequate Housing CESCR General Comment 4* UN Doc E/1992/23 (1991) para 7. Later in this paragraph the committee also refers to the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000, where it was stated that adequate shelter includes adequate security. Also see United Nations Commission on Human Settlements *Global Strategy for Shelter to the Year 2000* A/RES/1988/181 (1988) for the Global Strategy for Shelter report. The CESCR also states that the "adequacy" of a housing condition depends on various factors, although there are "certain aspects of the right that must be taken into account ... in any particular context": United Nations Committee on Economic, Social and Cultural Rights *The Right to Adequate Housing CESCR General Comment 4* UN Doc E/1992/23 (1991) para 8. One of these aspects is the legal security of tenure, stipulated in para 8(a) of General Comment 4. This paragraph states that any type of tenure should ensure a degree of security of tenure.

⁴⁶ The way in which the mandate of tenure reform should essentially influence the delivery of housing options will be discussed in greater detail later in this article.

⁴⁷ For pre-1994 laws see for instance the *Conversion of Certain Rights into Leasehold or Ownership Act* 81 of 1988 and the *Upgrading of Land Tenure Rights Act* 112 of 1991. Both of these laws were essentially aimed at strengthening weak public-law rights by converting licences and permits into either ownership or some registered form of tenure. The state was empowered to upgrade the rights. The laws were not intended to extend to newly established occupation rights – that is occupation taken in terms of the new constitutional dispensation. For post-1994 laws see for instance the *Interim Protection of Informal Land Rights Act* 31 of 1996 and the *Land Reform (Labour Tenants) Act* 3 of 1996.

⁴⁸ Section 2(4) of the *Conversion of Certain Rights into Leasehold or Ownership Act* 81 of 1988 makes it clear that the Act targets existing holders of either licences, permits or other informal occupation rights, while section 2 of the *Upgrading of Land Tenure Rights Act* 112 of 1991 is also phrased in a manner to suggest that the tenure rights, which it aims to upgrade to either leasehold or ownership, must have been granted in the past – that is, during the apartheid era. The *Interim*

are seemingly structured to provide legally secure tenure to previously disadvantaged groups who currently hold land with insecure tenure, which shows that the programme has a limited, backward-looking, restoration-type character.⁴⁹ The importance of secure tenure raises the question of whether or not the programme can and should be extended beyond current land users to include future land holdings, which would have a direct impact on the content and status of new land rights awarded in line with section 25(5) and section 26(1) of the *Constitution*.⁵⁰

To summarise: the socio-economic right to housing and the land-reform objective of greater access to land are requisites for social welfare in the constitutional context, but these objectives may be empty if access to housing and land is provided on an *ad hoc*, informal basis that does not include secure tenure.⁵¹ A structured approach by the state is required both to eradicate extant forms of legally insecure tenure and to ensure that the socio-economically vulnerable are in future provided with secure land rights. The latter objective might involve the systemic optimisation of private property rights for either a specific person or a group of newly entitled individuals.⁵² One should

Protection of Informal Land Rights Act 31 of 1996 is inherently limited to temporarily protect existing weak land rights. S 3 of the *Land Reform (Labour Tenants) Act* 3 of 1996 explicitly only provides tenure protection for persons who were labour tenants on 2 June 1995. A person who becomes a labour tenant after this period can in principle not claim the tenure protection that the Act provides for.

⁴⁹ Even though restorative justice is essentially aimed at historical redress, the land reform programme must be viewed as a mechanism also to indicate how new land holdings should look and how they should be different from the past. In this sense tenure security must be employed in future land holdings. Pienaar 2014 *TSAR* 437 also states that "... the material provisions aimed at tenure reform, redistribution and restitution were intrinsically restricted and short-sighted. The latter defect particularly embodied a lack of synergy with other connected and related issues that impacted on land generally. It furthermore lacked a constitutional foundation that was clearly needed to prevent anything slightly resembling apartheid from happening again".

⁵⁰ The provision of access to land/housing in urban areas without tenure security is dealt with later in this article. See specifically Pienaar 2014 *TSAR* 439-440 for existing problems with the redistribution programme, amongst others the shift of the target group from the poorest of the poor to more wealthy beneficiaries; the demand-led approach; and complexities regarding the grant system. Overall, there has also been more emphasis on the provision of leases, but the security of these leases has not been properly debated.

⁵¹ See for instance Durand-Lasserve 2006 *Global Urban Development* 2-3 for an explanation regarding the global importance of secure tenure and how this objective fits in with a social-welfare commitment towards the eradication of poverty.

⁵² There are a number of private property rights that could be granted for this purpose, namely ownership, limited real rights (including registered long-term leases or servitudes of either personal use or habitation) or personal rights that are statutorily protected.

not underestimate the power of the common law land-use rights,⁵³ but at the same time one should not be hesitant to introduce new statutory rights that provide greater security than was traditionally associated with their common-law counterparts.⁵⁴ The legislature has a wide discretion to promulgate and amend laws for this important social-welfare purpose.⁵⁵

The redistribution of land and the gradual strengthening of legally insecure tenure rights are social-welfare objectives that are crucial to the transformative purpose of the *Constitution*, which will in some instances result in extant property holdings being either limited or taken away from the haves and redistributed to the have-nots.⁵⁶ In a

⁵³ The idea that private property rights can have presumptive power over public interests was developed by Underkuffler. She proposes a distinction between the common conception of property and the operative conception of property. According to the former, individual property interests, held by legal rights holders, are presumptively superior to competing public interests. Private property rights can be limited by the public interest, provided that the limitations are justified, since property rights have presumptive power: Underkuffler *Idea of Property* 44-46. In terms of the operative conception of property, change is considered an integral part of the very concept of property. Property rights therefore change according to and in line with general social needs: Underkuffler *Idea of Property* 48-49. Accordingly, the tensions that evolve between individual rights and society at large are part of the very meaning of property: Underkuffler *Idea of Property* 53-54. Underkuffler argues that "[i]t is the nature of the interests and the values that they assert – not the identities or numbers of the holders – that should determine normative (and presumptive) power": Underkuffler *Idea of Property* 97. The operative concept of property clearly makes more sense in a society that has a redistribution mandate, since extant property rights are affected throughout the process – change is already part of our concept of property, especially with regard to land. This does not mean that private property rights have no power. Our claim is not that private property has presumptive power (or that it should), but rather that private property doctrine can be utilised to provide beneficiaries of the land reform programme to hold secure property rights – this can be in the form of ownership, long-term leases etc.

⁵⁴ Regardless of the domination of ownership over other interests in land and its resistance against statutory intervention, "... governments routinely use (and have always used) legislation to amend or regulate the hierarchical domination of property ownership in response to social, economic and political circumstances and requirements. One significant example of such intervention is the embodiment of anti-eviction policies in legislation": Van der Walt *Property in the Margins* 78. The systemic strengthening of tenure rights for vulnerable individuals or groups is easily attainable through properly enacted laws. Previous landlord-tenant laws adopted in both South Africa and England show how the introduction of statutory tenancies has provided strong tenure protection for tenants during housing shortages. The ease with which the state can ensure immediate tenure protection becomes evident when considering these laws and the effect they have had over lengthy periods of time. See specifically Maass 2012 *PELJ*.

⁵⁵ See specifically ss 25(6), 25(8) and 25(9) of the *Constitution*.

⁵⁶ Section 25(2) of the *Constitution* allows the state to expropriate private property, provided that the expropriation is authorised in terms of law of general application, the expropriation is for a public purpose or in the public interest, and compensation is paid. The amount of compensation should essentially be influenced by the factors mentioned in s 25(3) of the *Constitution*, which should also result in an equitable balance being struck between the public interest and the interests of those affected. S 25(5) provides clear constitutional authority for land reform, including a mandate for the state to "... take reasonable legislative and other measures, within its available

number of instances private property has been regulated for land-reform purposes in such a way that the social-welfare objective is prioritised and given effect to, after which the guarantee that nobody may be deprived of private property arbitrarily is considered – that is, if the latter question comes up at all.⁵⁷ In the majority of redistribution and tenure-reform cases the constitutional protection of private property simply does not feature, because the land-reform objectives are clearly authorised in terms of legislation and are ostensibly non-arbitrary in the light of the overall significant social-welfare purpose they serve – the *FNB* arbitrariness test would simply show that there is sufficient reason for the limitations.⁵⁸ Using the state's power of expropriation for land-reform objectives is also widely accepted as a justifiable state action that serves a valid public purpose, and provided that just and equitable compensation is paid this kind of expropriation should be constitutionally unassailable as a strategy to promote the access-to-land and access-to-housing objectives.⁵⁹

resources, to foster conditions which enable citizens to gain access to land on an equitable basis". It is therefore clear that the Bill of Rights gives priority to the land reform programme and any measure that is either intended to give effect to the equitable redistribution of land or aimed at redressing past injustices should in principle be regarded as important and given the appropriate priority: Van Wyk 2005 *Stell LR* 473-474. In 2006 the Minister of Land Affairs acknowledged the slow progress of land reform and it was indicated that two million hectares of land had to be redistributed annually to meet its 24.6 million hectares target by 2014. The Minister of Public Works has also indicated that expropriations should be used to accelerate land reform in a just manner: Pienaar, Du Plessis and Olivier 2007 *SAPL*. Nevertheless, the slow rate of the redistribution programme has led to calls for a more far-reaching approach in terms of which land owned by the white minority should be more rapidly distributed to the black majority. It seems that the government is considering a number of mechanisms to increase the redistribution of land, including expropriation, a land tax, a restriction on the ownership of land and the purchasing of private land: Pienaar, Du Plessis and Olivier 2006 *SAPL* 199. In 2013, President Zuma confirmed in his State of the Nation address that the government will do away with the "willing buyer, willing seller" policy and revert to the "just and equitable" principle to determine compensation for expropriations: Sapa 2013 <http://www.fin24.com/Economy/Willing-buyer-seller-principle-to-go-20130214>.

⁵⁷ See for instance the structure of the court's analysis in *Nhlabathi v Fick* 2003 7 BCLR 806 (LCC). Also see Pienaar, Du Plessis and Olivier 2012 *SAPL* for a complete survey of recent case law regarding land reform matters. It is striking to note the number of cases that deal with both the land restitution programme and evictions in terms of the *Extension of Security of Tenure Act* 62 of 1997 (ESTA), which was initially promulgated to ensure better tenure protection for farm workers. Case law regarding evictions in terms of ESTA generally deals with the interpretation of the Act and the factual circumstances of the evictees' tenure. The limitation of the landowners' property rights is not dealt with since the justification for such limitation is simply not at issue.

⁵⁸ See for instance *Khumalo v Potgieter* 1999 ZALCC 68 (17 December 1999), where neither the purpose nor the effect of the *Land Reform (Labour Tenants) Act* 3 of 1996 was disputed, despite the fact that it allows for the transfer of private property from a landowner to a labour tenant. The only issue in the case was the adequate amount of compensation that had to be paid to the landowner.

⁵⁹ See for instance *Khumalo v Potgieter* 1999 ZALCC 68 (17 December 1999). Limited cases have dealt with the state's power to expropriate land for redistribution and tenure reform purposes

Private ownership of land is inherently limited, especially in South African law, since the limits of ownership are defined by the social-welfare value of land and by the constitutional land-reform imperatives. The limitations imposed on ownership by the constitutional land-reform obligation are crucial to the beneficiaries' social citizenship. The social obligations of landowners find expression in the laws that give effect to the constitutional redistribution and tenure-reform objectives. The social-welfare purpose of these laws is clear and it is generally accepted that this purpose, embodied in the constitutional land-reform obligations, justifies expropriatory and regulatory state actions that will impose limitations on private ownership. In this sense, the section 25 guarantee of property rights serves a subsidiary role since the land-reform objectives are prioritised in terms of the regulatory framework. The purpose and effect of the property guarantee in section 25 is not to insulate extant property holdings from state actions that will limit property for the sake of land-reform objectives, but to ensure that the limitations that are in fact imposed on extant property holdings in the process of promoting land-reform objectives are not arbitrary or disproportionate. To that extent, the systemic unity between property on the one hand and access-to-land and access-to-housing rights on the other consists of the proper space that each of these rights occupies in the single system of law under the *Constitution*: constitutionally mandated and authorised land rights and housing rights are not to be treated as *ex post* restrictions that are imposed on what is perceived as *ex ante* unrestricted ownership – and that must therefore be justified – but as discrete constitutional rights, just like property, that exist and need to be protected in terms of the overall democratic and constitutional principles that make up the system of law and society we choose to live in.

simply because the state has not expropriated a significant number of properties for these purposes. The issue in case law that concerns expropriations for restitution purposes is usually the determination of the amount of compensation – landowners are simply not attacking the justification of this important restorative justice objective. See for instance the discussion in Pienaar, Du Plessis and Olivier 2012 *SAPL* for some idea of the issues raised in restitution case law.

4 Property and housing rights in the *Constitution*

4.1 Introduction

Some authors have argued that some property is necessary for persons to exercise their individual autonomy, since property provides a platform where self-realisation can take place, which arguably justifies the extension (redistribution) of property.⁶⁰ According to Alexander, the purpose of property law is to promote "human flourishing" for both owners and non-owners,⁶¹ since "[e]very person is entitled, as a matter of human dignity, to flourish".⁶² In addition, Alexander argues, "[t]he home is the central locus for developing and experiencing all, or nearly all, of the capabilities necessary for human flourishing".⁶³ Peñalver explains that a person cannot flourish if she is denied some physical space where she can exercise essential activities.⁶⁴ According to this theory, access to a home and the ability to occupy it for substantial periods of residential stability (tenure security) are therefore essential to human flourishing.

⁶⁰ Foster and Bonilla 2011-2012 *Fordham L Rev*. Prolific academic arguments have also been raised against the idea that the "home" deserves greater protection than other forms of property. Stern 2008-2009 *Mich L Rev* argues that psychological primacy of the home is in fact misplaced since there is no empirical evidence that supports this theory. Empirical research rather shows that social relations are vital for human flourishing. At 1110 Stern argues that "contrary to claims in the property scholarship, the home is not a primary construct of self and identity, residential dislocation does not typically harm mental health, and the relationship between homeownership and self-esteem is equivocal. Moreover, in contrast to the object focus of personhood theory, an enormous body of empirical work establishes that social interactions and ties – not possessions – are the bedrocks of psychological thriving". In addition, the idea that the on-going control of property is important for self-realisation is misconstrued since evidence shows that dynamism is in fact vital for self-growth and identity development. Relocation has been found to offer an opportunity for the development of new skills and the possibility of self-growth: Stern 2008-2009 *Mich L Rev* 1114. Schnably 1992-1993 *Stan L Rev* critiques the ideal of human flourishing – founded on society's consensual values – on the basis that there is no such consensus, specifically regarding the normative value attached to the home. Schnably argues that the home as a property interest does not deserve greater protection simply because it constitutes someone's home, since the normative values attached to the home are based on an assumed consensus that does not exist. The home is often also "a place of domination and resistance, conflict and discord, as it is the centre of a 'healthy life)": Schnably 1992-1993 *Stan L Rev* 367.

⁶¹ Peñalver 2008-2009 *Cornell L Rev* 828.

⁶² Alexander and Peñalver 2009 *Theo Inq L* 140-141. On the other hand, Rose 1995-1996 *Notre Dame L Rev* 329-330 argues that despite libertarian arguments for property as essential for personal autonomy, property is generally perceived as an economic right since it generates wealth. This right is not central to the political core of the government, while political rights, such as the right to vote, are.

⁶³ Alexander 2009 *Cornell L Rev* 816.

⁶⁴ Peñalver 2008-2009 *Cornell L Rev* 880. Owners have an obligation to assist those without such a space. This would at least be the case if there were a general sense of obligation to promote human flourishing in society.

Radin also argues that in some circumstances an occupier's non-commercial personal use of her home carries more weight, on a moral basis, than the owner's commercial interest in reclaiming the property.⁶⁵ "Personal" property is "bound up" with a person's personhood, because self-investment in the object has taken place.⁶⁶ On the other hand, "fungible" property is held for purely commercial reasons and is exchangeable.⁶⁷ According to Radin's theory, there is an important connection between personal property and the individual, since this type of property not only contributes to the holder's self-development, but also enables her to participate in society as a fulfilled person. In the housing framework, the occupier's home⁶⁸ is a form of personal property because of the occupier's self-investment in it. The preservation of this interest becomes "... a priority claim over curtailment of merely fungible interests of others".⁶⁹ As a result, the residential occupiers' personal interest in a home necessitates more stringent legal protection than the landowner's interest, because personal property is deemed more important by social consensus.⁷⁰

The theoretical arguments raised by Alexander, Peñalver and Radin regarding the increased protection of "home" rights, on the basis that they are socially important because they enable the holder to flourish, do not resonate with the South African courts' approach to property and housing matters, at least not as far as the role of section 25 is concerned. It is simply not the purpose of the South African property clause to enable human beings to flourish – the clause simply protects holders of

⁶⁵ Radin 1986 *Philosophy and Public Affairs* 360. The function of property for both private landowners and tenants is similar in German landlord-tenant disputes.

⁶⁶ The notion of property's being bound up with the holder was initially introduced by Radin in an earlier article where she extensively analysed the relationship between property and personhood: Radin 1981-1982 *Stan L Rev*. At 959 the author argues that the strength of a person's relationship with a specific object could be measured by the pain that person would suffer once the object is lost.

⁶⁷ Radin 1986 *Philosophy and Public Affairs* 362. Personal property has a unique value for the specific individual and can therefore not be replaced with another object without incurring some moral loss for the person. "The notion that external objects can become bound up with personhood reflects a philosophical view of personhood." Radin also mentions that the distinction between personal and fungible property should actually function on a continuum, because self-investment in property is a matter of degree. The extent to which self-investment takes place also depends on the individual's subjective feelings: Radin 1986 *Philosophy and Public Affairs* 363.

⁶⁸ Also see Fox *Conceptualising Home* 25-27 for a similar argument.

⁶⁹ Radin 1986 *Philosophy and Public Affairs* 365.

⁷⁰ Radin 1981-1982 *Stan L Rev* 978-979. Radin refers to her theory as a non-utilitarian moral theory, because certain claims are better protected based on their moral value: Radin 1981-1982 *Stan L Rev* 985.

extant property interests against arbitrary state interference, which means that it is often considered subsidiary to more important constitutional (and even societal) rights, interests and considerations. This does not mean that the home interest is not important or that the *Constitution* does not recognise it, though. The South African Constitutional Court has held that "... human dignity, freedom and equality, the foundational values of our society, are denied those who have no food, clothing or shelter"⁷¹ and has generally established the principle that the courts have a duty to address situations of homelessness, because it goes "... to the core of a person's life and dignity".⁷² However, the home interest is not recognised or protected as a property interest. In this property context the courts have explicitly rejected the notion that the "home" deserves greater protection than other rights or societal values.⁷³ A property interest will therefore not receive a heightened level of protection on the basis that it constitutes a person's home.

While the home interest is not protected as a special kind of property, it is explicitly recognised and protected as part of the right to housing. The South African housing provision is essentially welfare-orientated in the sense that it is directed at the most vulnerable to ensure that they are not rendered homeless and that they are eventually provided with adequate housing. Of course, the protection of extant housing rights forms part of this social-welfare purpose, but insofar as the core housing right is shaped in the form of an access-to-housing right it is limited to the marginalised and it is not absolute. Furthermore, insofar as the housing right assumes the form of the right not to be evicted from an existing home it again finds its roots in the right of

⁷¹ *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) para 23.

⁷² Sachs 2000 *SMU L Rev* 1388.

⁷³ In *Lester v Ndlambe Municipality* 2014 1 All SA 402 (SCA) para 17 the Court decided that s 26(3) of the *Constitution* must be interpreted against the backdrop of s 26(1). Evictees can therefore rely on protection in terms of s 26(3) only if they are socio-economically weak and might be rendered homeless as a result of the eviction order. As in *Lester*, the protection of one's home does not necessarily carry a greater value than other societal concerns, such as the state's duty to uphold the law and seek a demolition order in a case where building works are clearly illegal. Anything to the contrary would amount to an infringement of the legality principle and condone a criminal offence: *Lester v Ndlambe Municipality* 2014 1 All SA 402 (SCA) para 27. Even though the facts were vastly different, a similar outcome was reached in the recent case of *Malan v City of Cape Town* 2014 6 SA 315 (CC). The majority held that an elderly woman's home interest should not necessarily be prioritised as more important than a City's "zero-tolerance approach to drug dealing being conducted at any of its rental housing units": *Malan v City of Cape Town* 2014 6 SA 315 (CC) para 57.

access to housing and not in the property clause. For the most part, this second aspect of the housing right will feature in a clash with property rights and not as a property right. These qualifications are integral to any dispute between sections 25 and 26.

In constitutions that do not include a provision in the bill of rights that explicitly protects non-owner housing rights, it has become customary to protect the housing rights of non-owners via the general property clause. The best example is German law, where the Federal Constitutional Court has developed an extensive case law that recognises the protection of residential tenants particularly, whose housing rights are set out in legislation as property in terms of the general property clause in Article 14. Since World War II the German legislature has promulgated legislation to protect residential tenants against cancellation and eviction. In the case law dealing with this legislation, a central issue was to decide how closely the courts could scrutinise a landlord's reasons for cancelling a lease on the basis of requiring the property for her own use. In 1989 the Federal Constitutional Court recognised that tenant-protection laws place considerable limitations on the ownership of rental property but argued that an interpretation of these laws that takes no account of the landlord's wish to use her property for her own purposes would be in conflict with the constitutional guarantee of ownership in article 14 *GG*.⁷⁴ In other words, the courts must exercise their discretion to decide whether the landlord's needs are reasonable with restraint, so as not to interfere with the owner's fundamental right to take responsibility for her own life. At the same time, the tenant is not without protection either; in 1993 the Court indicated that the mere declared intention of the landlord to use the property for her own purposes was insufficient to justify cancellation and that the courts must inquire whether that intention is reasonable and feasible. In the process, the Court (controversially) cast the rights of tenants as a constitutional property interest that can under certain conditions withstand the owner's property right.⁷⁵ In other words, casting the housing rights of tenants (tenure security) as property was a necessary step in ensuring the constitutional status of those rights.

⁷⁴ BVerfGE 79, 292 (*Eigenbedarfskündigung*) 304-305.

⁷⁵ BVerfGE 89, 1 (*Besitzrecht des Mieters*) 9-10.

In South African law it is not necessary to promote social welfare in the form of either access to housing or the protection of existing housing rights via the property clause, since both those rights are protected explicitly in section 26 of the *Constitution*.⁷⁶ We do not exclude the possibility that it might be necessary or strategically advantageous, in a particular case, to rely on section 25 to strengthen the access to housing rights of a particular group or person, but in principle doing so is unnecessary. Generally speaking, conflicts about housing rights should be decided in terms of section 26 (and legislation enacted in terms of it) and not in terms of section 25.⁷⁷ When residential occupiers of land or tenants rely on section 26 for the protection of their housing rights, it is to be expected that the landowner might rely on section 25 to oppose their housing-right claims. That could of course create the same kind of binary confrontation between property (section 25) and social welfare (section 26) that we referred to earlier. It is therefore necessary, given a constitutional text that protects both property and housing rights explicitly, to sort out the relationship between section 25 rights and section 26 rights.

4.2 The constitutional matrix: the Port Elizabeth Municipality decision

In *Port Elizabeth Municipality v Various Occupiers*⁷⁸ the Constitutional Court explained the constitutional approach to conflicting land rights with reference to the historical context of discriminatory land law. The court noted that the process starts even before section 25 property rights are considered at all:

⁷⁶ The full text of s 26 of the *Constitution*:

Housing

26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

⁷⁷ This is also in accordance with the subsidiarity principle developed in the case law of the Constitutional Court: a litigant who avers that a right protected by the *Constitution* has been infringed must rely on legislation specifically enacted to protect that right and may not rely on the constitutional provision directly when bringing action to protect the right. See *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52; Van der Walt 2008 *CCR* 100-103; Van der Walt *Property and Constitution* 36.

⁷⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 8-23.

[T]he starting and ending point of the analysis [to interpret section 25] must be to affirm the values of human dignity, equality and freedom.⁷⁹

Section 25(1), protecting existing property rights against arbitrary deprivation, guarantees property against the arbitrary state deprivation that was the norm in racist apartheid laws, but at the same time the enforcement of privileged property rights was a core aspect of apartheid inequality and oppression, and therefore fundamental rights such as equality and human dignity must be secured before property rights are even considered.

In the court's view, the *Constitution* imposes new obligations on the courts concerning rights relating to property that were not previously recognised by the common law:

[The *Constitution*] counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home. The expectations that normally go with title could clash head-on with the genuine despair of people in dire need of accommodation. The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or *vice versa*. Rather, it is to balance out and reconcile the opposed claims in as just a manner as possible, taking account of all the interests involved and the specific factors relevant in each particular case.⁸⁰

This passage is a highly significant and useful statement of the Constitutional Court's view of the "constitutional matrix" within which constitutional and statutory provisions relating to property and housing rights have to be interpreted and within which the interpretation of legislation should take place. Firstly, the granting of an eviction order is no longer mechanically ensured by proof of the common law requirements – in line with section 26(3), an eviction order can be granted only if eviction is justifiable in view of all the circumstances. Secondly, the consideration of an eviction order in view of the circumstances amounts to a balancing exercise in which the rights of the landowner are considered against the interests of the occupiers, even when the latter's interests cannot be described as property rights in the traditional mould. Thirdly, this balancing exercise takes place against the background of the history of eviction in the apartheid era and its lasting and enduring effects on the distribution of land and access

⁷⁹ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 15.

⁸⁰ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23.

to housing today. Furthermore, the contextualised approach presupposes that the personal circumstances of the evictees and the practical effect that an eviction order would have for them must be considered when deciding whether such an order would be justified. Within this matrix, property rights do not simply and abstractly trump weaker or no-right interests in property, as they were assumed to do in the logic of traditional property law. To that extent, *Port Elizabeth Municipality* indicates that the content and status of housing rights under the *Constitution* are not determined either from the vantage point of property or in direct opposition to property; instead, the constitutional analysis must assume the format of determining the proper space for each right in the single system of law created under the *Constitution*. The primary indicator of the space that housing rights occupy is section 26, not section 25.

Following up on the decision in *Port Elizabeth Municipality*, conflicts between section 26 housing rights and section 25 property rights should not be adjudicated as a hierarchical ordering of the two competing rights either, since the owner's property rights would generally trump housing interests in a traditional, hierarchical approach. According to the approach set out in *Port Elizabeth Municipality*, the new approach should be to "weigh up" the access-to-housing interests of the affected persons and the property rights of the landowner to establish what the effect on the former inhabitant would be if the right were terminated, and what the effect on the landowner would be if it were not terminated, in both cases taking into consideration the historical, social and individual context. Since infringements against access to housing rights and legal rules that bring about homelessness always involve the section 10 right to human dignity, this weighing-up process has to take dignity into consideration as well.⁸¹ However, the equality and human dignity aspects that accompany eviction cases, especially if the evictees are members of a marginalised and under-privileged

⁸¹ See Liebenberg *Socio-economic Rights* ch 6; Muller *Impact of Section 26* 75-93 and sources cited there. The most important cases cited by Muller are *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) paras 23, 83; *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 29; *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 12, 15, 18, 41-42; *Occupiers of 51 Olivia Road, Berea Township and 197 Main Street, Johannesburg v City of Johannesburg* 2008 3 SA 208 (CC) para 16; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) paras 75, 119, 173, 218, 231, 329, 406; *Machele v Mailula* 2010 2 SA 257 (CC) para 29. Also see Chaskalson 2000 *SAJHR*; Sachs 2003 *Current Legal Problems*; and Liebenberg 2005 *SAJHR*.

group, generally require the section 26 rights to be considered first, before the section 25 rights are decided.⁸² In view of the introductory remarks to this section, a utilitarian weighing-up of section 25 rights and section 26 interests might be just as undesirable as a libertarian confrontation between the two. If what appears to be the correct interpretation of the common law or of legislation would have the effect of rendering homeless someone who currently has or previously had access to housing, regardless of how inadequate that accommodation might have been and how unlawful or weak the access was, the resulting *prima facie* conflict with section 26(3) might be said to require a different approach that starts out with section 26 analysis and that will (if at all) proceed to section 25 analysis only once the section 26 rights have been secured.

The *Port Elizabeth Municipality* decision indicates that the section 26(1) access to housing interest of even unlawful occupiers, who enjoy no rights in terms of the common law, is relevant to the weighing up process involved in a section 26 analysis. That implies that any weighing-up of their housing interests against the landowner's property right would be self-defeating. It is therefore possible that the contextual assessment of all rights and interests that the *Port Elizabeth Municipality* decision foresees, in view of the contextual and legislative matrix within which housing rights and obligations are regulated under the guidance of section 26 and the rest of the bill of rights, requires the section 26 analysis to be undertaken and completed first. The nature and purpose of a section 26 analysis would be to establish whether or not the infringement of section 26 access-to-housing or anti-eviction rights that would result from the proposed interpretation of the relevant common law or legislation would be justified, in view of section 36(1) of the *Constitution*, considering the matrix of constitutional and other legal provisions in the broad social and historical context sketched out in *Port Elizabeth Municipality*. If the infringement of section 26 rights implied by the proposed interpretation cannot be justified, it is unconstitutional and then a different interpretation, development of the common law or a statutory amendment might be required to ensure that the section 26 right is given effect to. Once an interpretation of the common law or an interpretation of the legislation has

⁸² Van der Walt 2013 *SALJ* proposes a similar argument relating to the development of a common-law principle in the area of the personal servitude of habitation.

been settled to avoid conflict with section 26, the relevant interpretation or development that secures the protection of the section 26 rights might involve an infringement of the landowner's section 25 rights, which might then require *ex post* section 25 analysis.

According to the methodology for deciding section 25 disputes that was laid down in the *FNB* decision,⁸³ section 25 analysis would generally focus on the question of whether the deprivation of property resulting from the enforcement of section 26 rights was arbitrary in the sense that the deprivation is procedurally unfair⁸⁴ or, substantively, if there is insufficient reason for it, judging from a complexity of contextual relationships.⁸⁵ In *FNB* the Court identified the relationship between the means employed and the ends sought to be achieved; the relationship between the affected property holder and the property; the connection between the affected property holder and the reason for the deprivation; the extent of the deprivation; and the nature of the affected property as factors to be considered in this respect. Since decisions such as *Port Elizabeth Municipality* and others suggest very strongly that the procedurally fair enforcement of section 26 rights will generally not result in the arbitrary deprivation of property, the *ex post* section 25 analysis is generally not even required.

4.3 The protection of housing rights in anti-eviction strategies

Port Elizabeth Municipality is an interesting case that not only explains the historical and social context regarding conflicts between property and other land rights, but also establishes the possibility that unlawful occupiers can remain on private land against

⁸³ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC). For a general discussion see Van der Walt *Constitutional Property Law* 194ff.

⁸⁴ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100. Neither the *FNB* decision nor subsequent decisions explain what procedural arbitrariness entails. Logically, this category can refer only to deprivation brought about directly by legislation and not involving any administrative action; see Van der Walt *Constitutional Property Law* 264-270; Van der Walt 2012 *Stell LR*.

⁸⁵ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) para 100; see further Van der Walt *Constitutional Property Law* 245-264.

the will of the landowner, in exceptional instances even for an indefinite period of time.⁸⁶ In the light of the specific circumstances of the case, the Court sanctioned the continued unlawful occupation of the land and the concomitant deprivation of the landowner's property.⁸⁷ In this case the deprivation was justified on the basis of the length of the prior occupation; the fact that neither the Municipality nor the owner required the land for any specific use; the Municipality's failure to engage with the occupiers; and the small size of the group, who also appeared to be genuinely in need.⁸⁸ The factual analysis turned on the position of the occupiers and their constitutional needs, which really pushed the effect of the protection of the section 26 right on the landowner's property into the background.⁸⁹ In the end the Court therefore refrained from undertaking a proper section 25 analysis as had been foreseen in *FNB*.⁹⁰

A similar outcome was reached in *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*,⁹¹ where a private landowner had obtained an eviction order against thousands of unlawful occupiers, which was essentially unenforceable because of the number of occupiers that would have had to be evicted.⁹² The court acknowledged both the occupiers' section 26 right of access to adequate housing and the section 25 right of the

⁸⁶ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 59-61.

⁸⁷ The owner was effectively deprived of his right to use and dispose of his property. In fact, the owner had no prospect of evicting the occupiers, absent the state's involvement in finding suitable alternative accommodation for the evictees. The Court made no order in this regard and one would have to assume that the state would have had no further incentive to assist the owner and relocate the occupiers to more apt housing. In consequence the owner would probably be stuck with having a number of unlawful occupiers on his land for an indeterminate period of time, while the state escaped its duty in terms of s 26(2).

⁸⁸ *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 59.

⁸⁹ See specifically *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 24-59.

⁹⁰ The purpose of this article is not to investigate whether the deprivation might have amounted to an arbitrary deprivation of property, but rather to show that the protection of the right to housing was prioritised. The protection of private property is therefore subsidiary and can therefore probably be infringed upon if the *FNB* analysis is not properly conducted by the courts.

⁹¹ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA).

⁹² *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) paras 7 and 9. A deposit of R1.8m was required to cover the costs of a firm which the sheriff intended to engage to assist with the execution of the eviction order. This amount was higher than the value of the land unlawfully occupied (para 4).

landowner not to be deprived of property in an arbitrary manner and held that both rights had been infringed by the state's failure to ensure that alternative land was available to the unlawful occupiers.⁹³ The Supreme Court of Appeal decided that the occupiers could remain on the land until alternative land was made available by the state. The only appropriate relief for Modderklip, who had to endure the prolonged and possibly indeterminate presence of the occupiers on its land while alternative land was found, was constitutional damages, based on the fact that Modderklip's private property rights had been infringed because it could not enforce its eviction order.⁹⁴ The basis for the compensation award was explained differently in the Constitutional Court, namely that the state's failure to act justified the payment of compensation.⁹⁵ As in *Port Elizabeth Municipality*, a proper section 25 analysis was not undertaken to determine whether the continued unlawful occupation of land would amount to an arbitrary deprivation of property.⁹⁶ In the Supreme Court of Appeal the Court indirectly assumed that it did, while the Constitutional Court made no such finding.⁹⁷ However, the fact that it was impossible in practice to relocate the unlawful occupiers had the effect that Modderklip was effectively deprived of its land to the extent that it could neither use it nor dispose of it.⁹⁸ It could perhaps be argued that the result of not enforcing the eviction order in this case was a complete transfer of property, justified by the social-welfare purpose of protecting a vulnerable group against eviction, relocation and possible homelessness, in return for which the landowner was

⁹³ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) paras 35 and 52. The Court construed the failure to protect and give effect to the occupiers' s 26 right as a direct consequence of the failure to protect Modderklip's s 25 right: Van der Walt 2005 *SAJHR* 159.

⁹⁴ *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) para 43.

⁹⁵ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 48. The Constitutional Court focused on the s 34 right of access to the courts (with sufficient enforcement procedures) rather than the infringement of ss 25 and 26 as justification for the payment of compensation: Van der Walt 2005 *SAJHR* 156.

⁹⁶ See specifically Strydom and Viljoen 2014 *PELJ* for the argument that the deprivation in *Modderklip* was probably arbitrary.

⁹⁷ The Court decided that it was unnecessary to deal with the question of whether Modderklip's s 25 right was infringed: *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2005 5 SA 3 (CC) para 26.

⁹⁸ The state was also not interested in purchasing the property, despite the fact that the landowner was willing to part with it: *Modder East Squatters v Modderklip Boerdery (Pty) Ltd, President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) para 37.

compensated. However, this is not what either the Supreme Court of Appeal or the Constitutional Court saw as the justification for depriving Modderklip of its land.

Subsequent Supreme Court of Appeal and Constitutional Court cases addressed the issue of the continued unlawful occupation of private land from the perspective that suspended eviction orders should be granted to allow the state to provide marginalised occupiers with suitable alternative accommodation if the eviction was likely to render them homeless.⁹⁹ This development is directed only at households that are unable to acquire alternative accommodation because of their socio-economic vulnerability. Evictees who can acquire low-cost housing will therefore not be accommodated on the basis of this principle, which shows that it serves as a "safety net" for the poorest of the poor. The notion of suspended eviction orders is a welcome innovation for private landowners, since it indicates that unlawful occupiers will eventually be evicted.¹⁰⁰ Private landowners are simply required to tolerate the presence of the

⁹⁹ In *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W), the court held for the first time that the interests of the occupiers, the private landowner and the state would be protected if the state was joined, because the state has a duty to provide the evicted occupiers with adequate housing: *Sailing Queen Investments v The Occupants La Colleen Court* 2008 6 BCLR 666 (W) para 18. The development of suspended eviction orders was held to be justifiable since it would generally not be just and equitable, and would therefore in contravention of ss 4(6) and 4(7) of PIE, to grant an eviction order where the effect would be to render the occupiers homeless: *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 9 BCLR 911 (SCA) paras 14, 16 and 18. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC), the Constitutional Court decided that regardless of who the evictor is, once the possibility of homelessness exists as a result of an eviction order the situation can be categorised as an emergency and the state should provide emergency accommodation: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 92. See *City of Johannesburg v Rand Properties (Pty) Ltd* 2007 6 SA 417 (SCA) para 46 for a contradictory statement by the Supreme Court of Appeal. The Court in *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) emphasised that the need to housing can be defined as an emergency if the occupiers would be rendered homeless in consequence of the eviction order (para 15). The s 26 obligations of the government are, however, not linked with the initial question of whether or not the eviction order would be just and equitable. The needs of the occupiers, and specifically the availability of alternative accommodation, can have an influence on the date of the eviction order, but will weigh very little when considering whether the eviction order should be granted or not. The Court decided that the eviction should be carried out without delay and that the City should provide temporary alternative accommodation to the evictees on the sheriff's schedule: *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) paras 14, 18 and 56-58.

¹⁰⁰ See specifically *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 40, where the Constitutional Court made it clear that "[i]t could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances

occupiers for a limited period of time while the state finds suitable alternative accommodation for the evictees.¹⁰¹ It seems that the courts now implicitly accept that any deprivation of the landowner's property that goes beyond a temporary delay in executing the eviction order will be unjustifiable since the obligation to provide housing to the socio-economically weak rests on the state,¹⁰² while private owners' property entitlements should generally not be limited to a greater extent than is necessary for the state to fulfill its obligations.¹⁰³

an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight's situation in this case has already illustrated. An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry mandated by PIE".

¹⁰¹ S 26(2) of the *Constitution* states that it is the obligation of the state to give effect to s 26(1) of the *Constitution*. The obligation of the state is interpreted narrowly to mean that the local authority should make alternative emergency housing available on an interim basis. In addition, the landowner's identity, previous use of the property, future plans with regard to the property and relationship with the occupiers are irrelevant, because the courts will disregard these factors when there is an emergency situation and place the obligation to prevent an increase in homelessness squarely on the local authority. In *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) it was decided that the question of whether alternative accommodation should be made available must be distinguished from the question of whether it would be just and equitable to grant the eviction order. The question concerning the justification of the eviction order must be separated from the obligation to provide housing, because these matters have implications for different role-players.

¹⁰² In *Blue Moonlight*, the Court emphasised that in some instances, especially where the owner was aware of the presence of unlawful occupiers when it bought the building, private landowners might have to tolerate the temporary presence of such occupiers, but this does not mean that owners should provide free housing for an indefinite period: *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) paras 34, 35 and 39-40. This was decided without any real engagement with the social obligations of the landowner as enacted in s 25 of the *Constitution*. In *Changing Tides* the court decided that private owners might in some instances have to be patient when their usual ownership entitlements, including the right to use and dispose, are restricted temporarily to accommodate the pressing needs of the occupiers. The needs of the occupiers can have an influence on the date of the eviction order, but not the question of whether the eviction order should be granted or not: *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 6 SA 294 (SCA) para 18.

¹⁰³ This judicial development is not in line with the dictum of Sachs J in *Port Elizabeth Municipality*, namely that "the Constitution imposes new obligations on the courts concerning rights relating to property not previously recognised by the common law. It counterposes to the normal ownership rights of possession, use and occupation, a new and equally relevant right not arbitrarily to be deprived of a home ... The judicial function in these circumstances is not to establish a hierarchical arrangement between the different interests involved, privileging in an abstract and mechanical way the rights of ownership over the right not to be dispossessed of a home, or vice versa. Rather it is to balance out and reconcile the opposed claims in as just a manner as possible taking account of all the interests involved and the specific factors relevant in each particular case": *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) para 23. The general decision that the occupiers should be evicted and relocated is also in conflict with the decision in *Jaftha v Schoeman; Van Rooyen v Stoltz* 2005 2 SA 140 (CC) that any measure which deprives an occupier of existing access to housing limits the s 26(1) right. It follows that such an approach should generally not be followed by the courts.

The judicial development of a general duty to tolerate a delay in the execution of an eviction order, justified by state protection of the housing rights of vulnerable individuals and groups in terms of the state's duty to address homelessness, has now progressed to the point where it is generally accepted that the resulting interim deprivation of landowners' entitlement to use their land is a non-arbitrary deprivation of property, even without indulging in the case-by-case *FNB*-type analysis that one might expect.¹⁰⁴ An argument that such a deprivation is arbitrary has simply not been raised since it is most unlikely to succeed in the majority of cases.¹⁰⁵ The approach of the courts has been to prioritise the struggle against increased homelessness and the provision of access to housing, while the effect of these constitutional obligations on private landowners' property rights is generally so obviously constitutionally justified that an actual *ex post* section 25(1) analysis might be avoided in all but the most exceptional circumstances. At least in the anti-eviction context, the protection of private property is clearly a subsidiary constitutional consideration in eviction cases that deal with the housing needs of the poorest of the poor.¹⁰⁶ The priority is to ensure that nobody is evicted from her home arbitrarily; once that objective has been secured the role of the property guarantee is merely to ensure that the ensuing deprivation of affected landowners' property was not arbitrary either.

¹⁰⁴ See specifically *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 40.

¹⁰⁵ A temporary deprivation of landowners' entitlement to use is most likely non-arbitrary in consideration of the socio-economic importance of the deprivation, namely to enable the state to find suitable alternative accommodation, and the factors listed in *FNB*, which require that there must be a relationship between the means employed and the ends sought to be achieved (a temporary restriction of the owner's use right to allow the state to find suitable alternative accommodation); the relationship between the affected property holder and the property (the majority of cases concerned private landowners of inner-city buildings that were unlawfully occupied); the connection between the affected property holder and the reason for the deprivation (private owners of inner-city buildings nowadays face the possibility that they might have to tolerate unlawful occupiers for interim periods of time, especially if they bought low-cost buildings that were already being unlawfully occupied); the extent of the deprivation; and the nature of the affected property.

¹⁰⁶ See for instance *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) paras 37, 97 and 100, where the Court considered the landowner's property rights from the viewpoint of the occupiers' right to housing. The Court basically concluded that ownership can be limited in order to give effect to other constitutional rights, provided that the deprivation is both authorised in terms of law of general application and is non-arbitrary. The exact impact of the deprivation and a contextual analysis thereof was simply not scrutinised.

Even though the eviction jurisprudence generally allows interim deprivations of property for the purposes of section 26, these interferences with private property occur on an *ad hoc* basis in consequence of households' pure desperation. Deprivations of this kind are authorised in terms of the anti-eviction procedures set out in PIE, which is intended to ensure that the evictions are non-arbitrary and therefore carried out in a just and equitable manner.¹⁰⁷ These interferences with private property are therefore not planned as part of a structured state approach to the housing crisis – they simply occur along the way as a consequence of efforts to curb homelessness.

4.4 *Further support for housing rights in section 25*

The effect of the argument in this part of the paper is that access-to-housing rights and the protection of existing housing rights generally depend on section 26, further bolstered by section 10, and not section 25. In the preceding sections we argued one half of that main point, namely that associating housing rights (both in the form of tenure security and anti-eviction strategies) with section 26 rather than section 25 does not mean that extant property holdings are insulated against the promotion and protection of housing rights. We argued, with reference to the constitutional text and case law, that section 26, further bolstered by other rights such as dignity, is a strong constitutional foundation for the promotion of housing rights and that it is not hampered by any perceived structural or hierarchical weakness *vis-à-vis* property.

In this section, we want to comment on the second part of the argument, namely that the inclusion of an explicit housing right in the bill of rights means that the promotion and protection of housing rights do not depend on the constitutional property guarantee. Of course, this does not mean that section 25 cannot be utilised by the state or by parties in a strategic manner to strengthen housing rights. Our argument is aimed at a broader constitutional point, namely that section 26 should be seen and

¹⁰⁷ See specifically *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) para 37, where the Court stated that "[u]nlawful occupation results in a deprivation of property under s 25(1). Deprivation might however pass constitutional muster by virtue of being mandated by law of general application and if not arbitrary. Therefore PIE allows for eviction of unlawful occupiers only when it is just and equitable".

developed as the primary constitutional foundation of housing rights. It is true that in certain cases, depending on the circumstances of the landowner and the occupiers, private landowners might be obliged to carry a burden that goes some way towards providing non-owners with what very much looks like property rights. However, the role of the courts in this regard is limited, since they can suspend or refuse eviction orders, but they are generally not empowered to create legally secure tenure rights for unlawful occupiers beyond the structures that are foreseen in the applicable legislation. There is simply no statutory authorisation for the courts to create, alter or strengthen marginalised occupiers' tenure status of their own volition. It is the duty of the state to accommodate unlawful occupiers on a permanent basis, and it is the state that has the power to legislate and implement programmes to that effect. To that extent, we argue that there is very limited reason or scope, if any, for promoting or strengthening housing rights via the property framework of section 25.

Having said that, it is true that several subsections of section 25 provide the state with the duty and the authority to make and implement laws that will directly or indirectly promote or strengthen housing rights. We provide several examples in the paragraphs that follow. However, the fact that these strategies are anchored in section 25 and that they promote housing rights does not have any bearing on our central argument, since the strategies involved arise from the land-reform subsections of the property clause (section 25(4)-(9)) as opposed to the property-securing subsections (section 25(1)-(3)). The examples below therefore do not undermine our argument that housing rights are primarily rooted and should be promoted and protected on the basis of section 26. They merely demonstrate the broader fact that the housing right in section 26 finds further support in the land-reform provisions in section 25(4)-(9).

One of the ways in which the state can intervene and ensure permanent housing solutions for the vulnerable on the basis of section 25 strategies is through its power to expropriate property. The power to expropriate is of course anchored in section 25(2), but for the present purposes the crucial link is the use of that power for land-reform and housing purposes as set out in section 25(4)-(9). Municipalities are, for instance, statutorily authorised to expropriate property for housing purposes, in line

with the state's redistribution mandate.¹⁰⁸ Consequently, the state can compulsorily acquire property as a landowner and use it to provide accommodation (even to previously unlawful occupiers). The occupiers' tenure of the land would thereby effectively be transformed from unlawful and insecure occupation to lawful and secure rights.¹⁰⁹ Moreover, in a case where a large number of unlawful occupiers reside on private land (or even in a privately-owned building) the power of expropriation could be used to circumvent the eviction and relocation of those occupiers and allow them to continue occupying their homes, albeit with legally secure tenure.¹¹⁰ Such an approach would avoid the grave disruptions, high costs and time-consuming processes of finding suitable alternative accommodation. A housing strategy of this nature is directly authorised by section 25, which sets out both the constitutional authority and requirements for expropriation (section 25(2)-(3)) and the obligation to provide equitable access to land (section 25(5)).

In the alternative, the state can accommodate the homeless in emergency situations by using its power of expropriation to temporarily expropriate landowners' use rights, since such a temporary expropriation might be more cost-effective and less cumbersome than expropriating the land permanently.¹¹¹ A variety of different types

¹⁰⁸ The *Housing Act* 107 of 1997 makes provision for a municipality to expropriate land by notice in the *Provincial Gazette* if it is required for the purposes of a housing development. S 9(3) requires that the state must a) be unable to purchase the land from the owner after reasonable negotiations; b) have obtained permission from the MEC before placing the notice in the *Provincial Gazette*; and c) publish a notice within six months after the MEC granted permission. S 25 also requires that expropriations must be in the public interest and that just compensation should be paid. Both the state's redistribution programme, which falls under the wider umbrella of the constitutional commitment to land reform, and the progressive provision of access to adequate housing – included in the Bill of Rights as a socio-economic right – are undoubtedly in the public interest: Viljoen (Part 1) 2014 *TSAR* 360-362. Also see s 6 of the *Housing Development Agency Act* 23 of 2008, in terms of which the Minister may expropriate land for the development of human settlements.

¹⁰⁹ An option for the state would therefore be to expropriate the property and thereafter transfer it to a Social Housing Institution which would be able to manage the property and make rental housing options available to the previously unlawful occupiers. Accordingly, the occupiers' tenure status would be transformed from being unlawful to being legally secure, provided that the rental agreements ensure secure tenure. For more detail on the state's social housing initiative see Maass 2013 *SAJHR*.

¹¹⁰ An outright expropriation of property would evidently have been a logical choice in a case such as *Modderklip*, where the eviction of thousands of unlawful occupiers was impossible.

¹¹¹ The *Expropriation Act* 63 of 1975 generally empowers the Minister of Public Works to "... expropriate any property for public purposes or take the right to use temporarily any property for public purposes." S 12 of the Act, which regulates the basis on which compensation should be determined, makes a distinction between the expropriation of an owner's property and the taking

of property can be identified and put to use for this purpose, including vacant inner-city buildings that are either habitable or in need of very little repair; already unlawfully occupied land or buildings; and portions of newly developed residential properties that are well-located in the inner cities.¹¹² Expropriations of this kind can provide much-needed tenure security to the beneficiaries, even if the accommodation is provided on a temporary basis, while it is established whether the property is suitable for a permanent solution or whether more suitable alternative land is available. Again, section 25(2)-(3) and 25(5) provides the framework that justifies and authorises this strategy. Unfortunately, the possibility of using the state's power of expropriation to create temporary (or even permanent) access to land and housing for the socio-economically weak has not received the consideration one might expect. The important connection between sections 25(2)-(4) and 25(5) and between sections 25(2)-(4) and 26(1)-(2) has simply not yet been analysed by the state to create pragmatic solutions to the housing crisis, despite the fact that existing expropriation and housing legislation makes provision for a number of ways in which the state can go about its obligations to provide greater access to land and housing.

5 Conclusions

Overall, the constitutional obligation to provide more equitable access to land and housing and to protect housing rights against arbitrary termination should enjoy more theoretical and doctrinal attention from property scholars and the state must also be more proactive in the development of these rights as discrete constitutional categories.

In *Port Elizabeth Municipality* Sachs J noted the following:

The Constitution recognises that land rights and the right of access to housing ... are closely intertwined. The stronger the right to land, the greater the prospect of a secure home.¹¹³

of a right to use property. In the case of the latter, the amount of compensation for the expropriation shall not exceed "... an amount to make good any actual financial loss caused by the expropriation or the taking of the right". See specifically Viljoen (Part 1) 2014 *TSAR* 366-367, 371-376; Viljoen (Part 2) 2014 *TSAR* 528-533.

¹¹² Viljoen (Part 1) 2014 *TSAR* 367.

¹¹³ However, one should acknowledge that the s 26(1) right includes an obligation on the state, in terms of s 26(2), to also make provision for services, including water and sewage: Van Wyk 2005 *Stell LR* 469. This right might therefore seem to be more extensive than the s 25(5) right, although it is unlikely that the beneficiary in terms of the redistribution programme would be denied these services.

The intersection between sections 25 and 26 allows the state to negotiate the space between land rights and socio-economic rights progressively so as to satisfy both. These provisions cannot be interpreted in isolation; they are interdependent and interrelated.¹¹⁴ In addition, the provision of legally secure tenure must be incorporated as part of the realisation of these rights. The important connections between sections 25(5) and 25(6) and between sections 26(1) and 25(6) must be considered as part of the constitutional matrix that regulates the relationship between property and housing rights, and this matrix should be reflected in housing policies and strategies.¹¹⁵ A number of laws have been enacted to give effect to the right to housing, but the legislature's failure to appreciate the importance of secure tenure for different rights holders is not in conformity with the transformative purpose of the *Constitution* and specifically section 25(6) of the *Constitution*.¹¹⁶

¹¹⁴ Van Wyk 2005 *Stell LR* 475.

¹¹⁵ In *Jaftha v Schoeman; Van Rooyen v Scholtz* 2005 2 SA 140 (CC) para 28 the Court held that "[s]ection 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy". Also see the definition of "housing development" in s 1 of the *Housing Act* 107 of 1997. Also see s 10A for a general restriction on the voluntary sale of state-subsidised housing.

¹¹⁶ For example, enhanced tenure security has not been prioritised in the private landlord-tenant market, despite the fact that low-income households rent dwellings in informal settlements: Tissington *Resource Guide to Housing* 38. Roughly 55 per cent of tenants earn less than R3 500 per month. It is safe to assume that tenants in informal settlements would be short-term tenants, since it would be basically impossible for these tenants to have their leases registered. See specifically Van der Walt and Maass (Part 1) 2012 *TSAR* and Van der Walt and Maass (Part 2) 2012 *TSAR* for the argument that short-term tenants' rights are mainly personal and the registration thereof is necessary in order to convert them into real rights. Ch 3 of the *Rental Housing Act* 50 of 1999 regulates the relationship between the parties and to some extent codified a number of common law rules. Some notable changes that were introduced by the Act are the general prohibition against discrimination and the requirement that the landlord may terminate the lease only on a ground that does not constitute an unfair practice: s 4 of the Act. The latter provision has been interpreted by the Constitutional Court to provide enhanced tenure protection for tenants. See specifically *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 3 SA 531 (CC) and Maass 2012 *SAPL*. In relation to the landlord's maintenance responsibility as well as his freedom to set rents, the Act is silent. On the other hand, the primary tenure option in the social housing sector is rental housing, while collective forms of ownership serve as alternative tenure options: Department of Human Settlements *Social Housing Policy for South Africa Towards an enabling environment for social housing development* (May 2005) 18. S 2(1)(h) of the *Social Housing Act* 16 of 2008 states that government and Social Housing Institutions must ensure secure tenure for residents in social housing stock. The extent of tenure protection for social housing tenants is based on the provisions in the Housing Act and the Rental Housing Act: Department of Human Settlements *Social Housing Policy* 25, 81. The level of tenure protection will therefore be similar to that of private tenants in the private rental market, which is unsettling since the private sector does not generally make provision for strong tenure rights for tenants: Maass 2011 *Stell LR* 764. The overall aim of the social housing initiative, which is to provide affordable, secure rental housing options for low to medium income households, would be frustrated if tenants occupied units with insecure tenure. Social landlords are at liberty, for instance, to negotiate periodic tenancies that

It is generally accepted that the temporary or permanent transfer of natural resources in the form of land or residential premises must be undertaken by the state to gradually give effect to its redistribution and housing mandates. The state's power to either deprive landowners of some entitlements or expropriate the property as a whole (or to expropriate specific entitlements, even temporarily) should be utilised more creatively for these constitutional purposes, in conformity with the statutory guidelines already captured in a number of laws that have been promulgated under the auspices of these constitutional provisions. It is crucial that they are read together with due consideration of their social-welfare objectives.

However, one must also be sensitive to the specific purposes that the different constitutional provisions serve. In the light of the divergent purposes of the property provision and the housing provision, it would be illogical to protect unlawful occupiers' housing interests, specifically against evictions, primarily as constitutional property rights in terms of section 25(1), since the housing provision (together with PIE) was specifically crafted for this purpose.¹¹⁷ Objections against eviction and homelessness usually come from the socio-economically weak and marginalized, who generally lack substantive property rights. The negative right not to be arbitrarily deprived of one's home addresses the issue of increased homelessness, and the courts have recently interpreted this right in line with the section 26(2) obligation of the state to provide alternative accommodation. It is highly unlikely that unlawful occupiers would gain any additional protection if they argue that their negative right not to be arbitrarily evicted should also be acknowledged as constitutional property and protected as such. Their anti-eviction right is explicitly protected in section 26(3) and in PIE, which might

offer insubstantial tenure protection for tenants. These tenancies can be terminated on written notice by either party without having to acquire the permission of the other party or any outside authority: *Cooper Landlord and Tenant* 61-65. The social housing framework therefore fails to properly prescribe how social tenants will be enabled to occupy social housing on a continuous basis and consequently establish a home.

¹¹⁷ See Viljoen 2014 *CILSA* for a similar argument specifically in relation to the protection of tenants' housing interests. It is argued that there is no need to protect tenants' interests as constitutional property, provided that there is a Bill of Rights that contains a housing clause. Tenants' interests are in such instances protected in terms of the housing clause rather than in the property clause. On the other hand, an incomplete Bill of Rights that does not contain a housing clause might have the effect that tenants' interests must be protected in terms of the property clause if they are to find any constitutional protection.

be countered by the landowner's argument that his property should not be limited in an arbitrary manner. From a subsidiarity point of view the alternative, in terms of which the concept of property should be extended to also protect unlawful occupiers, would simply be irrational.¹¹⁸ It would also cast a conflict between landowners and unlawful occupiers or the homeless in the shape of a property-vs-property contest, which is most likely to be adjudicated on the basis of the hierarchical vocabulary and doctrine of property law to the detriment of the occupiers. In that sense the decision in *Port Elizabeth Municipality* could be seen as a warning not to cast eviction and homelessness cases in a purely property-vs-property mould; in other words not to adjudicate them purely on the basis of section 25, but to rather ensure protection for the occupiers solely on the basis of sections 10 and 26.

Nevertheless, once property has been redistributed or transferred for housing purposes and the beneficiaries have acquired either statutory or private-law property rights in these resources, the new holders of these rights should be able to protect their interests as constitutional property against arbitrary state interferences. There is no general constitutional guarantee in terms of section 26 that all extant housing interests deserve some special protection against either the state or private parties.¹¹⁹

¹¹⁸ In terms of the subsidiarity principle, as it was developed by the Constitutional Court, a litigant must first rely on legislation that was promulgated with the aim of giving effect to a constitutional right if that person wishes to enforce that right: Van der Walt 2008 *CCR* 100. This principle was developed in *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) paras 51-52. In such a case the litigant may not rely directly on the constitutional provision, except where the constitutional validity of the legislation is challenged: Van der Walt 2008 *CCR* 101, referring to *South African National Defence Union v Minister of Defence* 2007 5 SA 400 (CC) para 52; *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 2 SA 311 (CC) para 437; *Sidumo v Rustenburg Platinum Mines Ltd* 2008 2 SA 24 (CC) para 248; *Engelbrecht v Road Accident Fund* 2007 6 SA 96 (CC) para 15. It would clearly be at odds with the subsidiarity principle if an unlawful occupier challenged an eviction on the basis of s 25(1) of the *Constitution*. S 26(3) of the *Constitution* was specifically included to protect evictees and ensure that evictions are carried out in a just and equitable manner, while PIE was enacted to give effect to s 26(3).

¹¹⁹ Nevertheless, the Constitutional Court has confirmed that the housing provision places at least a negative obligation on the state (and on all other entities and individuals) to desist from action that would impair the right of access to adequate housing. The Court held that "... any measure which permits a person to be deprived of existing access to adequate housing, limits the rights protected in s 26(1)": *Jaftha v Scoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) para 34. The state should be allowed to interfere with an individual's access to housing only when it is justifiable to do so: *Jaftha v Scoeman*; *Van Rooyen v Stoltz* 2005 2 SA 140 (CC) paras 26, 28. Van der Walt *Constitutional Property Law* 361-362 argues that from the decision one can infer that any legislation or action, by an individual or state body, that impairs indigent peoples' existing housing rights is perceived as a limitation on the negative obligation provided for in s 26(1) of the *Constitution*. Also see Liebenberg 2008 *TSAR* 467 on the negative obligation as developed in the

The protection and concomitant state duty in terms of section 26 is welfare-oriented to assist the poorest of the poor, firstly against homelessness and secondly in getting a space where they can live with dignity – the exact content of the latter provision remains a highly contested issue. In addition, there is also no precedent that the "home" deserves greater protection as constitutional property than other forms of property.

case law. It is important to acknowledge that the statement in *Jaftha* must be understood in its context and therefore qualified to persons who are socio-economically vulnerable.

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LIST OF ABBREVIATIONS

CCR	Constitutional Court Review
CILSA	Comparative and International Law Journal of Southern Africa
Columbia L Rev	Columbia Law Review
CESCR	Committee on Economic, Social and Cultural Rights
Cornell L Rev	Cornell Law Review
Duke LJ	Duke Law Journal
ESTA	Extension of Security of Tenure Act
Fordham L Rev	Fordham Law Review
GG	Grundgesetz für die Bundesrepublik Deutschland
Harv Envtl L Rev	Harvard Environmental Law Review
Harv J L & Pub Pol'y	Harvard Journal of Law and Public Policy
ICESCR	International Covenant on Economic, Social and Cultural Rights
Int J Soc Welf	International Journal of Social Welfare
Iowa L Rev	Iowa Law Review
JAL	Journal of African Law
Mich L Rev	Michigan Law Review
NYU J L & Liberty	New York University Journal of Law and Liberty
Notre Dame L Rev	Notre Dame Law Review

PELJ	Potchefstroom Electronic Law Journal
PIE	Prevention of Illegal Eviction from and Unlawful Occupation of Land Act
RDP	Reconstruction and Development Programme
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal
SAPL	Southern African Journal of Public Law
SMU L Rev	SMU Law Review
Stan L Rev	Stanford Law Review
Stell LR	Stellenbosch Law Review
Theo Inq L	Theoretical Inquiries in Law
TSAR	Tydskrif vir die Suid-Afrikaanse Reg
U Chi L Rev	University of Chicago Law Review
U Pa L Rev	University Pennsylvania Law Review
Wm & Mary L Rev	William and Mary Law Review
Yale LJ	Yale Law Journal

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

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SUMMARY

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

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

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

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

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