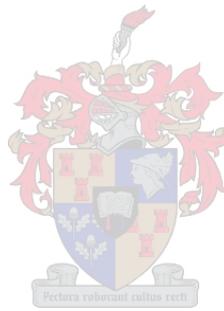


Compensation for Expropriation under the Constitution

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Declaration

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20 February 2009

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Summary

Since the advent of constitutional democracy in 1994 South African courts have been faced with new interpretive imperatives. The courts have to re-evaluate existing legislation with reference to the Constitution, as well as interpret the Constitution itself. Section 25 of the Constitution, “the property clause”, is a telling example of this kind of provision. It protects property rights but at the same time provides for the expropriation of property, as long as such expropriation is duly authorised, is for a public purpose or in the public interest, is procedurally fair and provided that “just and equitable” compensation is paid. “Public interest” includes the nation’s commitment to land reform.

Pre-constitutional expropriation law benchmarked market value as the foremost determinant of compensation. This gave rise to a legal culture dominated by the belief that payment of an amount equating the market value of the property was the best way of duly compensating a property owner. The Constitution, however, lists market value as but one of several factors that need to be taken into account when compensation is calculated, and shifts the interpretive focus from the notion of “market value” to what would be “just and equitable” compensation in the particular circumstances of each case. The law regarding compensation for expropriation has therefore changed, but the legal culture seemingly not. If compensation is going to continue to be paid at market value in the land reform context, transformation is not going to succeed because the acquisition of land for land reform purposes will become too expensive. This raises the following question: Can section 25(3) of the Constitution together with related constitutional as well as statutory land reform measures, construed in a particular manner, have a transformative impact on land reform and, eventually, on the broader socio-economic reality in South Africa?

This question is answered affirmatively, and this dissertation endeavours to provide guidelines to construe relevant constitutional provisions and applicable legislation in a transformative manner. It does so, first, by looking at pre-constitutional expropriation law in order to give a picture of the conventional legal culture of expropriation. The impact of the Constitution on expropriation law since 1994 is then assayed, concluding that constitutional democracy has

had but a limited impact in this area due to the persistence of a legal culture placing too much emphasis on existing property interests and too little on transformation. A comparative perspective with reference to Germany, the United States of America and Australia is put forward in order to offer alternative angles on the compensation question. This is followed by a theoretical consideration of the question *why* compensation is paid, *what* is compensated, *when* compensation is due and *how much* is to be paid. This leads to a conclusion providing guidelines for an interpretation of compensation for expropriation provisions which is more transformative than existing practice.

Opsomming

Die koms van konstitutionalisme het nuwe intepretasiemoontlikhede op die tafel geplaas. Bestaande wetgewing moet nou her-interpreteer word met verwysing na die Grondwet, en die Grondwet self moet ook geïnterpreteer word. Die eiendomsklousule is nie 'n uitsondering nie. Die eiendomsklousule beskerm eiendomsreg terwyl dit terselfdertyd voorsiening maak vir onteiening van eiendom, welke onteiening gemagtig moet wees, vir 'n publieke doel of in die publieke belang, dit moet op 'n prosedurele billike wyse geskied en "billik en regverdige" vergoeding moet betaal word. Die publieke belang sluit grondhervorming in.

Pre-konstitusionele onteieningsreg het baie klem geplaas op markwaarde vergoeding. Hieruit het 'n regs-kultuur ontwikkel wat sterk klem daarop gelê het om die individu heel te maak met vergoeding, waarvolgens markwaarde vergoeding die enigste manier is om dit te doen. Die Grondwet lys markwaarde egter as net een van vyf faktore wat in ag geneem moet word met die berekening van vergoeding. Die fokus is verplaas van "markwaarde" na "billik en regverdige" vergoeding. Dit het dus 'n groot verandering in die reg aangaande vergoeding vir onteiening gebring. Dit blyk egter dat die regs-kultuur van vergoeding nie saam verander het nie. Die gevolg is: as vergoeding steeds teen markwaarde betaal moet word, veral in die grondhervormingskonteks, dan gaan transformasie nie slaag nie, want dit gaan te duur wees. Die vraag is: kan artikel 25(3) van die Grondwet, tesame met ander relevante grondwetlike en (grondhervorming) bepalinge so 'n transformerende impak hê indien dit op 'n seker manier uitgelê word?

Die antwoord is ja, en hierdie proefskrif beoog om riglyne te gee oor hoe om die Grondwet en wetgewing op 'n transformasie-vriendelike manier uit te lê. Die proefskrif begin met 'n analise van die voor-grondwetlike onteieningsreg en die regs-kultuur van onteiening. Daarna word die impak van die Grondwet op onteieningsreg ontleed en die gevolgtrekking gemaak dat die impak van die Grondwet tot dusver beperk is deur die voor-grondwetlike regs-kultuur van onteiening, weens die sterk klem wat op bestaande eiendomsreg geplaas word. Die volgende hoofstuk gee 'n vergelykende blik oor onteieningsgebruik in Duitsland, die Verenigde State van Amerika en Australië met die oog

daarop om die probleem uit 'n ander oogpunt te belig. Die daaropvolgende teoretiese hoofstuk ondersoek *hoekom* vergoeding betaal word, *wat* vergoed word, *wanneer* vergoeding vereis word en *hoeveel* vergoeding betaal moet word. Al die gegewens maak dit moontlik om, gebaseer op die gevolgtrekkings, riglyne voor te stel hoe om vergoeding vir onteiening op 'n transformasievriendelike manier te benader.

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And so, at the end of this journey, the words of Lewis Carroll echos that “so many out-of-the-way things had happened lately that Alice had begun to think that very few things indeed were really impossible”.

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1 Introduction

“It is an Alice in Wonderland world in which the consideration of principles of valuation and the opinions expressed by experienced property valuers make the task of the super valuator seemingly ‘curiouser and curiouser’.”¹

1.1 Motivation for study

When this project was started in 2005, the then still Minister of Land Affairs, Lulu Xingwana, had just caused an uproar by remarking that land reform will be speeded up by shortening the negotiation period for compensation for individual expropriations.² Farmers, concerned that South Africa would become the next Zimbabwe,³ objected that Xingwana’s statements were in conflict with land-reform laws setting out the procedures to be followed for expropriation. They insisted on a reasonable commercial price for farming properties. The ministry, on the other hand, was of the opinion that farmers were making expropriation difficult by inflating property prices,⁴ thereby preventing the government from successfully returning property to people who lost it under “years of racial discrimination and white colonial rule”.⁵ The government therefore proposed a move away from the willing buyer willing seller principle, intimating its intention to move away from buying property from farmers through negotiations, and using expropriation as a legitimate alternative method of land acquisition instead. This resulted in fierce media debates and reports of tension between mostly white farmers and government. The farmers persistently relied on the concept of “compensation”, as contained in and

¹ King J in *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) 955 – 956.

² Sapa “Farmers Seek Clarity on Land-Seizure Threat” *Mail & Guardian* (14 August 2006) http://www.mg.co.za/articlePage.aspx?articleid=280778&area=/breaking_news/breaking_news_national [as on 11 November 2008].

³ S Swartz “White Farmers Face October Deadline” *News24* (13 Augustus 2006) www.news24.com/News24/South_Africa/News/0,,2-7-1442_1981939,00.html [as on 11 November 2008].

⁴ Sapa “Farmers Seek Clarity on Land-Seizure Threat” *Mail & Guardian* (14 August 2006) http://www.mg.co.za/articlePage.aspx?articleid=280778&area=/breaking_news/breaking_news_national [as on 11 November 2008]; G Wanneburg “State Gives White Farmers Strict Deadline” *Independent online* 12 August 2006 http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=qw1155390841373B216 [as on 11 November 2008].

⁵ S Swartz “White Farmers Face October Deadline” *News24* (13 Augustus 2006) www.news24.com/News24/South_Africa/News/0,,2-7-1442_1981939,00.html [as on 11 November 2008].

historically construed under the Expropriation Act.⁶ For the farmers it is important to receive, as compensation, the full market value of property rights that have been expropriated. That is how it used to be prior to 1994. A Constitution protecting existing property rights, but not guaranteeing full market-value compensation for expropriation, is in their perception insufficient and may pose a threat to their vested interests. This indicates a perception that when land is bought, prices can be negotiated and the farmer is likely to receive full market value for the property, while when the property is expropriated, the Constitution causes uncertainty and poses the risk of compensation below market value. The farmers' fears stand in tension with the government's land reform aspirations. The government, pressed by the constitutional mandate to transform, seeks to rely to an increasing extent on the new compensation possibilities created by the Constitution and entailing possible departure from strict market value compensation in all instances.⁷

It is this issue of expropriation for land reform that initially motivated this research project, but as the study progressed it soon appeared that the tension between vested ownership interests and the government's expropriation powers is not restricted to land reform. The broader motivation for this study is therefore the underlying tension between ownership, as guaranteed in the Constitution, and the government's power to expropriate property, as sanctioned by the same Constitution, and the role of compensation in either fueling or relieving such tension. This seemingly irreconcilable tension has inspired a trip down the "rabbit hole", where "curious objects" were found along the way to the Wonderland of constitutional democracy.⁸ As with Alice, however, entering Wonderland does not come easily. It sometimes meant finding keys, drinking potions and eating cakes that lead to unexpected results, not always getting to the point in a simple, straightforward manner. The road to

⁶ 63 of 1975.

⁷ To date the government mostly acquired land for land reform purposes by buying the land from the owner, the price being determined by agreement. It seems as if the government, when saying that it wants to depart from the "willing buyer willing seller" principle, means that it would henceforth *expropriate* land as opposed to entering into negotiations with the owner. See also paragraph 5.1.

⁸ The term "constitutionalism" is often used to denote the period after 1994 in South Africa. This can be problematic, since South Africa *did* have a Constitution prior to 1994. In this dissertation I therefore use the term "constitutional democracy", referring to the period after 1994, with the adoption of the Interim Constitution.

the Wonderland of compensation for expropriation in the constitutional context starts with the tension between the pre-constitutional idea of property, underlying the pre-constitutional legal culture of expropriation, the aspirations of a post-apartheid transformation in property law in general and the way in which all of this is manifested in compensation for expropriation in particular. At the end of this road should be Wonderland of how to deal with the tension in a new constitutional compensation for expropriation law.

1.2 Research question, hypothesis and aim of the study

A critical look at the tension between private property and transformation in the expropriation context is aimed at answering the following research question: *What has been the impact of constitutional democracy in South Africa since 1994, with specific reference to the property clause, on compensation for expropriation?* My hypothesis is that the advent of constitutional democracy has so far not had a far-reaching impact on compensation for expropriation in terms of section 25(3) of the Constitution. This raises the further question whether section 25(3), together with related constitutional and other (land reform) measures, is capable of having a transformative impact if construed in a particular manner.

This study endeavours to provide guidelines for such a transformative interpretation and implementation of constitutional, statutory and other provisions on compensation for expropriation in the post-apartheid context. First, it aims to do so by analysing and assessing some existing interpretations and understandings of such provisions and by investigating, through theoretical and comparative analysis, alternative interpretation possibilities. This means that account will have to be given of the position in foreign jurisdictions. Secondly, this study aims to propose a viable strategy of weighing up the vested interests of those whose property stands to be expropriated against the vesting interests of those who stand to benefit from the expropriation, in order to ensure payment of “just and equitable” compensation furthering the transformative goals of the Constitution. It will in particular be shown how the proportionality principle can be invoked when market value compensation is not re-

garded as the dominant guideline for compensation payable to an expropriated owner.

The assumptions underlying this study are that transformation, especially in the area of land reform, is not taking place at the desired pace, and that a major obstacle in the way of such transformation is the fact that the manner in which compensation for expropriation is determined, inhibits and slows down the transfer of property for reform purposes. A viable and legitimate alternative approach, informed by the notion of transformative constitutionalism, is possible.

1.3 An introduction to the broader problem

Transformative constitutionalism is an interpretive leitmotif in constitutional discourse that could shed light on how to negotiate the tension between change and stability, playing itself out in, amongst others, the tension between established and aspirant property owners' seemingly conflicting appeals to the property clause.⁹ Transformative constitutionalism will thus be relied on in dealing with the research question. Karl Klare coined the phrase and developed the notion of "transformative constitutionalism" in 1998, describing this kind of constitutionalism as

"a long-term project of constitutional enactment, interpretation and enforcement committed to transforming a country's political and social institutions and power relationships in a democratic, participatory and egalitarian direction. Transformative constitutionalism connotes an enterprise of inducing large-scale social change through non-violent political processes grounded in law."¹⁰

Klare, from his analysis of the interplay between mainstream legal culture and transformative constitutionalism, concludes that in some instances mainstream legal culture tends to be a restraining force resisting transformation.

⁹ A study of transformative constitutionalism has been done, also in the property law context. See K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146; AJ van der Walt "Transformative Constitutionalism and the Development of South African Property Law" Part 1 2005 *TSAR* 655 and Part 2 2006 *TSAR* 1; H Botha "Freedom and Constraint in Constitutional Adjudication" (2004) 20 *SAJHR* 249; H Botha "Metaphoric Reasoning and Transformative Constitutionalism" 2002 *TSAR* 612; A Cockrell "Rainbow Jurisprudence" (1996) 12 *SAJHR* 1; D Moseneke "The Fourth Bram Fisher Memorial Lecture: Transformative Adjudication" (2002) 19 *SAJHR* 309; H Botha, AJ van der Walt & JWG van der Walt (eds) *Rights and Democracy in a Transformative Constitution* (2002).

¹⁰ K Klare "Legal Culture and Transformative Constitutionalism" (1998) 14 *SAJHR* 146 150.

Legal culture can be described as “a set of intellectual habits that are embedded in more or less uncritical acceptance of doing things the way they are usually done; the way they have been done for a long time”.¹¹ Pre-constitutional legal culture was hegemonic, largely characterised by its formal vision of law, not acknowledging the interplay between law and politics where the former is applied.¹² It will be shown in the course of this dissertation¹³ that the Expropriation Act¹⁴ is an embodiment of this legal culture, with case law re-enforcing it. This legal culture resists transformation. Lawyers are trained and socialised to accept the intellectual properties of the mainstream legal culture as normal, and not as contingent cultural artefacts,¹⁵ and “lawyers do not even realise that their unarticulated assumptions and their expressed views about what constitutes a legal problem, a source of legal authority or a convincing legal argument are culturally determined”.¹⁶ Klare describes how this combination of factors can work against transformative aspirations:

“This property of legal culture – that participants are often unaware of how it shapes their professional beliefs and practices – affects the substantive development of law. If cultural coding sets limits (however implicit or unconscious) on the types of questions lawyers ask and the types of evidence and argument they deem persuasive, surely this in turn sets limits on the kinds of answers the legal culture can generate ... Un-self-conscious and unreflective reliance on the culturally available intellectual tools and instincts handed down from earlier times may exercise a drag on constitutional interpretation, weighing it down and limiting its ambition and achievements in democratic transformation.”¹⁷

Legal transformation can therefore be promoted only if lawyers acknowledge that legal culture restrains their thinking about law as an agent of change. Transformation consequently poses a challenge to the judiciary too, requiring it to answer the following question: How does one achieve socio-economic

¹¹ AJ van der Walt “Legal History, Legal Culture and Transformation in a Constitutional Democracy” 2006 (12) *Fundamina* 1 8.

¹² JC Froneman “Legal Reasoning and Legal Culture: Our ‘Vision’ of Law” (2005) 1 *Stell LR* 3.

¹³ See chapter 2.

¹⁴ 63 of 1975.

¹⁵ K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 167. See also R Coombe “‘Same as it Ever Was’: Rethinking the Politics of Legal Interpretation” (1986) 34 *McGill LJ* 603; AJ van der Walt “Modernity, Normality, and Meaning: The Struggle Between Progress and Stability and the Politics of Interpretation” (2000) 16 *Stell LR* 21.

¹⁶ AJ van der Walt “Legal History, Legal Culture and Transformation in a Constitutional Democracy” (2006) 12 *Fundamina* 1 17.

¹⁷ K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 168.

transformation through law, when the legal culture and with it the tools and methods for construing and implementing law as an agent of change, have not really changed with and since the advent of constitutional democracy? With reference to compensation for expropriation, the crucial question from a transformative constitutionalism perspective would be how to invoke the property clause to level the economic playing field with the interests of existing and the aspirations of previously disadvantaged (prospective) property owners in mind.

Property law can be harnessed to facilitate the economic growth and development necessary to alleviate poverty. With this in mind the land reform imperatives were included in the property clause. The problem, however, is that property law by and large still depends on traditional rules and institutions, like private ownership,¹⁸ with their predilection for the strict protection of existing property interests. Transformation, on the other hand, requires the Constitution to facilitate access to property for redistributive purposes. The need for transformation can, by some, be perceived as a threat to the security of existing property holdings.¹⁹ However, if existing holdings are protected too strictly, redistribution might become impossible. On the other hand, transformation and land reform can be over-emphasised to the detriment of economic growth and development. What is required from post-apartheid property law is guidelines on how to make this tension work creatively towards the protection of vested property interests and, at the same time, the broadening of access to resources in a manner allowing for redistribution.²⁰ This is the challenge addressed in this dissertation, exploring new perspectives on compensation for expropriation under and in terms of the Constitution, and re-interpreting existing expropriation laws with due regard to the spirit, purport and objects of the Constitution.

¹⁸ AJ van der Walt *Constitutional Property Law* (2005) 402.

¹⁹ AJ van der Walt *Constitutional Property Law* (2005) 405.

²⁰ AJ van der Walt *Constitutional Property Law* (2005) 408.

1.4 Qualifications and exclusions

This study comprises a survey, analysis and assessment of relevant literature on expropriation (monographs, journal articles, legislation and case law). There is a historical dimension to the study in order to ascertain the origins of the pre-constitutional legal culture of expropriation. The historical roots of the legal culture of expropriation will be traced through an analysis of relevant case law, identifying interpretation techniques and patterns that have shaped the said culture in a certain manner. This will be compared to the expropriation practices under the Constitution, as developed through case law.

In order better to understand compensation laws, practices and procedures in South Africa, the South African legal culture of expropriation, before and after 1994, will be put side by side with its counterparts in Germany, the United States of America and Australia, and will be assessed in accordance with accepted methods and procedures of legal comparison, namely literature and case analysis. The United States of America, with its extensive literature and case law on regulatory takings, provides useful comparative material in answering the question of *when* compensation is due and *what* is compensated. By contrast, Germany is useful because in German law compensation is *not* paid for regulation, even if it deprives the owner of property. The South African property clause is modelled on and similar to the German property clause, in that the focus of both is on balancing the interest of the individual with that of the public. The Australian example is interesting from a South African perspective, not so much due to shared English roots, but rather because of its strong emphasis on *acquisition* of property as a pre-requisite for compensation. This differs from US expropriation law, since in the United States of America compensation is sometimes possible, even if the state did not acquire anything. What is furthermore worthy of note in Australia is that deprivations that did *not* take place in terms of section 51(xxxi) of the Constitution, do not require compensation. This leaves scope for the government to regulate property without having to compensate for every acquisition or regulation that restricts property rights.

From a theoretical perspective considerable reliance will be placed on Frank Michelman's ideas of redistributive justice, Joseph Sax's theory of expropriation as well as Margaret Radin's, Joseph Singer's and Laura Underkuffler's theories of property. These theories provide the foundation to analyse the problem posed by the research question dealt with in this study and to provide possible answers. Although the dissertation is situated within the broader framework of property law, it will not deal with theories of why property *should* be constitutionally protected, since this debate has largely come to an end in South Africa with the inclusion of a property clause in the Constitution. Theories of *what* is protected under the property clause will also not be fully canvassed, but reference will be made to this issue where appropriate. The dissertation focuses on compensation for expropriation and therefore discussions on the content of the property clause will be restricted by their relevance in this context.

1.5 Overview of chapters

Compensation under the Constitution is paid because an individual cannot be expected to carry the burden of an expropriation that is for a public purpose or in the public interest. Compensation therefore spreads the cost of the expropriation amongst the public that benefits. Before the Constitution, compensation was paid because it was presumed that the state will not take away rights without compensation, unless clearly stated. This shift is because the Constitution requires that the interest of the individual be weighed against the interest of the public. Compensation is due when the state expropriates property for a public purpose, and not for mere regulation of property. Before the Constitution, compensation was deemed to be market value. Under the Constitution, compensation must be "just and equitable", an amount necessary to alleviate the burden from the individual in proportion to the gain of the public, presumably also due to the balancing required.

Expropriation, although authorised by the Constitution, is carried out in terms of the Expropriation Act.²¹ The Expropriation Act²² pre-dates constitutional

²¹ 63 of 1975.

²² 63 of 1975.

democracy and this is the origin of the tension: A pre-constitutional act with all its interpretative baggage of case law is expected to operate meaningfully in a constitutional context. In chapter 2 pre-constitutional expropriation law will be discussed, with due regard to its technicalities as “black-letter law”, in order to come to grips with the pre-constitutional legal culture of expropriation.

The analysis of pre-constitutional expropriation law in South Africa will show how it has been influenced by, on the one hand, Roman-Dutch law with its emphasis on ownership and, on the other hand, by English law with its dominant administrative-law features and a strong emphasis on legislation. The Roman-Dutch influence is evident from the high level of protection that ownership conventionally enjoyed. Pre-constitutional expropriation law, for instance, seeks to fully indemnify the owner of expropriated property, and this could only be attained, it is thought, by paying the full market value of property, regardless of context. Other rights in property are protected under certain circumstances, but only on certain conditions and then not at market value.

The Roman-Dutch and English law principles formed the bases of the Expropriation Act.²³ Pre-constitutional legal culture in general is characterised by formalism with emphasis on the literal meaning of legislation²⁴ and this, as will be shown, often enabled the courts to interpret the applicable expropriation legislation in favour of the owner. The presumption of statutory interpretation that the legislature does not intend to take away rights without paying compensation, coupled with the strong emphasis on full indemnity at market value, strongly protected the property owner against almost every interference. The implication of this is that the apartheid system of land holdings and its characteristically unequal patterns of ownership (and wealth) were entrenched in legislation.²⁵ The property rights of black people (mostly excluding ownership) were less stringently protected than those of white people, and this ensured

²³ 63 of 1975.

²⁴ M Chanock *The Making of South African Legal Culture 1902 – 1936: Fear, Favour and Prejudice* (2001) 551. Chanock argues that this is not solely to blame on the National Party apartheid government after 1948, but has been part of South African legal culture for quite a long time.

²⁵ M Chanock *The Making of South African Legal Culture 1902 – 1936: Fear, Favour and Prejudice* (2001) 472 argues that apartheid law in general was shaped to provide security for selected citizens, and he focuses on the role the executive powers played in sustaining apartheid.

that wealth remained concentrated in the hands of the white minority. This is the state of affairs that the Constitution was designed to change.

In pre-constitutional expropriation law, compensation is paid because it is assumed that the state will not deprive an owner of property without compensation. A single person, it is believed, cannot be expected to carry the burden for something that will benefit the broader public. Compensation is due only upon expropriation, and not upon mere deprivation, and expropriation, in its turn, can only be possible when legislation provides for it. There seems to be confusion as to what is compensated – the rights that are taken away or the object itself.

Once it has been established that compensation is due, it is assumed to be at market value. According to the Expropriation Act,²⁶ market value is calculated by looking at what a willing buyer would pay a willing seller for the expropriated property. Intricate economic methods of guesstimating what such an amount would be, calculated by expert valuers on the assumption of seemingly objective, independent functioning markets, are routinely portrayed as reliable calculations of compensation for the expropriated property. This neatly fits the formalistic framework of apartheid law in general, and expropriation law in particular. Although the courts were at times well aware that trying to ascertain market value in such a way makes the task of the court in determining market value “curiouser and curiouser”,²⁷ it has remained the preferred method of determining market value.

Since the advent of constitutional democracy in 1994, the rights to property and “just compensation” for expropriation have been guaranteed, first, in the Interim Constitution²⁸ and, since 1997, in the Final Constitution.²⁹ Expropriation must comply with the requirements of section 25. Section 25(2) provides that:

“[p]roperty may be expropriated only in terms of law of general application

a) for a public purpose or in the public interest; and

²⁶ 63 of 1975.

²⁷ *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) 956.

²⁸ Act 200 of 1993 (“Interim Constitution”) s 28.

²⁹ Of 1996 (“Constitution”) s 35.

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”.

With reference to section 25(2)(b), section 25(3) further requires that:

“[t]he 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”.

The implication of these sections is that expropriation will pass constitutional muster if property is expropriated in terms of a *law of general application*, for a *public purpose*, in a manner that is *procedurally fair* and against payment of *just compensation*, as determined with reference to the five factors in section 25(3). Expropriation is now constitutionally mandated, focussing on striking a balance between the public interest and the interest of those effected and now including a wider understanding of the public purpose / public interest requirement.

Section 25(4) complements section 25(2) by stating that

“for the purposes of this section-

- 1) 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
- 2) property is not limited to land”.

Section 25(5) to 25(9) makes provision for land reform and instructs the legislature to promulgate legislation and provide other measures in order to attain the land reform goals. The Constitution is therefore the driving force behind land reform and transformation, and expropriation of land plays a vital role in attaining their goals.

The Constitution brought about some changes in expropriation law with the inclusion of sections 25(2) and 25(3) in the Final Constitution. The public purpose / public interest requirement was broadened, apparently to make it possible for the government to transfer land to private beneficiaries if it is done for land reform purposes. This requirement is of interest in this dissertation in three instances. The first instance links more directly to the compensation question, and that is the difference between public purpose as a requirement as per section 25(2)(a) and public purpose as a factor to be taken into account when calculating compensation. The one influences the validity of the expropriation itself, while the other can influence the amount of compensation paid to the expropriatee. The *Du Toit*³⁰ case is discussed in chapter 3 as an example of how the courts confused the said requirement and the compensation factor.

The second instance has to do with the question whether it is possible to expropriate property for the benefit of a private party, for land reform purposes. This question is discussed in chapter 3. Although this dissertation does not focus on the public purpose / public interest requirement, it is of relevance nonetheless insofar as it influences the compensation question.

The third instance relates to the expropriation of homes for a public purpose, and the question that arises is whether the government can adequately compensate such expropriations. This is discussed in chapter 4.

The courts have gradually started to inquire whether compensation is due in certain circumstances, but, as will be shown, the *FNB* case effectively reduced the question to an “arbitrary deprivation” inquiry where no clear distinction is drawn between deprivations and expropriations, and it is not clearly stated *when* something amounts to a compensable expropriation.

In Chapter 3 it is argued that the constitutional legal culture of expropriation does not deviate much from its pre-constitutional counterpart, even though the Constitution demands a different perspective on the issue of expropriation.³¹

³⁰ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

³¹ M Chanock *The Making of South African Legal Culture 1902 – 1936: Fear, Favour and Prejudice* (2001) 514 agrees that the Constitution did not result in a big break from pre-constitutionalist legal culture in general.

With the advent of constitutional democracy, market value was relegated to one of five factors, in a non-exhaustive list, to be taken into account when determining compensation, this means that the courts are now faced with an unprecedented challenge. Constitutional expropriation is unknown territory for them, and the notion of just and equitable compensation is undeveloped in the expropriation jurisprudence of a judiciary that has remained stuck in a market-value paradigm. The pre-constitutional Expropriation Act³² is still in force and it arms the courts with the “certainty” of market value compensation, as developed in pre-constitutional case law, to which they can have resort in times and instances of “uncertainty”. This has largely remained the position in spite of the constitutional imperative enjoining courts to construe and develop existing law in a manner promoting the spirit, purport and objects of the bill of rights.³³ Compensation is still regarded as an amount indemnifying the owner, and paid to spread the burden of the expropriation, with little reference to the equitable balance that should be struck between the vested interest of the owner and the aspirations and interests of the public. Accordingly, in the calculation of compensation, market value still plays a central role as determinant of the amount of compensation, with the emphasis still on the guidelines of the Expropriation Act³⁴ as opposed to those in the Constitution.

Three land reform pillars are briefly discussed in Chapter 3, before considering case law on expropriation in the context of land reform. Although this dissertation is not restricted to land reform, the problems experienced in this context serve as an apt example of how the pre-constitutional legal culture of expropriation can have a restraining influence on the transformative goals of the Constitution. If compensation is paid in accordance with section 12 of the Expropriation Act,³⁵ without due regard for the Constitution, the tendency is to favour to the constitutional guarantee of property rights above land reform. Insistence that ownership is duly protected only when expropriation is com-

³² 63 of 1975.

³³ AJ van der Walt “Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in the Constitutional State” (2001) 118 *SALJ* 258 describes this tension within the context of property law with an interesting reference to traditional dancing methods.

³⁴ 63 of 1975.

³⁵ 63 of 1975.

pensated at full market value means that land reform will become too expensive and therefore impossible.

Chapter 4 is a comparative chapter utilising the interpretative possibilities of legal comparison to shed light on the issue of compensation for expropriation in South Africa. It will be shown that in some foreign jurisdictions, notably Germany, the United States of America and Australia, private property is not regarded as absolute and it can be regulated and expropriated by the state. The German example illustrates how compensation for expropriation can focus on striking a balance between the public and individual interests, and how striking that balance can sometimes imply that compensation that is lower than market value can be just and equitable. Any law that places an excessive burden on the individual without providing for compensation will, however, be unconstitutional. In a nutshell, German expropriation law concentrates on the proportionality requirement.

German law does not recognise compensation for excessive regulation, but draws a categorical line between deprivation and expropriation. Expropriation must be authorised by a statute that makes provision for the payment of compensation (the *Junktim-Klausel*). This stands in contrast with the position in the United States of America, where compensation is sometimes paid when the government merely regulates, and not expropriates, property. This may happen in cases where regulation places an extraordinary burden on the individual. In the German case, a unique type of administrative or constitutional payment solves this problem without muddling the lines between deprivation and expropriation. The extensive literature on the US law of eminent domain nevertheless provides useful answers to the question when compensation is due, and all of this is discussed in chapter 4. It is especially interesting to contrast US law with the Australian law of compulsory acquisition, where compensation is only due when the government *acquired* property in terms of section 51(xxxi) of the Constitution.

Expropriation laws in the three comparative jurisdictions are studied in order to indicate possible routes to determine when compensation is due, and this, in its turn, will indicate what must be compensated. It will be argued that the preferable route in South Africa would be a modified German one, where the

distinction between deprivation and expropriation is categorical, and compensation is only due upon expropriation, with the possibility of a type of administrative or constitutional payment in cases where a regulation places an excessive burden on an individual. It is also preferable that compensation be calculated on a proportionality basis.

From the comparative study the focus shifts to the theoretical underpinnings of expropriation, and compensation for expropriation, with an analysis of literature and precedents on compensation. The part of the study concentrates on the questions *why* compensation is paid, *what* is compensated, *when* compensation is due and *how much* should be paid (the calculation question).

Chapter 4 starts off by looking at the problems caused by a formalistic approach that regards the compensation requirement as a means to protect private ownership from any government interference. This would mean that only *full compensation* is considered just and equitable compensation. Approaches that contextualise compensation inquiries within society in order to determine what is fair on the individual in the context of the broader society, are also discussed. It will be shown that property is also protected in this context in order to enable, and only insofar it enables, the individual to participate in society (Michelman) or to lead a self-governing life (the German approach). These theories are discussed since they can be especially useful in the South African context, where property under apartheid was regulated in a manner depriving certain population groups from participation in society, and disabling them from leading a self-governing life. The idea that compensation is paid to ensure fairness will also be elaborated on, with the assumption that this might be useful in South Africa with its strong focus on redistribution. As to the *when* question, the discussion will again revert to the issue of regulatory takings, contrasting it with Michelman's explanation that compensation should be paid when the demoralisation cost of the expropriation is too high.

The biggest part of the chapter, however, deals with the payment of compensation to achieve fairness. Asking the *how much* question in this manner can help to strike a balance between the interests of the public and those of the individual affected. In this context it will be shown that market value is not the obvious answer. The question of how much compensation should be paid

quite interestingly also involves the question of who should determine how much is to be paid. Here the experience in India sounds a warning worth noting. The Indian legislature prescribed a certain standard of compensation in the hope of bringing about economic reforms, while the courts interpreted this standard in such a way that it had the opposite effect. It will also be shown that the German approach with its requirement that the legislation authorising and expropriation should provide for compensation (the *Junktim-Klausel*) means that the decision of how much compensation should be paid is largely left to the legislature. The *how much* question has furthermore given rise to a debate on whether compensation can be justified in *all* cases, and whether there are some instances where expropriation should be prohibited, regardless of the amount of compensation, such as when homes are expropriated. In answering the *how much* question, emphasis will be placed on the proportionality principle as a tool to calculate fair compensation. This approach will ensure that emphasis will not only be placed on ownership, but that the interests of the public will also play a role in the calculation of compensation.

This dissertation should be read in the context of a topical, controversial debate in South Africa. It aims to give a non-emotive perspective on the debates that the Expropriation Bill,³⁶ as discussed in chapter 4, has stirred. The dissertation is based on the assumption that the point is reached where the development of expropriation law, with specific reference to the compensation element, is politically desirable, directed by the Constitution, but more importantly, possible. It aims to provide a foundation for compensation practices that integrate the pre-constitutional expropriation law, as far as possible, in a coherent post-apartheid constitutional expropriation law. Failure to start developing a new expropriation law and compensation practices might result in post-apartheid expropriation law that is “curiouser and curiouser”.

³⁶ 18 – 2008.

2 Compensation for Expropriation in Pre-Constitutional Law

"Where shall I begin, please your Majesty?" he asked. "Begin at the beginning," the King said, very gravely, "and go on till you come to the end: then stop."¹

2.1 Introduction

This chapter deals with expropriation law in South Africa prior to the era of constitutional democracy (commencing on 27 April 1994). In order to define the legal culture of pre-constitutional expropriation law, the history and the development of expropriation law will be analysed. The focus will then shift to how the courts have developed expropriation law through interpretation of the Expropriation Act.² This is the most technical chapter of the dissertation, and it aims at describing the expropriation "black letter law", to, in the process, highlight the most important characteristics of the legal culture of expropriation.

The chapter starts with the history of expropriation legislation in South Africa and moves on to requirements for a valid expropriation before looking in depth at section 12 of the Expropriation Act.³ The focus will be on the compensation principle, with specific attention to *when* compensation is due, for *what* compensation is paid and the calculation of compensation. Attention will be paid to the role of market value to determine compensation, and to a lesser extent attention will be given to the narrow techniques, or valuation methods, such as the comparative approach, used to ascertain market value. The chapter concludes with an evaluation of the legal culture informing pre-constitutional expropriation law and practices.

¹ L Carroll *Alice's Adventures in Wonderland* (2007) 180 <http://books.google.co.za/books?id=DHkIMoOUac4C> [as on 6 November 2008].

² 63 of 1975.

³ 63 of 1975.

2.2 *The history of expropriation law in South Africa*

2.2.1 Introduction

Historically South African law stems from seventeenth and eighteenth century Roman-Dutch law. It developed over time through case law, supplemented by legislation. Roman-Dutch law arrived in the Cape with the first colonial settlers, the Dutch, in 1652.⁴ The little legislation adopted in the Cape until 1806 does not survive in South African law today.⁵

With British settlement in the Cape in 1806, the Roman-Dutch law remained in force but was supplemented and modified by British legislation.⁶ Under British rule, four provinces were established, each with its own legislative body. The legislation introduced in the Cape Colony and in Natal was mostly the equivalent of its British counterparts.⁷ By the time of the British annexations of the Orange Free State and Transvaal, each of the four colonies had its own legislation, making for a diverse body of legislation in the various territories eventually coming under British rule. Consequently, upon annexation, the British authority moved for uniformity.⁸

In 1910 the Union of South Africa, incorporating four formerly British controlled colonies, was established by virtue of the South Africa Act,⁹ which was adopted as a British Act of Parliament. As South Africa's first Constitution this act required eventual uniformity of legislation made by the Union Parliament. When South Africa became a Republic in 1961, it became independent from England and the parliament of the Republic became the supreme legislative authority in the country.¹⁰

A curious mix of Roman-Dutch and English law developed into what is now known as the South African common law.¹¹ From the Roman-Dutch law side,

⁴ LM du Plessis *Introduction to Law* 3rd ed (1999) 49.

⁵ LM du Plessis *Introduction to Law* 3rd ed (1999) 50 – 51.

⁶ D Hutchison (ed) *Wille's Principles of South African Law* 8th ed (1991) 28.

⁷ D Hutchison (ed) *Wille's Principles of South African Law* 8th ed (1991) 28.

⁸ D Hutchison (ed) *Wille's Principles of South African Law* 8th ed (1991) 29.

⁹ 9 Edward VII, c9.

¹⁰ D Hutchison (ed) *Wille's Principles of South African Law* 8th ed (1991) 29.

¹¹ For a thorough description of the interaction between the two systems, especially in the area of private law, see R Zimmerman & D Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) and F du Bois (ed) *Wille's Principles of South African Law* 9th ed

the South African legal system shares a legal history and tradition with continental European civil-law legal systems historically based on medieval, learned Roman law. Furthermore, academic writings play a substantial role in South African law, something that is foreign to common law countries.¹² Roman-Dutch law has had a strong influence on especially private law in South Africa.

English Common Law¹³ is often contrasted with the Roman-Dutch civil law. English Common Law is an uncodified system less influenced by Roman law. From the English Common Law, South Africa inherited the tradition where the judiciary and case law play a prominent role in the development of law. South Africa was influenced by the Common Law especially as far as legislation and parliamentary sovereignty are concerned. The Common Law influence in South Africa is mostly evident in mercantile law, public law and procedural law.¹⁴

The legacy of this mixed legal system creates problems in the context of expropriation. Throughout case law a tension between the resilient Roman-Dutch law influences on (private) property law is visible on the one hand and, on the other hand expropriation law which, typically in the English tradition, is very much based on and driven by legislation. For example, expropriation is an administrative act, and South African administrative law has been influenced strongly by English law. This tension often confuses courts called upon

(2007). It should be noted that South Africa also has customary law that was mostly kept separate from the Roman-Dutch/English law under English colonial rule. It eventually received limited recognition and in 1927 a Native Administration Act was promulgated that provided for customary law to be applied in court in some instances.

¹² R Zimmerman & D Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 10.

¹³ The “common law” terminology can be confusing. Roman-Dutch law is based on Roman law that implies that the history of South African law has a Roman law foundation, something South Africa shares with Western Europe. “Common law” as a term refers mostly to Roman-Dutch law as it was adapted and developed in South African case law and custom. “Common law” is usually distinguished from other sources of law such as legislation. Law, as developed in case law in England, is also referred to as “Common Law”. This “Common Law” forms the basis of law in Anglo-American law and was hardly influenced by Roman law. The law of equity, however, plays a significant role in the English “Common Law”. To make things somewhat more confusing, the South African common law was influenced by the English Common Law. See LM du Plessis *Introduction to Law* 3rd ed (1999) 19 – 20. To make things easier, when reference is made to the Roman-Dutch common law it will be written in the lower case, while if reference is made to the English Common Law, the letters will be capitalised.

¹⁴ R Zimmerman & D Visser *Southern Cross: Civil Law and Common Law in South Africa* (1996) 9 – 12.

to assess the validity of an infringement on a private-law right, of Roman-Dutch origin, by a public-law administrative act, authorised by expropriation legislation based on English law.

In an attempt to understand the influence of the respective systems on the South African law of expropriation, a short summary of the law regarding expropriation in the Roman-Dutch and English law respectively follows, with a short summary of the most important principles that have crystallised from the two systems.

2.2.2 Roman-Dutch expropriation law

Roman law did not have a general law regarding expropriation, but allowed the state to expropriate for specific needs. One possible explanation for the lack of a comprehensive expropriation law is that large pieces of land were reserved, in the form of *ager publicus*, for public works in any event, making expropriation laws unnecessary.¹⁵

Nonetheless, some instances of expropriation, with specific reference to the compensation requirement, were recorded in Roman law. The *lex Icilia* of around 454 B.C. talks of the Aventine, public property, which was invaded by private persons that did not have the authority to do so. The Senate was forced to pass a law to divide the lands unlawfully held by these private occupants among the people after paying the cost (as determined by appraisers) of the buildings.¹⁶ Frontinus wrote that materials taken from private land for public works had to be paid for, and the price must be *viri boni arbitrato aestimata*.¹⁷ In Constantinople, private buildings could be acquired for establishing schools for a *competens pretium*. Land could also be acquired for public buildings, with compensation in the form of a right to build on or over the new (public) building. Likewise, in Constantinople, where land was expropriated for building a tower, the landowner was compensated with the right to live in

¹⁵ A Gildenhuys *Ontheieningsreg* 2nd ed (2001) 29 – 30; N Davis *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (1987) 6.

¹⁶ N Matthews “The Valuation of Property in the Roman Law” (1920 – 1921) 34 *Harv LR* 229 232.

¹⁷ N Matthews “The Valuation of Property in the Roman Law” (1920 - 1921) 34 *Harv LR* 229.

the (built) tower. Compensation was also granted in the form of an absolution from taxes.¹⁸

The *pretium* requirement is somewhat problematic since it can mean price, cost or value, and is therefore somewhat different from the term value that we use today.¹⁹ The closest equivalent to market value in Roman law would be the term *quanti venire potest* (what it can be sold for) or the *quanti vendere potest* (what the owner can sell it for), but it is distinguished from *verum pretium*, which would be the actual price.²⁰ In Roman times, the *quanti venire potest* referred to the actual circumstances of the case, what property could be sold for on the day of valuation. It differs from the current day approach to market value in that today the willing buyer willing seller rule is only applied in the instances where it will give the full value. In Roman law, a probable price, even in the absence of a buyer, was regarded as the *quanti venire potest*.²¹

There are also references in the history of Roman Law to the other requirements of expropriation, namely just cause. In the thirteenth century, Accusius wrote that expropriation presupposes a *justa causa*.²² Hundred years later, Baldus confirmed the condition of *pretium*.²³ Gierke added that what is required is a process that sets boundaries on the right to expropriate. The state's expropriatory power should not be exercised arbitrarily and only *ex justa causa*. Public necessity was regarded as sufficient *causa*, since the public should benefit when compensation is paid at public expense.²⁴ Later writings confirmed the principle that public policy dictates that when the State interferes with private rights, compensation should be paid.²⁵ It is from this line of development that the requirements for a valid expropriation were laid

¹⁸ N Matthews "The Valuation of Property in the Roman Law" (1920 - 1921) 34 *Harv LR* 229.

¹⁹ N Matthews "The Valuation of Property in the Roman Law" (1920 - 1921) 34 *Harv LR* 229 232.

²⁰ N Matthews "The Valuation of Property in the Roman Law" (1920 - 1921) 34 *Harv LR* 229 232.

²¹ N Matthews "The Valuation of Property in the Roman Law" (1920 - 1921) 34 *Harv LR* 229 240.

²² N Matthews "The Valuation of Property in the Roman Law" (1920 - 1921) 34 *Harv LR* 229 232.

²³ N Matthews "The Valuation of Property in the Roman Law" (1920 - 1921) 34 *Harv LR* 229 232.

²⁴ N Matthews "The Valuation of Property in the Roman Law" (1920 - 1921) 34 *Harv LR* 229 232.

²⁵ N Matthews "The Valuation of Property in the Roman Law" (1920 - 1921) 34 *Harv LR* 229 232.

down, namely *justa causa*, compensation, a fair procedure and public purpose.

Roman-Dutch jurists expanded on the subject.²⁶ Grotius wrote that if property is taken by the state, the first requirement is public utility and if possible, compensation should be paid to the one expropriated.²⁷ He seems to base expropriation on the idea of a social contract,²⁸ which recognises that between subjects property cannot be taken without consent. The state, on the other hand, can take property without consent, but only against payment of compensation and for a public purpose. He refers to this power as the *dominium eminens*,²⁹ the first reference to the term eminent domain.³⁰ Although Grotius did not really add anything new to the existing body of expropriation laws,³¹ he influenced many subsequent writers,³² and in the United States of America his writings are still relied upon in many cases.³³

2.2.3 The English heritage

The law of expropriation in England originates from the Great Charter in 1215 that protected individual liberty and freehold. In 1541, parliament enacted the first statute that regulated compulsory acquisition by legislation for public purposes.³⁴ Various other statutes followed, regulating mainly compulsory acquisition.

²⁶ A detailed discussion of the Roman-Dutch writings can be found in Steyn JA's judgement in *Union Government v Jackson* 1955 (2) SA 898 (A) 437. He explains that in Roman-Dutch law, the Sovereign's authority to expropriate was recognised only insofar it was necessary in the interest of public use. This power had to be exercised with caution to limit state interference with the owner's rights. See also A Gildenhuys *Onteieningsreg* 2nd ed (2001) 29 – 30. N Davis *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (1987) 6 makes reference to De Groot *Inleiding tot de Hollandsche Rechts-Geleerdheid* 2.32.7; Pufendorf *De Officio Hominis Civis* 2.15.4 and *De Jure Naturae ad Genuim* 8.5.7; Voet *Commentarius ad Penedectas* 1.4.7; Van Bynkershoek *Verhandelingen over Burgerlijke Rechts-Zaaken* 2.15.

²⁷ F Mann "Outlines of a History of Expropriation" (1959) 75 *LQR* 188 202.

²⁸ *De Jure Belli ac Pacis* 1.1.10.

²⁹ II.14.7.

³⁰ F Mann "Outlines of a History of Expropriation" (1959) 75 *LQR* 188 192.

³¹ F Mann "Outlines of a History of Expropriation" (1959) 75 *LQR* 188 203.

³² Such as Pufendorf. See F Mann "Outlines of a History of Expropriation" (1959) 75 *LQR* 188 203.

³³ F Mann "Outlines of a History of Expropriation" (1959) 75 *LQR* 188 203.

³⁴ F Mann "Outlines of a History of Expropriation" (1959) 75 *LQR* 188 194. W McNulty "The Power of 'Compulsory Purchase' under the Law of England" (1912) 21 *Yale Law Review* 639 643.

sition for transportation purposes and the building of canals,³⁵ and later property could only be taken *per legem terrae*, or by parliamentary legislation. It was deemed that the owner's consent was vicariously given to the elected parliament.³⁶ Blackstone formulated the principle of compulsory acquisition, stating that:

“in vain may it be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even a public tribunal, to be the judge of this common good, and to decide whether it be expedient or not...in this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce...[n]ot by absolutely stripping the subject of his property in a arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. All that the legislature does, is to oblige the owner to alienate his possessions for a reasonable price, and even this is an exertion of power, which the legislature indulges with caution and which nothing but the legislature can perform.”³⁷

The idea that expropriation amounts to a forced sale was initially accepted in England and formed the basis of the first English expropriation legislation. Expropriation was seen as a compulsory sale of land³⁸ and statutes served as an agreement between the expropriator and the expropriatee. Based on this view, by serving an expropriation notice, a common law vendor / purchaser relationship was created, binding the parties to the sale, subject to the payment of compensation and the delivery of the property. The state's capacity to expropriate was subject to just compensation as a kind of replacement price. If there was no agreement, the purchase price (compensation) was determined by arbitration. Arbiters did not have prescribed formulas to determine the amount of compensation.³⁹ The idea that expropriation is a forced sale was rejected by the British courts in later years.⁴⁰ In South Africa it was initially followed,⁴¹ but rejected in later case law.⁴²

³⁵ F Mann “Outlines of a History of Expropriation” (1959) 75 *LQR* 188 195.

³⁶ F Mann “Outlines of a History of Expropriation” (1959) 75 *LQR* 188 196.

³⁷ W Blackstone *Commentaries on the Laws of England* vol 1 par 139.

³⁸ A Gildenhuys “Markwaarde as Vergoedingsmaatstaf by Onteiening” 1977 *TSAR* 1 1.

³⁹ A Gildenhuys “Markwaarde as Vergoedingsmaatstaf by Onteiening” 1977 *TSAR* 1 1.

⁴⁰ *Kirkness v John Hudson & Co* 1955 AC 696 (Eng) 709.

⁴¹ This was mostly the case in Natal that seems to have followed the English case law on expropriation. See *Durban Corporation v Lewis* 1942 NPD 24 and *Minister of Defence v Commercial Properties Ltd and Others* 1956 (2) SA 75 (N) 79 where the court ruled that if an agreement (“voluntary sale”) about the acquisition of property is not reached after the serving of the expropriation notice, then the state may enforce the acquisition and the nature of the

The Land Clauses Consolidation Act of 1845 was the first act to prescribe the general procedure to follow at expropriation, serving as a code of compensation. An act dealing with specific instances of expropriation could adopt this code with or without modification.⁴³ Expropriation schemes still had to be authorised by their own authorising statutes. The act served as a model for the subsequent drafting of expropriation legislation in Britain and some Commonwealth countries, including South Africa after Union in 1910.⁴⁴

According to the Land Clauses Consolidation Act of 1845, the value of property was the value it had to the owner.⁴⁵ Ten per cent *solatium* was added to this value to compensate the expropriatee for the inconvenience of a compulsory sale.⁴⁶ The result was that the compensation amount was often inflated.⁴⁷ In an effort to reduce the compensation amounts, the Acquisition of Land (Assessment of Compensation) Act of 1919 was promulgated. According to this act, property included all kinds of property, and the act provided for the payment of compensation, not only for the loss due to the taking, but also for those who suffered damages due to the taking. This was the first act to incorporate the concept of market value into the calculation of compensation for expropriation.⁴⁸

In England, the power to expropriate is derived exclusively from statute. In principle, since parliament is sovereign and legislation passed by parliament is not subject to judicial review, it is possible that legislation can provide for expropriation without compensation. The individual is, however, protected by

expropriation is a compulsory sale. At 83 the court makes it clear that it is not the *serving of the notice* that is the exercise of compulsory powers, but it may be a step towards acquiring the property compulsorily.

⁴² *Cullinan Properties Ltd v Transvaal Board for the Development of Peri-Urban Areas* 1978 (1) SA 282 (T).

⁴³ F Mann "Outlines of a History of Expropriation" (1959) 75 *LQR* 188 198.

⁴⁴ A Gildenhuys "Markwaarde as Vergoedingsmaatstaf by Onteiening" 1977 *TSAR* 1 1.

⁴⁵ The courts, through judicial interpretation, developed the concept that compensation should be assessed based on the value of land to the owner. The owner should therefore be put in the same position (s)he was, as if the land were not taken. This allowed for compensation for the value of the land and the damages sustained by the owner (also called severance or injurious affected), and led to high awards of compensation. See N Davis *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (1987) 15; A Gildenhuys *Onteieningsreg* 2nd ed (2001) 33 – 34.

⁴⁶ A Gildenhuys "Markwaarde as Vergoedingsmaatstaf by Onteiening" 1977 *TSAR* 1 1.

⁴⁷ A Gildenhuys "Markwaarde as Vergoedingsmaatstaf by Onteiening" 1977 *TSAR* 1 2.

⁴⁸ S 2 of the 1919 Act. See A Gildenhuys "Markwaarde as Vergoedingsmaatstaf by Onteiening" 1977 *TSAR* 1 2.

the presumption of statutory interpretation that the legislature does not intend to take property without compensation unless it is expressly stated in legislation.⁴⁹ When dealing with compensation, control over the calculation and the payment of compensation rests with independent bodies such as the Lands Tribunal.⁵⁰

2.2.4 Differences and similarities

In Roman-Dutch law the authority to expropriate stems from *dominium eminens*,⁵¹ and seems to be based on natural law.⁵² Public purpose plays a central role in authorising the acquisition of private property by the state, and compensation is a prerequisite for a valid expropriation.⁵³ The individual is protected in that the expropriation is not allowed to be arbitrary, and payment of compensation is required.

In English law the authority to expropriate is derived from statute, and expropriation is an administrative act authorised by legislation.⁵⁴ Legislation circumscribes the powers of the expropriating authority and prescribes how compensation should be calculated. Public purpose is also a requirement. In the context of parliamentary sovereignty, parliament has wide powers to promulgate legislation that can, theoretically, severely infringe an individual's property right. The individual is only protected in so far as certain presumptions of statutory interpretation work in his/her favour.

2.2.5 The influence of Roman-Dutch and English law

Prior to the advent of constitutional democracy, expropriation was authorised by various expropriation acts, the most prominent of which is still in force today, namely the Expropriation Act 63 of 1975. The expropriation acts were

⁴⁹ F Mann "Outlines of a History of Expropriation" (1959) 75 *LQR* 188 199.

⁵⁰ F Mann "Outlines of a History of Expropriation" (1959) 75 *LQR* 188 200. For more information on the Lands Tribunal, see <http://www.landstribunal.gov.uk/> [as on 28 January 2008].

⁵¹ H Grotius *De Jure Belli ac Pacis* 2.14.7.

⁵² F Mann "Outlines of a History of Expropriation" (1959) 75 *LQR* 188 201.

⁵³ See paragraph 2.2.2 above.

⁵⁴ See paragraph 2.2.3 above.

modelled on British legislation,⁵⁵ and not Roman-Dutch law. The court in *Joyce & McGregor Ltd v Cape Provincial Administration*⁵⁶ stated that “whether the passages in the Roman-Dutch writers which say that expropriation can only take place against reasonable compensation are mere summaries of enactments having the force of law; or whether they are based on some theory of expropriation [...] they appear to me to be equally irrelevant to the construction of our modern statutes”.⁵⁷ Despite this, the courts often rely on Roman-Dutch law to emphasise the duty to pay compensation and the calculation of such compensation.⁵⁸ Still, many judges were trained in England and that made it convenient for them to rely on English case law.⁵⁹

The two most prominent features the South African law on expropriation inherited from English law is that expropriation is an administrative process driven by legislation, and that compensation can be determined with the help of outside bodies (such as valuers). However, both the English and the Roman-Dutch law confirmed compensation, public purpose and a fair process as the basic requirements for a valid expropriation.

2.2.6 Expropriation before 1910

Expropriation law in the two oldest British colonies, the Cape Colony and Natal, was heavily influenced by English law. In the Cape Colony, land was

⁵⁵ A Gildenhuys “Markwaarde as Vergoedingsmaatstaf by Onteining” 1977 *TSAR* 1 1.

⁵⁶ 1946 AD 658 671.

⁵⁷ Plaintiff *in casu* relied on Roman and Roman-Dutch authority saying that when property, as guaranteed under the then Republican *Grondwet*, is expropriated, it must be for public benefit and against payment of reasonable compensation. The court rejected this view stating that the power to expropriation can only be derived from legislation, and the legislation determines how compensation should be calculated. The court went so far as to say that the common law bears no influence on the construction of modern statutes of expropriation.

⁵⁸ In *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) the court found justification for expropriation in 13th century Roman-Dutch law. In *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) 244 the court used the Roman-Dutch interpretation of value, an interpretation used in subsequent cases such as *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) 385 and *Minister of Agriculture v Federal Theological Seminary* 1979 (4) SA 162 (E) 168 - 170 that stated that the concept value has the same aim in both the act and common law.

⁵⁹ In *Krause v SA Railways & Harbours* 1948 (4) SA 554 (O) the court relied on a decision by the Privy Council. See also *Todd v Minister of Public Works* 1958 (1) SA 328 (A) 336, where the court referred mainly to English case law, although it rejected the English use of the particular interpretation, preferring the natural meaning of words. In *Minister van Waterwese v Von During* 1971 (1) SA 858 (A) the court cited English case law and ruled that compensation and expropriation go hand in hand, and that this is in line with the common law principle that expropriation must be accompanied by compensation.

mostly expropriated for building roads or railways and the process was governed by the Cape's own legislation. The first general expropriation act in the Cape Colony was the Lands and Arbitration Clauses Act.⁶⁰ This act only prescribed general procedures. Specific instances of expropriation were authorised by specific acts.⁶¹ The general act did not prescribe standards of compensation.⁶² Any dispute about compensation was referred to arbitration, with the act describing the arbitration procedure in detail.

In Natal the Land's Clauses Consolidation Law 6 of 1882 was modelled on the English Land's Clauses Consolidation Act of 1845.⁶³ Like the Lands and Arbitration Clauses Act in the Cape Colony, this was a general act that prescribed the procedures to follow, while specific acts authorised specific instances of expropriation. The general act provided for the calculation of compensation under three headings, namely value of land, severance and injuriously affected. Compensation was not only due to the owner, but also to other parties with an interest in the land.⁶⁴ On top of that, compensation was also due if the construction of the proposed works injured an owner, occupier or party with an interest in the land.⁶⁵ The act authorised "the company" to expropriate, since most expropriations were carried out by private railroad companies.⁶⁶

In the Free State Republic, expropriation law was codified in the Orange Free State Republic Law Code of 1891. The Code allowed for comprehensive expropriation legislation⁶⁷ that regulated not only the authority to expropriate, but also the expropriation process and the calculation of compensation.⁶⁸ Not

⁶⁰ 6 of 1882.

⁶¹ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 40.

⁶² N Davis *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (1987) 16.

⁶³ The same inflated amounts that were awarded under the English act were awarded in Natal.

⁶⁴ S 41 refers to "owners and occupiers of, and all other parties interested in any lands taken or used". It provided further that disputes about compensation could be solved either in the Magistrates Court (if the amount was less than £100), by arbitration or High Court proceedings. See N Davis *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (1987) 16.

⁶⁵ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 40.

⁶⁶ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 41.

⁶⁷ In Chapter LXXV of the Code.

⁶⁸ Expropriation was regarded as a serious matter, and a commission serving under the president had to first approve an expropriation before an authority could acquire land by expropriation. Expropriation was not an administrative procedure. It was a judicial procedure

only owners, but also parties with an interest in the expropriated goods were entitled to compensation.⁶⁹ The Railway Expropriation of Lands Ordinance⁷⁰ and the more general Expropriation of Lands and Arbitration Clauses Ordinance⁷¹ followed the 1891 code.

The Zuid- Afrikaanse Republiek guaranteed property in its Constitution.⁷² The court relied on this guarantee to protect citizens from arbitrary infringements on private property rights.⁷³ There was no general act prescribing a procedure for expropriation, but expropriation was often authorised in specific acts or by resolution of the Volksraad.⁷⁴ In 1903, after colonisation, the Expropriation of Land and Arbitration Clauses Proclamation,⁷⁵ modelled on English legislation and the 1872 Natal Act, was adopted. It provided for the compensation under the headings of actual value, financial loss and *solatium*.⁷⁶ Compensation would be paid to the owner as well as others who were injuriously affected by the expropriation.⁷⁷

where a summons was served on the expropriatee that contained a description of the property, the reason for the expropriation and an offer of compensation. If consensus could not be reached by agreement, then it was settled in the Supreme Court. Any party with an interest in the property, along with the owner, was entitled to compensation and *dominium* passed by order of the court. See N Davis *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (1987) 18.

⁶⁹ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 42.

⁷⁰ Ordinance 46 of 1903, authorising expropriation for railway purposes.

⁷¹ Ordinance 11 of 1905. This ordinance was modelled on the English law, and contained no provisions on how compensation should be calculated.

⁷² N Davis *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (1987) 18.

⁷³ *Jooste v The Government of SA Republic* 1897 (4) OR 147 148 – 149. Where no compensation was provided for in a specific act, it was payable based on the provisions of the Grondwet. See also N Davis *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (1987) 19.

⁷⁴ This resolution was seen as both the authorisation of the expropriation, and the act of expropriation itself. See also *Central SA Railways v Geldenhuis Main Reef Gold Mining Co Ltd* 1907 TH 270; *Mathiba v Moschke* 1920 AD 354.

⁷⁵ Proclamation 5 of 1902.

⁷⁶ If no agreement could be reached regarding compensation, then the matter was referred for arbitration. See N Davis *A Comparative Study of the History and Principles of South African Expropriation Law with the Law of Eminent Domain of the United States of America* (1987) 20.

⁷⁷ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 42.

2.2.7 Expropriation between 1910 and 1975

After 1910 the Union government did not consolidate all the previous colonial acts as it was supposed to do, but rather added a few more pieces of legislation to the pile. In 1965, the first Expropriation Act⁷⁸ that consolidated the previous acts and tried to unify the grounds for compensation was promulgated.⁷⁹ It gave the Minister of Lands, the administrators of the four provinces and local authorities (under the direction of the provincial administration) authority to expropriate on behalf of the government. Other ministers, if so authorised by specific legislation, had authority to expropriate parallel to that of the Minister of Lands. Because of this, most authorities still relied on specific expropriation legislation to expropriate and largely ignored the 1965 Act. Each act had its own procedure and method of calculating compensation and that, unsurprisingly, led to great confusion.⁸⁰

2.3 The Expropriation Act 63 of 1975

2.3.1 Introduction

After the commencement of the 1965 Expropriation Act, it became evident that expropriation had to be authorised by one act only, and that such an act had to prescribe expropriation procedures as well as the calculation of compensation.⁸¹ Therefore, in 1975, another Expropriation Act⁸² was adopted in an attempt to unify expropriation law. The 1975 Expropriation Act repealed the 1965 Expropriation Act in its entirety.

Section 26(1) of the Expropriation Act⁸³ states that if the power to expropriate is exercised on authority of another act, “compensation owing in respect thereof shall *mutatis mutandis* be calculated, determined and paid in accordance with the provisions of this act”. The Expropriation Act⁸⁴ thus applies to

⁷⁸ 55 of 1965.

⁷⁹ *Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 (A).

⁸⁰ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 44.

⁸¹ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 44.

⁸² 63 of 1975.

⁸³ 63 of 1975.

⁸⁴ 63 of 1975.

all expropriations and prescribes the procedure to be followed and the method of calculating compensation even if the expropriation itself is authorised by another statute.

The early expropriation legislation of South Africa did not prescribe the methods of determining compensation. Most acts just said that the value should be compensated, without necessarily equating value to market value.⁸⁵ Market value was first mentioned in an amendment to the Water Act⁸⁶ going back to 1934 and referring only to “*de billike marktwaaarde*”.⁸⁷ Earlier case law, however, referred to value.⁸⁸

The 1965 and 1975 Expropriation Acts⁸⁹ incorporated the concept of market value and the so-called willing buyer willing seller principle. The willing buyer willing seller principle forms the basis of the calculation of market value in South African expropriation law today.⁹⁰ Additionally, the Expropriation Act⁹¹ also lays down the requirements for a valid expropriation. The requirements will be discussed separately in the next paragraphs.

⁸⁵ A Gildenhuys “Markwaarde as Vergoedingsmaatstaf by Onteiening” 1977 *TSAR* 1 2. See *Estate Geekie v Union Government and Another* 1948 (2) SA 494 (N) 506 where the court per Milne AJ ruled that in the absence of clear instructions by the legislature, compensation should be determined based on the value or market value of the property. Compensation should be calculated in a manner that is not “unfair to require the Government to pay for it a sum which could not possibly represent its value to the Government”. Therefore, the court concluded, (507) “[t]he enquiry, it seems to me, is not whether the Board adopted a fair standard. What may seem fair to one man may seem quite unfair to another. On the one hand, it might seem fair that [an expropriatee] should receive for it what it would have fetched in the open market immediately before it was expropriated. To another it might seem that it would not be fair to require the Government to pay out the taxpayer’s money without getting an appropriate quid pro quo”. It is thus essentially a weighing up of the individual interest and Government’s interest.

⁸⁶ 8 of 1934.

⁸⁷ In English it is referred to as the “just market” value in s 9 of the Amendment Act 46 of 1934. See also A Gildenhuys “Markwaarde as Vergoedingsmaatstaf by Onteiening” 1977 *TSAR* 1 2.

⁸⁸ See *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 where the court considered what value entails. The court per De Villiers CJ rejected the earlier finding of the Natal Supreme Court in *Corporation of Pietermaritzburg v Owen* 13 NLR 1 that equated value with actual value, saying that “until we know what is meant by actual value, we are no nearer to a solution of the question”. Instead, the court followed the court a quo’s basis of valuation namely market value, saying that it “certainly provides a more definite and satisfactory means of arriving at a proper solution”. See also Innes J’s reason for choosing market value.

⁸⁹ 55 of 1965 and 63 of 1975.

⁹⁰ See s 12 of the Expropriation Act 63 of 1975. The act was amended in 1992 with the Expropriation Amendment Act 45 of 1992 to clarify certain concepts, and provided for the payment of compensation to tenants and for alternative methods of calculating compensation for land for which there is no market value.

⁹¹ 63 of 1975.

2.3.2 Requirements for a valid expropriation

2.3.2.1 Introduction

Expropriation is usually a unilateral act by the state which (on account of its eminent domain), based on operation of law, acquires private property, where the loss of property for the former owner is usually total and permanent. The property is ordinarily acquired by or on behalf of the state for a public purpose or in the public interest and compensation is payable.⁹² In South Africa section 2(1) of the Expropriation Act⁹³ gives the Minister of Public Works the power to expropriate property or to take a right to use property temporarily for a public purpose subject to the payment of compensation. From this one can deduce four requirements for a valid expropriation: the authority requirement, the public purpose requirement, the procedural fairness requirement and the compensation requirement.

In the Expropriation Act⁹⁴ the property that can be expropriated is not restricted to movable and immovable tangible objects,⁹⁵ but includes incorporeal real and personal rights. This would include mineral rights, limited real rights, personal rights and immaterial property rights.⁹⁶

Expropriation entails acquisition of property by the expropriator⁹⁷ and a loss of such property by the expropriatee.⁹⁸ What sets expropriation apart from a normal sale is that an agreement between the parties is not a requirement for the transfer of the property, and expropriation may therefore be effected regardless of whether there is an agreement between the parties.⁹⁹

⁹² For a more extensive definition see AJ van der Walt *Constitutional Property Law* (2005) 189.

⁹³ 63 of 1975.

⁹⁴ 63 of 1975.

⁹⁵ A Gildenhuis *Onteieningsreg* 2nd ed (2001) at 62. The constitutional concept of property is likewise not restricted to land.

⁹⁶ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 63.

⁹⁷ *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) 515 A; A Gildenhuis *Onteieningsreg* 2nd ed (2001) 62.

⁹⁸ *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) at 515. In *Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 (A) 975 the court regards this as the literal meaning of "expropriation".

⁹⁹ In *Mathiba and Others v Moschke* 1920 AD 354 363 per Innes CJ ruled that "in my opinion the meaning of the Besluit is clearly that the Government was empowered to take private land required for a location and to give by way of compensation, not what the owner was willing to

Expropriation is an original form of acquisition¹⁰⁰ and therefore the state acquires title through operation of law and not through co-operation with the previous owner.¹⁰¹ The expropriator acquires new rights in the land that are independent from the expropriatee's rights. Upon expropriation of immovable property, the property is transferred subject to the rights that are registered in the land¹⁰² (except mortgage bonds).¹⁰³ This includes the rights of lessees.¹⁰⁴ If the state wants the property free of the burden of the rights of thirds,¹⁰⁵ it needs to expropriate those rights in terms of the Expropriation Act¹⁰⁶ as well.¹⁰⁷

Expropriation terminates all other rights in the land, including the rights of persons who derive their rights from the expropriated property, and confers a duty on the expropriator to compensate for the expropriation. All unprotected¹⁰⁸ unregistered rights terminate on the date of expropriation, and the expropriator does not have a duty to compensate for the expropriation of those rights.

There have been conflicting rulings as to when *dominium* passes to the state,¹⁰⁹ but it is now generally accepted that *dominium* passes on the date

take but equal land or a fair price, whether the latter concurred in the offer or not and whether he was willing or not to dispose of his land on such compensation". See also *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C).

¹⁰⁰ See A Gildenhuys *Onteieningsreg* 2nd ed (2001) 119. This means that the payment of compensation is not a prerequisite for the transfer of ownership.

¹⁰¹ In *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C) 424 the court stated that expropriation of property cannot be equated with a contract of sale, but that expropriation has the character of *vis major*, and that is effected through the operation of law.

¹⁰² Except rights in terms of bonds over the property as provided for in s 8(1) of the Expropriation Act 63 of 1975.

¹⁰³ S 8(1) of the Expropriation Act 63 of 1975.

¹⁰⁴ *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C). The court also ruled in this case that the *huur gaat voor koop* rule is not applicable in expropriation cases.

¹⁰⁵ See *Minister van Waterwese v Mostert en Andere* 1964 (2) SA 656 (A) 667 where it is argued that when land is burdened with a real right it reduces the value of the property.

¹⁰⁶ 63 of 1975.

¹⁰⁷ For example a right of way or mineral rights. S 8(1) of the Expropriation Act 63 of 1975.

¹⁰⁸ See s 22 of the Expropriation Act 63 of 1975 for a list of protected unregistered rights.

¹⁰⁹ According to Caney J in *Minister of Defence v Commercial Properties Ltd and Others* 1956 (2) SA 75 (N) 79 *dominium* passes only once the property is registered in the expropriating authority's name, and expropriation is only possible when the steps laid out in the authorising act are followed. In *Pretoria City Council v Meerlust Investments (Pty) Ltd* 1962 (1) SA 328 (T) 333 the serving of an expropriation notice was found not sufficient to transfer ownership, and it was said that ownership can only pass once the expropriator has possession of the property.

indicated in the expropriation notice (the date of expropriation)¹¹⁰ and not the date of delivery or transfer.¹¹¹ Even though *dominium* passes on the date of expropriation, it is still desirable to register such transfer in the deeds office “for security and greater certainty of title”.¹¹² Accordingly, the expropriator must provide the registrar of deeds with a certified copy of the notice for the registrar to endorse.¹¹³ Thereafter a deed of transfer will be registered in the deeds registry.

The state can only take possession on the date stipulated in the expropriation notice or a date agreed upon.¹¹⁴ As stated previously, the state must exercise its authority and follow the procedure laid down in the act.

The Expropriation Act¹¹⁵ lays down the requirements for a valid expropriation, as well as the technical administrative procedures to follow. The Expropriation Act¹¹⁶ has not been repealed,¹¹⁷ and is still applicable today, subject to the Constitution. These requirements will therefore be discussed with the understanding that, while it is a pre-1994 act, the provisions are still applicable

¹¹⁰ Expropriation Act 63 of 1975 s 8(1). Even before this act, Van Blerk CJ stated in *Minister van Waterwese v Von Doring* 1971 (1) SA 858 (A) that the expropriatee is not deprived of property merely by the serving of the expropriation notice, but remains owner until the day stipulated on the notice. One of the consequences of this is that, by virtue of s 8(6) of the Expropriation Act 63 of 1975, municipal rates and taxes are the responsibility of the expropriatee until the expropriator takes possession of the property, and not on the expropriation date.

¹¹¹ See *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C) 422 where the court ruled that the serving of the expropriation notice has a twofold effect under the common law namely (i) to put and end to the rights of the owner in and to the land and (ii) to vest *dominium* in such land in the expropriating authority. *Dominium* according to Van Winsen J is thus transferred by operation of law, and not by the transfer of rights from the owner to the expropriator. Therefore, the authority does not derive its rights from the previous owners, but “by reason of the consequences attached by law to the operation of a valid notice of expropriation” (423). Upon serving of the expropriation notice, the owner merely has a right to compensation left. See also *Mathiba and Others v Moschke* 1920 AD 354 365 where Juta AJA ruled that *dominium* does not pass at registration, and that ownership passes to the expropriator without the co-operation of the previous owner.

¹¹² *City of Cape Town v Union Government* 1940 CPD 188 195.

¹¹³ Deeds Act 47 of 1937 s 31(6). In terms of s 31(2) read with s 16, an endorsement on the existing title deed suffices, and that transfer by deed of transfer is only necessary in exceptional circumstances.

¹¹⁴ Expropriation Act ss 7(2)(b) and 8(3).

¹¹⁵ 63 of 1975.

¹¹⁶ 63 of 1975,

¹¹⁷ The government tried to replace the act with the Expropriation Bill B16-2008, but due to harsh criticism from the public, the Bill was withdrawn. See paragraph 3.9 for comments on the Bill.

today. In the following chapter the impact of the Constitution on the Expropriation Act¹¹⁸ will be discussed.¹¹⁹

2.3.2.2 Authority to expropriate

In South Africa the authority to expropriate emanates from statute¹²⁰ authorising the state to expropriate property.¹²¹ Since the Expropriation Act¹²² is modelled on British statutes, the courts ruled that Roman-Dutch views on expropriation should be ignored when interpreting expropriation statutes.¹²³ Thus, in order to determine whether the expropriator had authority to expropriate, one should look exclusively at the legislation and not the common law.

In order to establish authority, expropriation legislation must be strictly construed¹²⁴ where the intention of the legislature is not clear.¹²⁵ Where the authority is not clearly set out, it is presumed that the legislator does not intend to infringe on existing rights,¹²⁶ and that it does not intend to take rights away without compensation.¹²⁷ This means that the legislator have to care-

¹¹⁸ 63 of 1975.

¹¹⁹ See paragraph 3.3.

¹²⁰ See *Joyce & McGregor v Cape Provincial Administration* 1946 AD 658 671, where the court ruled that the state derives its authority from statute and not Roman Dutch law. That means the decision to expropriate is a purely administrative one. See also *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N); *Apex Mines Ltd v Administrator, Transvaal* 1988 (3) SA 581 (T).

¹²¹ The exception to this is s 127 of the National Water Act 36 of 1998 that provides for instances where a private individual can acquire servitude rights on another person's land through expropriation. This is a judicial procedure. A *Gildenhuys Onteieningsreg* 2nd ed (2001) 56 also mentions way of necessity as another example of where the individual, through a court application, can acquire another's property by expropriation. This is doubtful, as it does not have to fulfil the public purpose or compensation requirement.

¹²² 63 of 1975.

¹²³ *Joyce and McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671. The court *quo* in *Cape Town Municipality v Abdulla* 1975 (4) SA 575 (C) stated that in the absence of clear instructions on how to calculate compensation, compensation should be calculated with reference to the common law. This was, however, rejected on appeal. *Cape Town Municipality v Abdulla* 1976 (2) SA 370 (C).

¹²⁴ *Provinsiale Adminstrasie, Kaap die Goeie Hoop v Swart* 1988 (1) SA 375 (C); *Rigg v South African Railways and Harbours* 1958 (4) SA 339 (A).

¹²⁵ *Administrator, Transvaal and Another v J van Streepen (Kempton Park) (Pty) Ltd* 1990 (4) SA (A) 644 657.

¹²⁶ *Rigg v SAR&H* 1958 (4) SA 339 (A) 349; *Fink and Another v Bedfordview Town Council and Others* 1992 (2) SA 1 (A) 18.

¹²⁷ *Krause v SAR&H* 1948 (4) SA (A) 554.

fully circumscribe the way in which the expropriator may infringe on rights, and that, when such rights are removed, then compensation must be paid.¹²⁸

The legislature may make legislation authorising expropriation within the constitutional parameters of its legislative powers.¹²⁹ Prior to the advent of constitutional democracy, the courts had limited powers to review expropriation statutes, even if the compensation provided for in such a statute was unsatisfactory or unfair.¹³⁰ In terms of the Expropriation Act¹³¹ the Minister of Public Works and an executive committee of a province are authorised to expropriate.¹³² Such authority can be delegated to state officials.¹³³ The expropriator is restricted to the power afforded to it by legislation. The state must exercise its authority in such a way that is procedurally fair.

2.3.2.3 Procedural fairness

There are two methods of expropriation, the administrative method and the judicial method. With the administrative method, expropriation is an administrative act, based on statute.¹³⁴ With the judicial method, the court orders the expropriation.¹³⁵ In South African law the administrative method is followed, and expropriation is an administrative act, with the exception of land restitution cases.¹³⁶ Since expropriation is an administrative act title passes at the serving of the expropriation notice. If the expropriatee is unhappy about the

¹²⁸ See also *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA (SCA) 1 par 39 where the Supreme Court of Appeal confirmed this with reference to the Constitution.

¹²⁹ A Gildenhuys *Ontheieningsreg* 2nd ed (2001) 75.

¹³⁰ *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) 258-259; *Collins v Minister of the Interior* 1957 (1) SA 522 (A) 565.

¹³¹ 63 of 1975.

¹³² Expropriation Act 63 of 1975 s 2(1) read with s 1(vii) and 1(vix).

¹³³ Expropriation Act 63 of 1975 s 24.

¹³⁴ *Durban City Council v Jailani Cafe* 1978 (1) SA 151 (D) 154; *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) 263. The expropriation is affected by serving the expropriatee with a notice of expropriation stating the amount of compensation offered. If the expropriatee is not satisfied with the compensation amount, (s)he must instruct legal action.

¹³⁵ This was only used for expropriations in terms of the Water Act 53 of 1956. Compensation is determined by the court, and as the expropriatee is a party to the litigation, (s)he can dispute the compensation amount in court.

¹³⁶ Note, however, that in terms of the Restitution of Land Rights Act 22 of 1994 s 42E, land can be expropriated without a court order. Expropriation is possible on the Minister of Land's instructions when i) a valid restitution claim has been lodged and ii) when there is no such claim, but the acquisition is related or affected in a direct manner by such a claim.

compensation, title still passes, but the expropriatee must go to court to dispute the amount of compensation.¹³⁷

The court in *Durban City Council v Jailani Café*¹³⁸ laid down the administrative requirements for a valid expropriation, namely that the authority must comply with the procedure laid down in the legislation; the expropriation must be for the purpose set forth in such legislation and the acquisition must be a bona fide act, implying that the authority had to apply its mind when deciding to expropriate. Since expropriation is an administrative act, it can be reviewed in terms of principles of administrative law.¹³⁹ In such a case, all statutory requirements must be followed strictly.¹⁴⁰ If the procedure laid down in an act is not followed strictly, the expropriation can be declared invalid.¹⁴¹

As in all cases where the rights of the individual are adversely affected, the rules of natural justice are applicable in expropriation cases.¹⁴² One of the cornerstones of natural justice is the *audi alteram partem* principle. Decisions regarding expropriation were subject to the *audi alteram partem* principle only in limited instances.¹⁴³ In order to enable the expropriatee to state his/her case, the authority must provide him with the necessary information to make an informed decision.¹⁴⁴ The expropriation notice should make it clear that expropriation is initiated with the service of the notice,¹⁴⁵ and must contain enough information to enable the expropriatee to lodge an objection if (s)he

¹³⁷ Compare with the judicial method where title only passes once the compensation amount is settled and paid. See P Penny "Compensation upon Expropriation" (1966) 83 SALJ 185 185.

¹³⁸ 1978 (1) SA 151 (D) 154, as followed in *Van Rensburg v Stadsraad van Alberton en 'n Ander* (1) SA 147 (W) 149; *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N) 793.

¹³⁹ In *Durban City Council v Jailani Café* 1978 (1) SA 151 (D) Milne J states that it is an administrative act, a position reiterated in *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N) 793 – 794.

¹⁴⁰ *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (K); *Maharaj v Verulam Town Council and Another* 1988 (3) SA 777 (D).

¹⁴¹ *Pretoria City Council v Meerlust Investments (Pty) Ltd* 1962 (1) SA 328 (T); *Durban Corporation v Lewis* 1942 NPD 24.

¹⁴² A Gildenhuis *Onteieningsreg* 2nd ed (2001) 80.

¹⁴³ In *Pretoria City Council v Modimola* 1966 (3) SA 250 (A) Botha JA ruled that the act of expropriation is a state decision, and therefore not subject to the *audi alteram partem* rule. In fact, he stated that the act of expropriation falls under *casus fortuitus*. See also *Durban City Council v Jailani Café* 1978 (1) SA 151 (D) 153-154; *Theunissen Town Council v Du Plessis* 1954 (4) SA 419 (O) 424. The strict requirements that were stipulated in these cases before the *audi alteram partem* rule could operate, was somewhat relaxed in *Administrator, Transvaal v Traub* 1989 (4) SA 731 (A).

¹⁴⁴ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 83.

¹⁴⁵ *Pahad v Director of Food Supplies and Distribution* 1949 (3) SA 695 (A) 709.

wants to. Such information is usually provided with the serving of the notice of expropriation. In light of the Promotion of Administrative Justice Act¹⁴⁶ it would now be necessary that all expropriations afford the expropriatee the chance to object if (s)he wants to. The requirements concerning the information that should be on the notice should be the same in the new constitutional dispensation, subject to section 33 of the Constitution and the Promotion of Administrative Justice Act.¹⁴⁷

Expropriation is initiated with the servicing of the notice.¹⁴⁸ The requirements for such notice are that it must clearly and fully describe the property¹⁴⁹ and clearly state the date of expropriation¹⁵⁰ or the time of temporary expropriation.¹⁵¹ The notice may also state the amount of compensation¹⁵² and must identify the act on which the expropriation authority relies.¹⁵³ It is not clear if the purpose of the expropriation should be stated or if it is sufficient if the notice states that expropriation is for a public purpose.¹⁵⁴ In *Provinsiale Administrasie, Kaap die Goeie Hoop v Swart*¹⁵⁵ the court ruled that a vague and ineptly worded expropriation notice is invalid since it creates legal uncertainty.

¹⁴⁶ 3 of 2000. The act is only applicable to state actions.

¹⁴⁷ 3 of 2000. See 3.5.4 for a discussion on the influence of the Constitution on procedural fairness.

¹⁴⁸ Expropriation Act 63 of 1975 s 7(2).

¹⁴⁹ Expropriation Act 63 of 1975 s 7(2)(a). See *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C) 420 where description of property was ruled to be sufficient if the property was pointed out by officials to the expropriatee conveying the intention to expropriate such land.

¹⁵⁰ In terms of s 8(1) of the Expropriation Act 63 of 1975, this is the date on which *dominium* will pass to the state, regardless of registration in the Deeds Office. See paragraph 2.3 for a discussion of the *dominium* debate.

¹⁵¹ Expropriation Act 63 of 1975 s 7(2)(b). The notice should also state on what date the state will take possession of the property.

¹⁵² It is not a requirement that the notice *must* offer compensation. If no compensation was offered in the notice, the expropriatee can claim compensation in terms of s 10 of the Expropriation Act 63 of 1975. S 7(2)(c) only requires that the expropriatee's attention be drawn to s 9(1) and s 12(3)(a)(ii) that gives the expropriatee the opportunity to request an amount. Such an amount shall be determined with reference to market value (as per s 12(1)(a)(i)) and actual financial lost (as per s 12(1)(a)(ii) or s 12(1)(b)).

¹⁵³ See *Latib v The Administrator Transvaal* 1969 (3) SA 186 (T) 190-191 where the court said that it is not necessary to state the exact section of the act and *Minister of Defence v Commercial Properties Ltd and Others* 1955 (3) SA 324 (D) where the court stated that an owner is entitled to know upon which acts the expropriator relies.

¹⁵⁴ *Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 (A) 974. See also *Sorrell v Milnerton Municipality* 1980 (4) SA 660 (C) 664 where the court relied on *Davis v Caledon Municipality* 1960 (4) SA 885 (C) that ruled that the purpose need not be stated on the notice if it is expropriated in terms of the Municipal Ordinance 19 of 1951. However, the court qualified it by saying that such a purpose should be clear in the *audi alterem partem* stage, or else such a notice can be declared invalid.

¹⁵⁵ 1988 (1) SA 375 (C) 379.

It thus seems as if the principle of legal certainty is used to test the validity of the content of such a notice.

The notice must be served on the owner and all the holders of registered rights in the land.¹⁵⁶ Upon expropriation of land, all the rights in the land are transferred from the expropriatee to the expropriator, unless the notice of expropriation specifically excludes certain rights.

The expropriatee is entitled to reasons for the administrative act, and the expropriation must be justifiable in light of the reasons given. It is possible for the expropriatee to waive procedural requirements in favour of him or her if the said requirements are not imposed by public policy.¹⁵⁷

An authority must exercise its powers to expropriate strictly in accordance with the authorising act. Since expropriation infringes on private property rights the courts will interpret this requirement strictly.¹⁵⁸ In *Maharaj v Verulam Town Council and Another*¹⁵⁹ the court had to determine whether a notice served on the appellant was invalid because the minister did not comply with section 7(2) (d) of the Expropriation Act.¹⁶⁰ The court held that in order to determine whether a notice is valid, one must look at the intention of the legislature. In this particular case the court found that the legislature's intention with the particular section was to enact a procedure to protect the expropriating authority. Therefore, if the expropriating authority wished not to make use of a mechanism protecting it, it could do so without affecting the validity of the notice.¹⁶¹

¹⁵⁶ Expropriation Act 63 of 1975 s 7(1), (3) and (4). For a more complete list of parties that the notice must be served on, see A Gildenhuys *Onteieningsreg* 2nd ed (2001) 116.

¹⁵⁷ *Durban Corporation v Lewis* 1942 NPD 24 39; *Braude v Pretoria City Council* 1981 (1) SA 680 (T) 686.

¹⁵⁸ *Pretoria City Council v Meerlust Investments (Pty) Ltd* 1962 (1) SA 328 (T); *Rigg v South African Railways and Harbours* 1958 (4) SA 339 (A); *Fourie v Minister van Lande en 'n Ander* 1970 (4) SA 165 (O) 170.

¹⁵⁹ 1988 (3) SA 777 (D).

¹⁶⁰ 63 of 1975. The particular section requires an owner, who received an expropriation notice, to alert the minister of specific types of unregistered rights in land. The provision also provides that the minister may withdraw the offer if (s)he receives such information.

¹⁶¹ *Maharaj v Verulam Town council and Another* 1988 (3) SA 777 (D) 783.

2.3.2.4 Public purpose

The Expropriation Act¹⁶² further authorises the Minister to expropriate property for public purposes.¹⁶³ Public purpose in its simplest form means that the expropriation should benefit the community as a whole and not just one person in particular.¹⁶⁴ It can have a broad or a narrow meaning. In the broad sense it is a purpose that affects the whole or local population, as opposed to a purpose that is private or personal affecting only one person. In fact, anything that affects the country as a whole or is to the advantage of the public is included.¹⁶⁵ In the narrow sense, public purpose is restricted to government purposes.¹⁶⁶

In *Fourie v Minister van Lande en 'n Ander*¹⁶⁷ the court followed an historical interpretation of the concept public purpose to interpret the Expropriation Act.¹⁶⁸ The court not only relied on previous South African interpretations,¹⁶⁹ but also on the interpretation the English courts attached to the concept. The court per Steyn AJ concluded¹⁷⁰ that public purpose should be interpreted in the wider sense, that includes government purposes, but that is not restricted to it. This was confirmed in *White Rocks Farm (Pty) Ltd and Others v Minister*

¹⁶² 63 of 1975.

¹⁶³ Expropriation Act 63 of 1975 s 2(1).

¹⁶⁴ J Murphy "Interpreting the Property Clause in the Constitution Act of 1993" (1995) 10 *SAPR/PL* 107 125.

¹⁶⁵ Examples include expropriation of property adjacent to the prime minister's official residence in order to ensure safety in *Slabbert v Minister van Lande* 1963 (3) SA 620 (T); expropriation of a home in order to house an official of the post office in *Fourie v Minister van Lande en 'n Ander* 1970 (4) SA 165 (O) 165. Another example is the acquisition of land to establish a mountain catchment area in order to preserve the country's water sources in *White Rocks Farm (Pty) Ltd and Others v Minister of Community Development* 1984 (3) SA 785 (N) 794.

¹⁶⁶ *Slabbert v Minister van Lande* 1963 (3) SA 620 (T) 621.

¹⁶⁷ 1970 (4) SA 165 (O) 170.

¹⁶⁸ 55 of 1965. In *Fourie v Minister van Lande en 'n Ander* 1970 (4) SA 165 (O) the Court per Steyn AJ relied on the assumption that, where a concept has an established meaning based on judicial interpretation, the legislature can use such a concept in subsequent legislation without qualifying it. The intention is that the concept should carry its already established meaning.

¹⁶⁹ *African Farms and Townships Ltd v Cape Town Municipality* 1961 (3) SA 392 (K); *Slabbert v Minister van Lande* 1963 (3) SA 620 (T); *Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society* 1911 AD 271; *SA Turf Club v Claremont Municipality* 1912 CPD 54; *Minister of Lands v Rudolph* 1940 SR 126; *Minister of Internal Affairs & Banner v Albertson and Others* 1941 SR 240.

¹⁷⁰ *Fourie v Minister van Lande en 'n Ander* 1970 (4) SA 165 (O) 170 176.

of *Community Development*¹⁷¹ where the court ruled that the wide meaning of public purpose is applicable in South Africa.

Public purpose was distinguished from public interest in *Administrator, Transvaal and Another v J van Streepen (Kempton Park)*,¹⁷² where the court ruled that the expropriation for the benefit of a third cannot be for a public purpose, but it might be possible in certain circumstances that it is in the public interest.¹⁷³

The public purpose requirement was not the subject of many court cases pre-1994, and post-1994 it is most prevalent in academic commentary.¹⁷⁴ In America, however, it is the subject of much debate. This will be discussed in chapter 4.3.3.2. The compensation requirement, however, was the subject of many court cases pre-1994.

2.3.2.5 Compensation

The payment of compensation is a requirement for a valid expropriation¹⁷⁵ but compensation does not have to be full compensation.¹⁷⁶ Section 2(1) of the Expropriation Act 63 of 1975 places an obligation on the Minister to pay compensation for expropriated property. The compensation amount is determined in terms of section 12 of the act. Even if an expropriation is authorised by another act, compensation must be determined in terms of the 1975 Expropriation Act.¹⁷⁷ Compensation as requirement and the calculation of compensation will be discussed in the next paragraph.

The expropriator must serve a notice on the expropriatee that, inter alia, defines the property to be expropriated and make an offer for compensation.

¹⁷¹ 1984 (3) SA 785 (N).

¹⁷² 1990 (4) SA 644 (A) 601.

¹⁷³ In this case property was expropriated for the relocation of a private railway line. The railway line had to be relocated because of road works undertaken by the expropriator. The court interpreted authority to expropriate "for any purpose in connection with the construction...of any road" as wide enough to include the expropriation of the property for the relocation of the private railway line.

¹⁷⁴ For a discussion of the public purpose requirement under the Constitution, see 3.5.

¹⁷⁵ *Jooste v The Government of the South African Republic* 1897 (4) OR 147.

¹⁷⁶ *Joyce and McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671.

¹⁷⁷ 63 of 1975 s 26(1).

The Expropriation Act¹⁷⁸ stipulates that the expropriatee shall, within 60 days from the date of serving the notice, provide the expropriator with a statement that indicates whether (s)he accepts the offer made in the notice, rejects it, or if no offer was made, (s)he must provide the expropriator with an amount of compensation proposed.¹⁷⁹ The expropriatee must further provide the expropriator, within those 60 days, with details of unregistered leases, details of possible contracts of sale and a copy of the building contract if the property is subject to a builder's lien. This information is required in order to enable the minister to make an offer of compensation.¹⁸⁰

If there is no agreement on the amount of compensation within those 60 days, the minister must indicate how the amount was calculated in terms of section 12 and furnish full particulars of how all relevant amounts are made up. If the expropriatee thereafter does not make an application to the court to determine the compensation, (s)he is deemed to have accepted the amount.¹⁸¹ The offers made by the minister are statutory offers and should comply with the requirements of the particular act. Such an offer does not lapse when it is rejected,¹⁸² and once it is accepted it is a binding contract.¹⁸³ If no agreement is reached, either party can, by way of notice of motion, institute proceedings in the High Court in whose area of jurisdiction the property is situated.¹⁸⁴

If the parties cannot agree on an amount, it can be determined either by a High Court or through arbitration. The particulars of claims should make a distinction¹⁸⁵ between claims for market value, claims for actual financial loss, the 10% *solatium* allowed for and interest.¹⁸⁶ How each of these claims is

¹⁷⁸ 63 of 1975.

¹⁷⁹ See the Expropriation Act 63 of 1975 ss 9(1)(a)-(b) for the exact wording and requirements.

¹⁸⁰ Expropriation Act 63 of 1975 s 10(2).

¹⁸¹ Expropriation Act 63 of 1975 s 10(5)(a).

¹⁸² Expropriation Act 63 of 1975 s 10(6).

¹⁸³ See *A to Z Bazaars (Pty) Ltd v Minister of Agriculture* 1974 (4) SA 392 (C) where the private law rules of offer and acceptance were applied.

¹⁸⁴ Expropriation Act 63 of 1975 ss 14(1) and 14(3)(a).

¹⁸⁵ This procedural practice seems to originate from *Durban Corporation v Lewis* 1942 NPD 24, where the court per Broome, J stated: "It seems to me to be important that these three heads should be considered separately and not allowed to overlap, as has happened in many of the English authorities". This is done to avoid double recovery. In *Jacobs v Minister of Agriculture* 1972 (4) SA 608 (W) the court applied the principle of double recovery.

¹⁸⁶ Interest is calculated from the date of possession. See *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (C).

calculated will be dealt with below. Under the Expropriation Act¹⁸⁷ the High Court has an inherent jurisdiction to determine the compensation.¹⁸⁸

2.4 Compensation in terms of the Expropriation Act 63 of 1975

2.4.1 The compensation principle

Section 12 of the 1975 Expropriation Act provides the basis upon which expropriation is determined in all cases of expropriation, regardless of statutory origin. The Expropriation Act,¹⁸⁹ and therefore section 12, is still applicable for insofar as it is compatible with the Constitution.¹⁹⁰

The determination and payment of compensation is not a prerequisite for the transfer of ownership, as compensation can be determined and paid after *dominium* has vested to the expropriator.¹⁹¹ Therefore, even though compensation is a requirement for a valid expropriation, the amount need not be determined before ownership can vest.¹⁹²

Case law, in the pre-constitutional era at least, is divided on the issue whether an expropriatee has a *right* to compensation. According to some judgements the expropriatee does not have a *right* to compensation,¹⁹³ while others regard it as accepted that the serving of an expropriation notice *does* give the expropriatee a right to compensation.¹⁹⁴ The later cases seem to be more in line

¹⁸⁷ 63 of 1975.

¹⁸⁸ See *Voster v Bloemfontein Stadsraad* 1987 (4) SA 418 (O) 420 and 421 where the court ruled that the Compensation Court has jurisdiction up to the amount of R100 000 to provide for a cost effective way to solve compensation disputes, but that the High Court has inherent jurisdiction. The Expropriation Amendment Act 45 of 1992 abolished the Compensation Court, and any compensation claim after 1 May 1992 must be instituted in a High Court, regardless of the time the cause of action arose. See also *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 (A), *Durban City Council v Jailani Café* 1978 (1) SA 151 (D). In *re Farmerfield Communal Property Trust* 1999 (1) SA 936 (LCC) it was confirmed that in cases of expropriation for restitution in terms of the Restitution of Land Rights Act 22 of 1994, the Land Claims Court has exclusive jurisdiction.

¹⁸⁹ 63 of 1975.

¹⁹⁰ See paragraph 3.3.

¹⁹¹ *Government of the Republic of South Africa v Motsuenyane and Another* 1963 (2) SA 484 (T) 486; A Gildenhuis *Onteieningsreg* 2nd ed (2001) 65.

¹⁹² *Government of the Republic of South Africa v Motsuenyane and Another* 1963 (2) SA 484 (T) 488; *Joyce & McGregor v Cape Provincial Administration* 1946 AD 658 670.

¹⁹³ *Joyce and McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671. See also *Cape Town Municipality v Abdulla* 1976 (2) SA 370 (C) 375.

¹⁹⁴ *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C) 422 – 423.

with the assumption that rights are not expropriated without compensation and the presumption that the legislator does not intend unreasonable results.¹⁹⁵ However, in *Simmer & Jack Pty Mines Ltd v Union Government (Minister of Railways & Harbours), Union Government (Minister of Railways and Harbours) v Simmer & Jack Proprietary Mines Ltd*¹⁹⁶ the court ruled that the state may expropriate property without compensation if such an intention is clearly expressed in legislation. If there is no express authorisation from the legislature to compensate, the courts could create such a duty.¹⁹⁷ In the High Court case *Van Niekerk NO and Another v Bethlehem Municipality*¹⁹⁸ the court regarded the duty to pay compensation as implied, while in *Belinco (Pty) Ltd v Bellville Municipality and Another*¹⁹⁹ the Appellate Division interpreted an act that did not make provision for compensation as also not giving the authority to expropriate. Compensation was therefore required for a valid expropriation under the 1975 act, even before 1994.

Payment of compensation is based on the assumption that the legislator does not intend to take away rights without compensation, and in cases where there is doubt whether or not compensation is payable, the assumption tips the balance in favour of payment.²⁰⁰ Compensation is paid because it is assumed that the state will not deprive an owner of property without compensation.²⁰¹ A single individual or small group cannot be required to sacrifice their property without compensation for something that will benefit the broad public. Therefore, if an individual is forced to contribute unequally to something that is of public benefit, compensation is due.²⁰² Compensation need not be in monetary terms, but can also involve the allocation of another piece of land.²⁰³

¹⁹⁵ *Minister van Waterwese v Mostert* 1964 (2) SA 656 (A) 666 and 669; *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1988 (3) SA 122 (A) 132.

¹⁹⁶ 1915 AD 368 398.

¹⁹⁷ See *Tongaat Group Ltd. v Minister of Agriculture* 1977 (2) SA 961 (A) 975 where the court found that the damage that the intended use of the property caused is not covered by the act and could therefore not be compensated.

¹⁹⁸ 1970 (2) SA 269 (O) 271.

¹⁹⁹ 1970 (4) SA 589 (A) 597.

²⁰⁰ *Krause v SAR&H* 1948 (4) SA 554 (O) 562-563; *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1986 (4) SA 576 (W) 579; *Oosthuizen v South African Railways and Harbours* 1928 WLD 52 62.

²⁰¹ *Krause v SA Railways & Harbours* 1948 (4) SA 554 (O) 563.

²⁰² This links with what the French refer to as “*égalité devant les charges publiques*” and the Germans as “*Aufopferung*”, implying that every member of the public should contribute to

2.4.2 When is compensation due?

Compensation is due only upon expropriation of property and not upon mere deprivation of property by the state.²⁰⁴ Expropriation authorised by an act must be executed in terms of that act. If expropriation is not clearly authorised by statute, it can be difficult to determine whether the deprivation of property amounts to an expropriation or not. In many jurisdictions, a deprivation of property that severely limits or destroys property rights without a formal transfer of ownership to the state is seen as a form of expropriation and referred to as constructive expropriation.²⁰⁵ In some foreign jurisdictions, this is referred to as *de facto* or quasi-expropriation,²⁰⁶ material expropriation,²⁰⁷ inverse condemnation or a taking.²⁰⁸ Constructive expropriation is mostly a constitutional property law issue, and was therefore not known in South Africa before 1994.²⁰⁹ The Constitution brought new debates on whether or not this form of expropriation should also be recognised in South Africa.²¹⁰ The debate, however, is beyond the scope of this chapter,²¹¹ and a comparative analysis of the issue will be dealt with in chapter 4.

society's burdens according to their abilities. See A Gildenhuys *Onteieningsreg* 2nd ed (2001) 3.

²⁰³ *Government of the Republic of South Africa v Motsuenyane and Another* 1963 (2) SA 484 (T) 487.

²⁰⁴ Examples of deprivation by the state that does not require compensation is forfeiture, tax and confiscation. For an interesting discussion of why taxation can not be said to be an expropriation, see the German case *BVerfGE* 115, 97 [2006] (*Halbteilungsgrundsatz*).

²⁰⁵ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 137. See also chapter 4 for a comparative discussion.

²⁰⁶ Belgium. See n 211

²⁰⁷ Switzerland. See n 211.

²⁰⁸ The United States of America. See chapter 4.

²⁰⁹ For pre-1994 examples of cases that look like constructive expropriation, see *Pretoria City Council v Blom and Another* 1966 (2) SA 139 (T). See also *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1988 (3) SA 122 (A) where compensation was awarded because the installation for a drainage system that led to monetary damage was described as something akin to expropriation. Compare *Apex Mines Ltd v Administrator, Transvaal* 1988 (3) SA 581 (T) where the court refused to compensate the holder of mineral rights whose rights were diminished by the proclamation of a road that prohibited the mine from mining within 100 meters of the road. In *Tongaat Group Ltd v Minister of Agriculture* 1977 (2) SA 961 (A) 974 the court found that in the absence of express indication by legislation, compensation would not be paid for damage that was not caused by the expropriation *per se*.

²¹⁰ See AJ van der Walt "Moving towards Recognition of Constructive Expropriation?" (2002) 65 *THRHR* 459.

²¹¹ For a thorough discussion see AJ van der Walt *Constitutional Property Law* (2005) 209 – 237.

The state therefore has to pay compensation if property is expropriated, but the question is whether the state has a duty to compensate even if it did not acquire any property. In *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd*²¹² the appellant installed a drainage system as authorised by a local government ordinance. The respondent claimed that, although there was no physical damage to the property, it suffered consequential damage because the installation diminished the value of its property. The court had to decide on the character of the appellant's action, especially whether it amounted to an expropriation, and whether the respondent was therefore entitled to compensation. The court ruled, based on an earlier judgement,²¹³ that "the construction ought to be in favour of the subject, in the sense that general or ambiguous words should not be used to take away legitimate and valuable rights from the subject without compensation, if they are reasonably capable of being construed so as to avoid such a result consistently with the general purpose of the transaction".²¹⁴ The court found that the installation of a drainage system took away one right of ownership without consent, and should therefore be compensated. The court did not classify it as expropriation as such, but as something akin to expropriation, but nevertheless ordered that compensation be paid.

2.4.3 What is compensated?

The owner²¹⁵ should be compensated for the rights that are taken away.²¹⁶ Compensation should thus be determined according to the rights that the

²¹² 1988 (3) SA 122 (A) 130.

²¹³ *Minister of Railways and Harbours of the Union of South Africa v Simmer and Jack Proprietary Mines Ltd* 1918 AC 591 (PC).

²¹⁴ *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1988 (3) SA 122 (A) 132.

²¹⁵ Under the 1975 act the court ruled in *Apex Mines Ltd v Administrator, Transvaal* 1986 (4) SA 581 (T) 590 and confirmed in *Apex Mines Ltd v Administrator, Transvaal* 1988 (3) SA 1 (A) that "owner", as in terms of a local road ordinance, does not refer to the holder of a mineral right. It only refers to the owner of the surface, and the owner of a mineral right can only hope for equitable relief. The Appellate Division gave a narrow definition of the term "property", and ruled that it only refers to registered property. Compare *Holness and Another NNO v Pietermaritzburg City Council* 1975 (2) SA 713 (N) where "owner" was not restricted to its common law meaning and included administrators of a trust.

²¹⁶ Under the 1965 Expropriation Act 55 of 1965, the court ruled in *Todd v Minister of Public Works* 1958 (1) SA 328 (A) 331 that it is only land that can be expropriated. In *Greyvenstein en 'n Ander v Minister van Landbou* 1970 (4) SA 233 (T) 234 the court states that an owner can only be expropriated of an interest in property. See also *Minister van Waterwese v*

owner had in the property. This depends mostly on the notion of property as a bundle of rights in relation to a thing.²¹⁷ The payment for goods will be determined based on what someone will pay in the open market in order to obtain those rights in relation to the thing. Gildenhuis²¹⁸ argues that we have to accept that rights in relation to things give them value, that the rights themselves determine the value of the property and not any subjective interest of the owner or expropriator.²¹⁹ Thus, at the time of expropriation it is the rights in the property that must be taken into account, and not the property itself.²²⁰ Therefore rights give value to land. At the expropriation of land, it is the owner's subjective rights that are expropriated, and not the immovable property as an object.²²¹

The property referred to is the property in its entirety on the date of expropriation, including all the possible uses of the land.²²² This contradicts the previous statement that what are expropriated are the owner's subjective rights.²²³ If the doctrine of subjective rights is followed, then what are expropriated are indeed the rights with reference to the object, as opposed to the object itself.²²⁴

Mostert en Andere 1964 (2) SA 656 (A) 666 stating that land is expropriated when the rights of the owner in the land are expropriated. In *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1988 (3) SA 122 (A) 129 an infringement on the appellant's use and enjoyment of the property was construed as an expropriation.

²¹⁷ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 153. P Penny "Compensation upon Expropriation" (1966) 83 *SALJ* 185 204 argues that, in the case of real estate, what is valued is the rights attaching to property, and not the property as such.

²¹⁸ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 153; *Pienaar v Minister van Landbou* 1972 (1) SA 14 (A) 20; *Hirschman v Minister of Agriculture* 1972 (2) SA 997 (A) 891-892.

²¹⁹ Compare with n 271.

²²⁰ Compare with *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) 241 – 242 where the court said that the land itself must be compensated without regard to the rights in land. A Gildenhuis "Markwaarde as Vergoedingsmaatstaf by Onteiening" 1977 *TSAR* 1 5 argues that the value of land would depend on the rights that are expropriated, and that the value would therefore depend on what the rights, and not the land itself, would fetch on an open market.

²²¹ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 66.

²²² For a very thorough discussion of which factors are included, see A Gildenhuis *Onteieningsreg* 2nd ed (2001) 278 – 283.

²²³ See n 272.

²²⁴ PJ Badenhorst "Die Vereistes vir 'n Geldige Onteieningskennisgewing" (1989) 52 *THRHR* 130 136.

2.4.3.1 Compensation for potential

When calculating potential of property, it is important that the potential should have existed at the time of expropriation and not only on the date of the hearing.²²⁵ The phrase “which the property would have realised” in section 12(1)(a)(i) shows that the property must be valued with all its potential included.²²⁶ Therefore, the “property” that is compensated is the property and all its potential uses that enhance its value.²²⁷ What is compensated is the present value of the future development, and not the value at completion.²²⁸ Likewise, encumbrances that reduce the value of the property should be deducted.²²⁹ All the factors a hypothetical purchaser would take into account on the day the notice is served should be taken into account when calculating the compensation amount.²³⁰ For instance, one could question what exactly the willing buyer knows about the property when (s)he considers the price and whether the seller’s notion of the potential of the property would influence such a price. In *Krause v South African Railways and Harbours*,²³¹ De Beer AJP stated that the possibility that the potential might not be fulfilled, or might only be fulfilled long after the expropriation, should also be taken into ac-

²²⁵ M Jacobs *The Law of Expropriation in South Africa* (1982) 70. In *Tongaat Group Ltd. v Minister of Agriculture* 1977 (2) SA 961 (A) 975 the court had to rule whether loss of value of the remainder of the appellant’s property should be compensated when the intended use of the property expropriated is to build an airport.

²²⁶ *Illovo Sugar Estates Limited v Minister of Agriculture* 1972 (2) SA 887 (AD).

²²⁷ *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) 955; *Illovo Sugar Estates Ltd v SAR&H* 1948 (1) SA 58 (D).

²²⁸ *Devland Investment Co (Pty) Ltd v Administrator Transvaal* 1979 (1) SA 321 (T) 327.

²²⁹ *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A); *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) 955.

²³⁰ *Jacobs v Minister van Landbou* 1975 (1) SA 946 (T) 629. See also *Bonnet v Department of Agricultural Credit and Land Tenure* 1974 (3) SA 737 (T) 744 where Bliss J stated “[g]enerally speaking it seems to me clear that, when there is no dispute between the parties as to whether the property has a particular potential or not, there can be no question of onus, and the Court has to determine the value of the expropriated property in accordance with the well-established principle that has been so often applied, namely, that it must arrive at a valuation on the evidence placed before it, but in doing so it must bear in mind that it is not like a licensing body, entrusted in this regard with the power of giving a discretionary decision, but that its valuation, though it relates to matters that may in many respects be so uncertain and so difficult to determine, that no one can be dogmatic about them, nevertheless purports to be a finding of fact, a logical deduction from factual data”. In *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 511 the court stated that the fact that the premises had a liquor licence had to be taken into account.

²³¹ 1948 (4) SA 554 (O) 560.

count.²³² It is generally accepted, as in the *Sebokeng* case,²³³ that potential can be factored in even if it is not realised, but that it at least should be a reasonable possibility.²³⁴ In *Minister of Land and Natural Resources v Moresby-White*,²³⁵ the court ruled that where the land had two potentials, both would not be compensated if they were incompatible.

When considering the potential of the property, the court must also consider the following: the potential is not yet realised; foreseen and unforeseen risks could affect the realisation of such potential; there will be a lapse of time before the potential is realised; changes could occur in the profitability and feasibility of developing the potential; and the development costs to achieve such a potential are not easily determinable.²³⁶

Potential of the property does not include the intended use for which the property is expropriated²³⁷ when it is clear that no other person would acquire the

²³² Likewise, farming potential of neighbouring farms has been included in the calculation of market value where the comparative sales method was used. See *Union Government v Jackson & Others* 1956 (2) SA 398 (AD) 428.

²³³ *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) 395.

²³⁴ Courts in general are willing to assume a higher value on what is called plottage. Plottage is where it is accepted that a buyer might pay more for the sum of erven as for the individual erven themselves, in order to develop it. This was the case in *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (AD). In *Krause v SA Railways & Harbours* 1948 (4) SA 554 (O) the court included the subdivision potential of the land because the municipality would probably not reject an application for subdivision. In *Lochner v Afdelingsraad, Stellenbosch* 1976 (4) SA 737 (C) 745 the court stated that the potential must be realisable. See *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) 953 where the court had to rule on sectional title potential and ruled that since a sectional title register has not been opened yet, compensation should be determined on the basis what a willing buyer would pay a willing seller of the property with sectional title potential, and not what individual owners of the sectional title would pay the seller. In *May v Reserve Bank of Zimbabwe; Thomas Family v Reserve Bank of Zimbabwe; Cairns Family Trust v Reserve Bank of Zimbabwe; Frogmore Tobacco Estates (PVT) Ltd v Reserve Bank of Zimbabwe* 1985 (4) SA 185 (ZH) 192; *Van Zyl v Stadsraad van Ermelo* 1979 (3) SA 523 (A); In *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) 675 - 677 the court said that the plaintiff must prove that a reasonable possibility for the potential exists and that a willing buyer and a willing seller would take this into account on a balance of probabilities. In *Thanam NO v Minister of Lands* 1970 (4) SA 85 (D) 88 the court stated that the plaintiff must establish the potential uses of the property and show that it is reasonably capable of being fulfilled and that a willing buyer and willing seller would consider such potential. In the later case of *Davey v Minister of Agriculture* 1979 (1) SA 466 (N) 469 the court emphasised that potential would be a factor that influences the price a buyer would pay for the property.

²³⁵ 1978 (2) SA 898 (RA). In this case, the land was used for game farming purposes, but it could also be a cattle ranch. However, it could not be both at the same time.

²³⁶ M Jacobs *The Law of Expropriation in South Africa* (1982) 62.

²³⁷ See for example *Tongaat Group Ltd. v Minister of Agriculture* 1977 (2) SA 961 (A) where the state partially expropriated the appellant's property to build an airport. This intended use of part of the property resulted in a depreciation in value of the appellant's remaining property. The investment potential of the remaining property was lowered, therefore resulting in actual

property for that purpose.²³⁸ The reasoning is that if such a special purpose or utility were to be taken into account, it would influence the objectivity of market value and not clearly reflect the price a willing buyer would pay a willing seller if it were an ordinary transaction.²³⁹ What needs to be determined is not the value of the property for the owner or authority, but the intrinsic value of the property.²⁴⁰ This links up with the avoidance of considering the personal circumstances of the owner and focuses on the value of the property and rights in property.²⁴¹

The plaintiff must prove potential unless there is a clear potential.²⁴² The plaintiff must prove that such a potential would be within the knowledge of an imaginary seller and purchaser. The questions that must be answered are whether an imaginary buyer and seller, in an open market, in their negotiations, would consider the potential when determining the price of land, and if so, to what extent the potential would influence the price.²⁴³

2.4.3.2 Compensation for partial expropriations

In *Administrator, Transvaal v Kildrummy Holdings (Pty) Ltd and Another*,²⁴⁴ the court developed a principle (the *Kildrummy* principle) according to which, in cases of partial expropriation, the expropriatee should be regarded as one of the potential buyers, not in the capacity as owner of the expropriated land

financial loss for the appellant. *Potential* would only be considered if the appellant can show that the expropriated property had a specific potential that made it more valuable. The court ruled that expropriation should be given its ordinary meaning, which means that land is expropriated and used, by the state, without reference to the use of the property after the expropriation. The court distinguished between damages *because of the expropriation* and damages *because of the use of the expropriated property*.

²³⁸ M Jacobs *The Law of Expropriation in South Africa* (1982) 67.

²³⁹ *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) 953 where the court stated that value is a factual question and the purpose of expropriation should not be taken into account. *May v Reserve Bank of Zimbabwe; Thomas Family v Reserve Bank of Zimbabwe; Cairns Family Trust v Reserve Bank of Zimbabwe; Frogmore Tobacco Estates (PVT) Ltd v Reserve Bank of Zimbabwe* 1985 (4) SA 185 (ZH) 195 stated the expropriation itself cannot be used to enhance the value of the property (shares in this instance). In *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) 683 the court states that land with development potential cannot be devaluated because it is being expropriated for nature conservation purposes.

²⁴⁰ This means that so-called "hope value" is also not taken into account when determining the value. See *Viscount Camrose v Basingstoke Corporation* 1966 3 All ER 161 164.

²⁴¹ *Pienaar v Minister v Landbou* 1972 (1) SA 14 (A) 20.

²⁴² *Loubser en Andere v Suid-Afrikaanse Spoorweë en Hawens* 1979 (3) SA 589 (T).

²⁴³ *Loubser en Andere v Suid-Afrikaanse Spoorweë en Hawens* 1979 (3) SA 589 (T) 609.

²⁴⁴ 1983 (4) SA 960 (T) 972.

but as owner of the remaining or adjacent land. The question is what the owner of the neighbouring land that is being expropriated would pay in order to consolidate the properties or to develop their potential (of consolidating the erven),²⁴⁵ thereby avoiding adding a subjective value the expropriated property has for the expropriatee.²⁴⁶

2.4.4 How compensation is calculated

2.4.4.1 Introduction

Once it is clear *what* the state is expropriating, the question is how compensation should be calculated. Section 12(1) of the Expropriation Act²⁴⁷ sets out how compensation should be calculated.

12. Basis on which compensation is to be determined.—

(1) The amount of compensation to be paid in terms of this act to an owner in respect of property expropriated in terms of this act, or in respect of the taking, in terms of this act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed—

(a) in the case of any property other than a right, excepting a registered right to minerals, the aggregate of—

(i) the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer; and

(ii) an amount to make good any actual financial loss caused by the expropriation; and

(b) in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right:

²⁴⁵ In *Held v Generaal vir die Gebied van Suidwes-Afrika* 1988 (2) SA 218 (SWA) 226 the court justified the objective approach, stating that this can avoid adding the subjective loss to the compensation amount. *Hirschman v Minister of Agriculture* 1972 (2) SA 887 (A); *Ingersoll-Rand Co (SA) Ltd v Administrateur, Transvaal* 1991 (1) SA 321 (T) 329.

²⁴⁶ In *Hirschman v Minister of Agriculture* 1972 (2) SA 887 (A) the court referred to *Administrator, Transvaal v Kildrummy Holdings (Pty) Ltd and Another* 1983 (4) SA 960 (T), and warned that where the expropriatee is considered a notional buyer, it should be seen in perspective. The factors that the expropriatee considers must be factors that *any* willing seller (including the expropriatee, but not only the expropriatee) and willing buyer would consider.

²⁴⁷ 63 of 1975.

Provided that where the property expropriated is of such nature that there is no open market therefore, compensation therefore may be determined—

(aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or

(bb) in any other suitable manner.

The phrase “shall not exceed” in section 12(1) has been interpreted to mean that the court should stay as close as possible to the estimate based on market value plus the 10 per cent *solatium* as provided for in section 12(2), unless it has very convincing arguments to divert from it.²⁴⁸ However, in *Estate Geekie v Union Government and Another*²⁴⁹ the court said that compensation could also be *more* than market value. After the adoption of the Constitution, the court in *Kerksay Investments (Pty) Ltd v Randburg Town Council*²⁵⁰ stated, without referring to the Constitution, that under the 1975 Expropriation Act compensation can be *less* than market value since the factors in section 12 are mere guidelines to determine compensation that is just and equitable. There is thus no uniformity on the interpretation of “shall not exceed”.

2.4.4.2 Market value

All this is done to determine what, on the date of the notice, the property will fetch in the open market. The value that property will fetch in the open market is commonly referred to as the market value. Market value as compensation norm is based on the assumption that in the property market there will always be a free interchange between supply and demand.²⁵¹ This is problematic

²⁴⁸ *Jacobs v Minister of Agriculture* 1972 (4) SA (W) 608; M Jacobs *The Law of Expropriation in South Africa* (1982) 60; *Sher and Others NNO v Administrator, Transvaal* 1990 (4) SA 545 (A) 570; *Held v Administrateur-Generaal vir die Gebied van Suidwes-Afrika* 1988 (2) SA 218 (SWA) 570; *Kolver v Malan* 1917 in *Krummeck's Watercourt Cases* (1913-1921) 147; A Gildenhuis *Onteieningsreg* 2nd ed (2001) 292; *Union Government v Gass* 1959 (4) SA 401 (A) 416. In *Union Government v Jackson and Others* 1956 (2) SA 398 (A) the court also included an amount for the hardship the owner suffered as a result of waiting for the compensation to be paid.

²⁴⁹ 1948 (2) SA 494 (N).

²⁵⁰ 1997 (1) SA 511 (T).

²⁵¹ In this instance, an open market must be imagined to be a place where a transaction takes place free of competition. P Penny “Compensation upon Expropriation” (1966) 83 *SALJ* 185 204 writes that “[t]he ‘market’ or ‘exchange’ value of a thing is determined by its utility, its scarcity and the competitive wants of purchasers. It represents the point of equilibrium between supply and demand at any one moment. In real estate valuation, the thing to be

when it comes to the (real) property market that is regulated by its own occurrences and acts.²⁵² The rationale remains that the market price will be determined by the economic principles of supply and demand,²⁵³ thereby determining the “equivalent in value...of the property loss” as the *Estate Marks* case²⁵⁴ requires. This method of calculation was adopted in the South African case law.²⁵⁵

In *Estate Marks v Pretoria City Council*,²⁵⁶ the court, referring to market value, imported the common law position that a person whose property is expropriated must be compensated in full. According to this approach, compensation is usually paid for the value of the property lost,²⁵⁷ and value is normally taken to be market value.²⁵⁸ However, sometimes market value cannot be used, and if there is no specifically prescribed formula, any just norm can be applied.²⁵⁹

Market value is a problematic concept because in transactions of sale, the market is a relatively unrestrained phenomenon where sellers and buyers bargain until they reach an acceptable price level, and such bargaining is

valued is the group of rights attaching to a property. Because the term “Property” is commonly used as a convenient ellipsis for this group of rights, it should not be thought that it is the property as such which is being valued.” See A Gildenhuis “Markwaarde as Vergoedingsmaatstaf by Ontheiening” 1977 TSAR 1 3. For case law, see *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) 389; *Todd v Administrator, Transvaal* 1972 (2) SA 874 (AD) 881 – 882; *Estate Hemraj Mooljee v Seedat* 1945 NPD 22 24.

²⁵² A Gildenhuis “Markwaarde as Vergoedingsmaatstaf by Ontheiening” 1977 TSAR 1 8.

²⁵³ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 174.

²⁵⁴ *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) 242. See n 257.

²⁵⁵ See for instance *Krause v SA Railways and Harbours* 1948 (4) SA 554 (O) 560; *Hirschman v Minister of Agriculture* 1972 (2) SA 887 (A) 889; *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) 385; *Held v Administrateur-Generaal vir die Gebied van Suidwes-Afrika* 1988 (2) SA 218 (SWA) 225. See also *Sri Raja Vyricherla v Revenue Divisional Officer Vizagapatam* 1939 2 All ER 317 321 for an English discussion of market value. This corresponds with the methods followed in *Minister of Water Affairs v Mostert* 1966 (4) SA 690 (A) 722; *Katzoff v Glaser* 1948 (4) SA 630 (T) 637.

²⁵⁶ 1969 (3) SA 227 (A) 242 – 243.

²⁵⁷ *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) 242 per Ogilvie Thompson JA stated that “[t]he common law of expropriation provided that the equivalent in value be given to take the place of the property loss”.

²⁵⁸ *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 522 where De Villiers JP was “of the opinion [that] we must take the word ‘value’ in its more ordinary meaning of temporary or market value [it being *value in exchange*]. To give the other meaning [namely *value in use*] would perhaps be more satisfactory from an assessment point of view; in a country where fluctuation in the market value of property, are considerable and frequent this would certainly make for uniformity”. This is a conservative approach according to E Grütter *Die Regsposisie van die Huurder by Ontheiening* (1986) 56.

²⁵⁹ Expropriation Act 63 of 1975 s 12(1)(bb).

usually done without many artificial constraints. The problem thus lies in the fact that one must imagine compensating a compulsory purchase in terms of exactly the opposite, namely a free market transaction where the price level is determined by the relatively free will of the buyer and the seller. The determination of market value is therefore an informed guess.²⁶⁰

If the property does not have a market value because there is no market for such property,²⁶¹ compensation is determined by looking at replacement cost minus the depreciation value or any other suitable means.²⁶²

Before this provision was inserted in the Expropriation Act,²⁶³ the court in *Todd v Administrator, Transvaal*²⁶⁴ ruled that despite the fact that there was no open market, it will nonetheless determine what such property would fetch

²⁶⁰ *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A); *Minister of Lands and Natural Resources v Moresby-White* 1978 (2) SA 898 (RAD); *Krause v SA Railways & Harbours* 1948 (4) SA 554 (O).

²⁶¹ This makes it all the more hypothetical, and serves as an example of where market value is not the desired valuation method. For an in-depth discussion on special properties see S Georgiou *The Determination of Compensation for the Expropriation of Special Purpose Properties* (1988), who argues that in cases of special purpose properties it is impossible to determine the market value of such properties. She suggests that one should rather calculate compensation under actual financial loss in such a case, or according to the replacement value. For case law, see *Held v Administrateur-Generaal vir die Gebied van Suidwes-Afrika* 1988 (2) SA 218 (SWA) 231, where half a farm was expropriated, where the expropriated farmland was situated in the middle of another farm. See also *Minister of Agriculture v Federal Theological Seminary* 1979 (4) SA 162 (E) 169, where a theological seminary was expropriated, and the court ruled that “the State is always a potential buyer and once that is so then, even if there is no open market...the Court must nevertheless assume an open market because the act requires the open market test to be applied in assessing the value of the expropriated land”. In *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) agricultural land was expropriated to enforce the Group Areas Act. There is only one buyer in such an instance, namely the Black Development Board. Yet, the court insisted that even if it does not have a market value, it must apply such a test, with the information at the court’s disposal, as best it can. In *Todd v Administrator Transvaal* 1972 (2) SA 874 (A) the administrator expropriated property zoned for educational use. In such a case, the Department of Education is the only possible buyer. The court ruled that when determining value, the valuator must ignore the fact that there is only one possible buyer, and imagine an open market. In *Minister of Agriculture v Estate Randeree* 1979 (1) SA 145 (A) 153 Corbett JA stated that if property is zoned for something like a public street, “I have difficulty visualising upon what basis the court can even begin to compute the compensation payable upon expropriation”. In *Illovo Sugar Estate v SA Railway and Harbours* 1947 (1) SA 58 (D) 76 compensation for expropriation of a cane farm adjacent to a sugar mill was awarded under actual financial loss. Both the cane farm and the mill belonged to the plaintiff, and there was no other supplier of cane to the mill in the vicinity. The fact that the court awarded extra money under actual financial loss indicates that the court does not regard the proximity of the sugar mill to the cane farm as an intrinsic value of the property. See also *Durban Corporation v Lewis* 1942 NPD 24 48-9 where the court stated that sentimental value of the owner will not be compensated.

²⁶² A Gildenhuys *Onteieningsreg* 2nd ed (2001) 156. This provision was inserted by the Expropriation Amendment Act 45 of 1992.

²⁶³ 63 of 1975.

²⁶⁴ 1972 (2) SA 874 (AD) 881-882.

on the open market, since the act requires it.²⁶⁵ It took value to be the value that the arbitrator placed on it. This is a clear indication of how the courts labour the idea that value can only refer to market value.²⁶⁶

Notwithstanding the problems with this approach, the courts have usually found a way to apply the open market test, even where it has been very difficult to do so.²⁶⁷ The market value test plays a central role in South African expropriation law, and in order to determine the market value, one has to hypothesise what the property would have realised if sold on an open market by a willing seller to a willing buyer.

2.4.4.3 The willing buyer willing seller principle

The willing buyer willing seller principle looks at what price a willing buyer would pay for property and what price a willing seller would accept for the property. It is used to determine the market value of property. The willing buyer willing seller principle is described as illusory, since the bargaining process is constrained by a compulsory sale, and the seller is more often than not unwilling to sell.²⁶⁸

As King J stated in *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council*.²⁶⁹

“Notwithstanding, the law enjoins me to transport myself into a world of fiction and to don the mantle of a super valuator, overriding, if necessary, the views expressed by men experienced in the valuation of property and whose views are relied upon almost daily by willing purchasers and sellers. I must at one and the same time be the willing seller and the willing buyer, both well-informed, and I must arrive at a price in a market that did not exist at the time of expropriation.

²⁶⁵ See also *May v Reserve Bank of Zimbabwe; Thomas Family v Reserve Bank of Zimbabwe; Cairns Family Trust v Reserve Bank of Zimbabwe; Frogmore Tobacco Estates (PVT) Ltd v Reserve Bank of Zimbabwe* 1985 (4) SA 185 (ZH) 116; *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) 953.

²⁶⁶ A Gildenhuys “Markwaarde as Vergoedingsmaatstaf by Onteiening” 1977 TSAR 1 5 criticises this as being unscientific.

²⁶⁷ *Todd v Administrator Transvaal* 1972 (2) SA 874 (AD) 881-882; *May v Reserve Bank of Zimbabwe; Thomas Family v Reserve Bank of Zimbabwe; Cairns Family Trust v Reserve Bank of Zimbabwe; Frogmore Tobacco Estates (PVT) Ltd v Reserve Bank of Zimbabwe* 1985 (4) SA 185 (ZH) 116; *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) 953; *Minister of Agriculture v Estate Randeree* 1979 (1) SA 145 (A) 183.

²⁶⁸ M Jacobs *The Law of Expropriation in South Africa* (1982) 61.

²⁶⁹ 1979 (1) SA 949 (W) 955 – 956.

This is so because I must ignore any enhancement or diminution in value flowing from the expropriation or the scheme causing the expropriation. It is an Alice in Wonderland world in which the consideration of principles of valuation and the opinions expressed by experienced property valuers make the task of the super valuator seemingly "curiouser and curiouser".

It is also unclear which persons would qualify as hypothetical buyers, because different buyers will pay different prices for land, based on their needs.²⁷⁰ It is therefore assumed that the hypothetical buyer should at least be someone who would in practice buy or have bought similar properties.²⁷¹ This must be done without regard to the particular seller, since no method of calculation should include subjective considerations.²⁷² The court in *Pienaar v Minister van Landbou*²⁷³ stated that market value is an objective concept that should be determined not by looking at the personal circumstances of the owner, but

²⁷⁰ A Gildenhuys "Markwaarde as Vergoedingsmaatstaf by Onteining" 1977 TSAR 1 3 says such an imaginary sale is one where the seller is not anxious to sell property, but is willing to sell if (s)he gets a good price. It is important that objective formulas be used, so that the personal circumstances of the expropriatee do not dictate the price. See also *Pienaar v Minister van Landbou* 1972 (1) SA 14 (A) 20. If the land has a special characteristic that is of value to the specific owner, this must be disregarded. Instead, the court must ask what a person in the shoes of the owner would pay to get the land. See *Hirschman v Minister of Agriculture* 1972 (2) SA 887 (A).

²⁷¹ A Gildenhuys "Markwaarde as Vergoedingsmaatstaf by Onteining" 1977 TSAR 1 4. He also mentions the Canadian and Australian approach that states that in cases where land has a special meaning to the expropriatee, the expropriatee can also be regarded as a hypothetical buyer. It must be treated with caution, since in such a case the expropriatee cannot be the willing buyer and the willing seller. The English case of *Sri Raja Vyricherla v Revenue Divisional Officer Vizagapatam* 1939 2 All ER 317 states that the value of the property will not be increased because of such special value. In South Africa there seems to be an indication that we follow the rule to some extent.

²⁷² In *Durban Corporation v Lewis* 1942 NP 24, "value to the owner" was considered "in so far as they enhance the value to him". In *Krause v SA Railways and Harbours* 1948 (4) SA 554 (O) 561 "the value which has to be assessed is the value to the old owner...not the value to the new owner". In *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) 384 the court stated that value is the equivalent in value to the expropriatee. However, the appellant division settled it in *Pienaar v Minister van Landbou* 1972 (1) SA 14 (A) 20 where value was determined with reference to the land itself, and the court ruled that personal circumstances of the owner should not have an influence, since it will be valued differently in the hands of different owners. This point was qualified when it was mentioned, but not decided, in *Hirschman v Minister of Agriculture* 1972 (2) SA 887 (A). Where property has a special value because the owner can use it together with other property, it is a factor will be considered with the calculation of compensation. In such a case the owner is regarded as a potential purchaser, even if it means that (s)he is both the hypothetical willing buyer and the willing seller (*qua* owner). It remains, however, the intrinsic value of the property that is valued. However, courts would rather award extra compensation under actual financial loss. S Georgiou *The Determination of Compensation for the Expropriation of Special Purpose Properties* (1988) 51.

²⁷³ 1972 (1) SA 14 (A). See n 272.

by looking at the property itself.²⁷⁴ However, when calculating actual financial loss, personal circumstance can play a role in determining what loss should be compensated.

2.4.4.4 Compensation for financial loss

In Roman-Dutch law a person who was expropriated was only allowed to claim compensation for the things that were expropriated. The Expropriation Act²⁷⁵ makes provision for actual financial loss as a separate, complementary compensation claim.²⁷⁶ Market value and actual financial loss are two separate claims.²⁷⁷

Section 12(1)(a)(ii) states that compensation includes “an amount that would make good any actual financial loss caused by the expropriation”, while section 12(b) also makes provision for compensating actual financial loss in the case of the expropriation of a right. The onus is on the plaintiff to show that (s)he has suffered loss.²⁷⁸ The loss must result from natural and reasonable direct consequences of expropriation.²⁷⁹

Examples of what constitutes actual financial loss are the cost of removal,²⁸⁰ loss of income,²⁸¹ loss of goodwill,²⁸² loss of interest,²⁸³ disturbance,²⁸⁴ and in some cases the difference between the cost of new premises and the value of

²⁷⁴ This contradicts the doctrine of subjective rights that regards expropriation as the expropriation of rights to an object as opposed to the object itself. See paragraph 2.4.3.

²⁷⁵ 63 of 1975.

²⁷⁶ A Gildenhuys *Ontheieningsreg* 2nd ed (2001) 316.

²⁷⁷ *Union Government v Gass* 1959 (4) 401 (A) 416; *Illovo Sugar Estates Limited v South African Railways and Harbours* 1947 (1) SA 52 (D) 64. The state must also make clear in the notice what part of the compensation moneys is to compensate for the property, and what is compensated under actual financial loss. Expropriation Act 63 of 1975 ss 9(1)(b) and 10(4).

²⁷⁸ *Bonnet v Department of Agriculture Credit and Land Tenure* 1973 (2) SA 560 (T).

²⁷⁹ See *Greyvenstein en 'n Ander v Minister van Landbou* 1970 (4) SA 233 (T); *Pienaar v Minister van Landbou* 1972 (1) SA 14 (A); *Natal Estates Ltd v Community Development Board and Others* 1985 (3) SA 378 (D); *Held v Administrateur-Generaal vir die Gebied van Suidwes-Afrika* 1988 (2) SA 218 (SWA); *Sandton Town Council v Erf 89 Sandown Extension 2 (Pty) Ltd* 1988 (3) SA 122 (A); *Davis and Another v Pietermaritzburg City Council* 1988 (3) SA 537 (N); *Benede Sand Boerdery (Edms) Bpk v Virginia Munisipaliteit* 1992 (4) SA 176 (A).

²⁸⁰ *Greyvenstein en 'n Ander v Minister van Landbou* 1970 (4) SA 233 (T).

²⁸¹ *Illovo Sugar Estates v SA Railways & Harbours* 1947 (1) SA 58 (D) 82.

²⁸² M Jacobs *The Law of Expropriation in South Africa* (1982) 82.

²⁸³ *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (AD).

²⁸⁴ *Greyvenstein en 'n Ander v Minister van Landbou* 1970 (4) SA 233 (T).

the expropriated premises.²⁸⁵ Transfer costs and transfer duty²⁸⁶ are not regarded as actual financial loss. Where land was only partially expropriated, leaving the remainder of the property economically less viable, it is generally accepted that compensation must be paid for the depreciation of the remainder of the land under the heading of actual financial loss.²⁸⁷

In *Tongaat Group Ltd v Minister of Agriculture*²⁸⁸ the court held that the legislator did not intend that loss due to the use of the adjacent expropriated land should be compensated.²⁸⁹ The court's argument was that the loss would not be a result of the expropriation. While an owner can claim for the loss if part of his/her property is expropriated in regard to the property *not* expropriated, it is not possible to claim for losses incurred if the use of the expropriated property negatively affects the remainder. This approach has been criticised as leaving a *lacuna* in the act.²⁹⁰

²⁸⁵ In *Badenhorst v Die Minister van Landbou* 1974 (1) PH K7 the owners of land that was partially expropriated were forced to build new farmhouses on the remaining portion. The compensation they received for the expropriated part was not enough to build new farmhouses on the portion not expropriated. They were awarded compensation for actual financial loss under s 12(1)(a)(ii) for the difference between the cost of building the new houses and the value of the old houses, as it was argued it constituted actual patrimonial loss.

²⁸⁶ *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (AD); *Greyvenstein en 'n Ander v Minister van Landbou* 1970 (4) SA 233 (T).

²⁸⁷ M Jacobs *The Law of Expropriation in South Africa* (1982) 88. There are two methods to determine compensation in partial takings cases. The first method involves determining the value of the land taken, adding the decrease in value of the remainder to that value as in *Held v Administrateur-Generaal vir die Gebied van Suidwes-Afrika* 1988 (2) SA 218 (SWA) 226. The second method entails that the entire property is valued before the expropriation and the value of the remainder the property in the hands of the owner is determined after expropriation. The difference in the amount before and after constitutes the compensation amount. The first method is seen as benefiting the owner, since the owner would always receive the value of the land regardless of any benefits. However, this method can also be disadvantageous, for example where land has no market value or in cases where it is difficult to put a monetary value on the depreciation of the remaining property. The second method, on the other hand, favours the expropriating authority in that it receives credit for any betterment to the remaining land. See M Jacobs *The Law of Expropriation in South Africa* (1982) 90.

²⁸⁸ 1977 (2) SA 961 (AD).

²⁸⁹ In this case, the owner contended that the state's intended use of the expropriated land for the building of an airport would result in noise pollution that would decrease the value of the property to the owner.

²⁹⁰ M Jacobs *The Law of Expropriation in South Africa* (1982) 88. Two years before the *Tongaat* 1977 (2) SA (A) 961 ruling, the Transvaal court held in *Botha v Suid-Afrikaanse Spoorweë en Hawens* 1975 (4) SA 669 (T) that the owner is entitled to both the value of the expropriated property and damages including the depreciation in value of the remainder of the land not expropriated. The same reasoning was followed in *Lochner v Afdelingsraad Stellenbosch* 1976 (4) SA 737 (C).

In instances where the land is burdened with, for example, an electricity line servitude, the court would compensate the difference between the value of the property before and the value after such a burden. This is compensated under “actual financial loss” and not compensation for the loss of property as per section 12(1)(a).²⁹¹

Section 12 (1)(b) provides that when a right is expropriated the holder of that right should be compensated for the actual financial loss (s)he suffers. Likewise, if the state wants the land unburdened, parties with registered rights to the land must be compensated.²⁹² If such a right has a market value, then actual financial loss suffered is the market value.²⁹³ If the right does not have a market value, one has to determine the actual financial loss the holder suffered.²⁹⁴

The 1975 Act, in section 22 read with section 13 and 9(1)(d)(i) & (iii), provides for a right to claim compensation in certain circumstances. This means that holders of unregistered rights can be compensated if (i) they are the lessees and the owner informed the authorities of an unregistered lease in the land within the 60 day period from the service of the notice to expropriation, (ii) they can show a valid contract of sale for the property or (iii) they are builders with a right of retention based on a written building contract.²⁹⁵

²⁹¹ *JN de Kock en Seun (Edms) Bpk v Elektrysiteitsvoorsieningskommissie* 1983 (3) SA 160 (A); *Greyvenstein en 'n Ander v Minister van Landbou* 1970 (4) SA 233 (T).

²⁹² See *Greyvenstein en 'n Ander v Minister van Landbou* 1970 (4) SA 233 (T) 236 where the court ruled that only registered rights in land can be expropriated. The court defended s 13 of the Expropriation Act 55 of 1965 that requires real rights to be registered. This is because the expropriator should be aware of the rights at the time of expropriation, therefore it must be within the expropriator's knowledge in order to determine compensation. See *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C).

²⁹³ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 347.

²⁹⁴ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 347.

²⁹⁵ Sharecroppers used to be part of the group of holders of unregistered rights that is protected before the Expropriation Amendment Act 45 of 1992. For a thorough (albeit a bit outdated) discussion of the position of the lessee upon expropriation, see E Grütter *Die Regsposisie van die Huurder by Onteiening* (1986). See *Stellenbosch Divisional Council v Shapiro* 1953 (3) SA 418 (C) where the respondent's argument that he is entitled to remain on the land despite the expropriation because “huur gaat voor koop” was rejected. For a discussion on other rights, see A Gildenhuis *Onteieningsreg* 2nd ed (2001) 64.

2.4.4.5 Statutory exceptions

Section 12(5) contains statutory exceptions to the owner's entitlement of full market value compensation. The owner might therefore not be put in the exact same position (s)he was before the expropriation, since compensation can be less than (open) market value.²⁹⁶ These statutory rules only apply in specific instances mentioned in the act.

The first rule is that no special allowance shall be made for the fact that the owner did not consent to the expropriation.²⁹⁷ The courts readily accepted that the expropriatee's unwillingness to part with his/her property should not influence the calculation of compensation, also where the property has a sentimental value to the owner.²⁹⁸ The second rule states that the suitability of the expropriated property for the purpose, for which it is required by the state if it would not be purchased for that purpose in the open market should not be taken into account when determining value.²⁹⁹ The third rule excludes unlawful enhancement of property to be taken into account.³⁰⁰ This rule rests on the assumption that a willing buyer would not be willing to pay for an unlawful use of the property. This section is mostly applicable to the instances where zoning and planning legislation is contravened.³⁰¹ Improvements made after the date of notice of expropriation is excluded by the fourth rule.³⁰² Any improvements made after such date can be seen as an improvement that was made *mala fide*, and fairness requires that it should therefore not be compen-

²⁹⁶ *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) 245.

²⁹⁷ Expropriation Act 63 of 1975 s 12(5)(a). Under the British Lands Clauses Consolidation Act of 1845 the expropriatee was awarded a 10% *solatium* for the fact that the property was compulsory acquired. The 1919 Acquisition of Lands Act, on which South African legislation is based, stopped this. See A Gildenhuis *Onteieningsreg* 2nd ed (2001) 347.

²⁹⁸ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 246; *Krause v SA Railways and Harbours* 1948 (4) SA 554 (O); *Fine Wool Products of South Africa Ltd and Another v Director of Valuations* 1950 (4) SA 490 (EC); *Braamfontein Co Ltd v Johannesburg Municipality* 1916 TPD 745.

²⁹⁹ Expropriation Act 63 of 1975 s 12(5)(b). Before the 1965 and 1975 Expropriation Acts, the court in *Illovo Sugar Estates Limited v South African Railways and Harbours* 1947 (1) SA 52 (D) ordered the expropriator to pay an extra amount for the expropriated property because the property had an attribute of special value to the expropriator. The legislature amended this by adding a section in the Railway Expropriation Act 37 of 1955 s 8(4)(b), and the subsequent expropriation acts: A Gildenhuis *Onteieningsreg* 2nd ed (2001) 247-248.

³⁰⁰ Expropriation Act 63 of 1975 s 12(5)(c).

³⁰¹ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 249 – 250.

³⁰² Expropriation Act 63 of 1975 s 12(5)(d).

sated.³⁰³ The fifth rule prohibits the allowance for unregistered rights in respect of any other property or for any indirect damages, or anything done to obtain compensation.³⁰⁴ The reference to unregistered rights should be read in conjunction with section 22,³⁰⁵ which provides that all unregistered rights in land be terminated at the date of expropriation.³⁰⁶ The rest of this rule should be applied with reference to section 12(1)(a)(ii) and (b) with regard to actual financial loss. In *Tongaat Group Limited v Minister of Agriculture*³⁰⁷ the court stated that the line between actual financial loss and indirect damage is flexible. Indirect damage is usually damage that is not directly or immediately caused by the expropriation.³⁰⁸ The sixth rule is the statutory equivalent of the *Pointe Garde*-principle³⁰⁹ that prohibits the inclusion of enhancement or depreciation in value of the property, due to the purpose for which the property is expropriated, to be included in the calculation of value.³¹⁰ The rationale underlying this section is that “an appreciation or depreciation in the value of the property which [...] is a by-product or spin-off of the expropriation is to be ignored”.³¹¹ It is seen as a principle of equity that appreciation should not be compensated.³¹² The last rule allows for the inclusion of the benefit of works or the consequence of expropriation to be taken into account.³¹³ The benefit will usually be set off against the compensation.³¹⁴

³⁰³ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 251.

³⁰⁴ Expropriation Act 63 of 1975 s 12(5)(e).

³⁰⁵ See paragraph 2.4.4.4.

³⁰⁶ For a discussion on the constitutionality of this section, see A Gildenhuis *Onteieningsreg* 2nd ed (2001) 252.

³⁰⁷ 1976 (2) SA 357 (D) 366.

³⁰⁸ *Benede Sand Boerdery (Edms) Bpk v Virginia Munisipaliteit* 1992 (4) SA 176 (A) 182; *Pienaar v Minister van Landbou* 1972 (1) SA 14 (A) 25.

³⁰⁹ *Pointe Garde Quarrying & Transport Co v Sub-Intendent of Crown Lands* [1947] AC 656 (Tri&To).

³¹⁰ Expropriation Act 63 of 1975 s 12(5)(f).

³¹¹ *Port Edward Town Board v Kay* 1996 (3) SA 664 (A) 679.

³¹² A Gildenhuis *Onteieningsreg* 2nd ed (2001) 257. For a discussion of what “scheme” entails and how value must be determined, see A Gildenhuis *Onteieningsreg* 2nd ed (2001) 259 – 267.

³¹³ Expropriation Act 63 of 1975 s 12(5)(h). Subparagraph (i) is mostly applicable when only a part of the owner’s property is expropriated. Subparagraph (ii) is based on the principle of fairness, and is mostly applicable to partial expropriations. Subsection (iv) governs water rights and the extent of the water rights that will be awarded for the expropriated property.

³¹⁴ A Gildenhuis *Onteieningsreg* 2nd ed (2001) 270. See also 270 – 273 to see what benefits should be taken into account.

2.4.4.6 Solatium

Under this heading, non-financial losses are calculated. This includes inconvenience and disturbance that the expropriation may cause, or as the Irish court³¹⁵ so adequately put it, compensation for “the annoyance of being disturbed”.³¹⁶ *Solatium* is calculated as a percentage of the total claim (the percentage differs according to the amount claimed), with a maximum amount of R 10 000.³¹⁷

2.4.4.7 Interest

According to section 12(3), the expropriator must pay interest on the amount outstanding on the day it takes possession of the property and as long as it remained unpaid after possession.³¹⁸ Interest is calculated in terms of the Exchequer Act.³¹⁹ In terms of section 12(4), interest is not payable in terms of section 12(3) to the expropriatee while (s)he occupies or utilizes the property. The interest is calculated on the whole compensation amount minus the *solatium*.³²⁰

2.4.4.8 Valuation techniques

2.4.4.8.1 Introduction

Section 12 of the Expropriation Act³²¹ lays down the principles for calculating compensation, and as has been shown above, this usually means that compensation is paid for the value of the property taken, with the value being mostly equated to market value. The determination of market value largely depends on the testimony of expert valuers.³²² Valuers must provide the

³¹⁵ *In Re Athlone Rifle Range* 1902 1 IrR 433 (Ire) 137.

³¹⁶ For an in-depth discussion on the origins of this rule, the *solatium* for inconvenience and non-financial damages, see A Gildenhuys *Onteieningsreg* 2nd ed (2001) 186 – 190.

³¹⁷ S 12 (2).

³¹⁸ S 12(3)(a). See *Community Development Board v Mahomed* 1987 (2) SA 899 (A) 909.

³¹⁹ 66 of 1975.

³²⁰ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 130.

³²¹ 63 of 1975.

³²² If a judge does not accept expert testimony, the judge must make clear in the judgment why it is rejected. See *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (A) 252-3.

court with evidence of what a hypothetical willing buyer would pay for the expropriated property, and what a hypothetical willing seller would accept. South African courts mention mainly three methods to determine what price a willing buyer would pay a willing seller in an open market. They are the comparative approach, the land residual technique and the economic approach.

These are not legal rules but valuation techniques that expert valuers³²³ use in order to place evidence before the court of what they estimate to be the market value of the property.

2.4.4.8.2 Comparative or market data approach

According to Jacobs,³²⁴ the definition of this approach is “the consideration of actual sales of like lands in a like area and a determination from such comparison of the going market value of the lands in question at the date of expropriation”. It is based on the idea that a willing buyer would not pay more for land if (s)he could get comparable land elsewhere more cheaply.³²⁵ This approach has been imported in South African case law and is regarded as the most effective way of determining value.³²⁶

This method is used to determine market value, “rather than upon [speculating] as to the prices notional willing sellers and notional willing buyers would

³²³ Valuers play a central role in determining the value of the property. Therefore, their reputation and competence are often subjected to questioning. See *Minister van Waters v Theron* 1856 52 ER 1219 1223.

³²⁴ M Jacobs *The Law of Expropriation in South Africa* (1982) 101; *Minister van Waterwese v Von During* 1971 (1) SA 858 (A).

³²⁵ A Gildenhuys “Markwaarde as Vergoedingsmaatstaf by Onteining” 1977 TSAR 1 7.

³²⁶ *Todd v Minister of Public Works* 1958 (1) SA 328 (A) 380; *Bestuursraad van Sebokeng v M & K Trust & Finansiële Maatskappy (Edms) Bpk* 1973 (3) SA 376 (A) 390; *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) 956; *Van Zyl v Stadsraad van Ermelo* 1979 (3) SA 549 (AD) 568; *Thanam, NO v Minister of Lands* 1970 (4) SA 85 (D). See *Minister van Waterwese v Von During* 1971 (1) SA 858 (A) 872 where the court states that no two properties are the same, not even those adjacent to each other, but that this method is nonetheless the most reliable method of determining market value. The difference in property is merely a factor that should be taken into account when determining market value.

have agreed upon had they entered into contracts of sale”.³²⁷ It is generally regarded as a method that reduces speculation about prices.³²⁸

The most relevant³²⁹ and least technical principle that is applicable when determining what must be included or excluded in such a calculation is that the price the owner paid for the property may be referred to, especially if the property was bought just before expropriation.³³⁰ Only transactions at arms length can be regarded as an indication of the market value.³³¹ The expropriation price paid to comparable land can also be used as a factor to help determine the amount, but the expropriation cannot be elevated to a sales transaction.³³²

The properties used for comparison must be sufficiently similar to the property being expropriated. Where there are discrepancies, the valuator is expected to be creative and to take into account any facts that might influence the mind

³²⁷ In *Minister of Lands and Natural Resources v Moresby-White* 1978 (2) SA 898 (RAD) the court per Macdonald CJ states that the property used for comparison must be property sold on the open market, and not other compulsory sales.

³²⁸ M Jacobs *The Law of Expropriation in South Africa* (1982) 102. In *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (C) 667 the plaintiff relied on the residual land value method to ascertain value. The court rejected the use of the residual land value method and preferred to use the comparative method instead. See also *Minister van Waterwese v Von During* 1971 (1) SA 858 (A) 872 where the court states that no two properties are the same, not even those adjacent to each other, but that this method is nonetheless the most reliable method of determining market value. The difference in property is merely a factor that should be taken into account when determining market value. In *Minister of Lands and Natural Resources v Moresby-White* 1978 (2) SA 898 (RA) 903 the court per MacDonald CJ highlighted the problems of this approach. “The best evidence of market value is, of course, sales in the area of the land expropriated, more particularly contemporaneous sales, and, wherever possible, a compensation court will base its findings on such evidence rather than upon speculation as to the prices notional willing sellers and notional willing buyers would have agreed upon had they entered into contracts of sale. Such sales when available are incomparably the best method of arriving at a valuation, since they provide unbiased and quite disinterested evidence on the crucial point in issue. It follows that when there is such evidence it should not, unless there are good reasons for doing so, be passed over in favour of methods of valuation which depend upon evidence which is likely to be neither unbiased nor disinterested, which are based on *ex post facto* reasoning and which of necessity involve a high degree of speculation regarding the prices notional willing purchasers would have paid at the relevant date.”

³²⁹ For other principles, see M Jacobs *The Law of Expropriation in South Africa* (1982) 103 – 119.

³³⁰ M Jacobs *The Law of Expropriation in South Africa* (1982) 103.

³³¹ M Jacobs *The Law of Expropriation in South Africa* (1982) 104 and 107. Sales to the expropriation authority are normally not regarded as a sale by a willing seller, since the seller would be pressured by the imminent expropriation and can thus not be regarded as an open market transaction.

³³² *Minister van Waterwese v Von During* 1971 (1) SA 858 (A).

of the (hypothetical) purchaser.³³³ This would be done by employing his/her “skill and experience in deciding what a purchaser, if one were to appear, would be likely to give”.³³⁴

The obvious problem with this approach is when there are no comparable properties, or where the property standing to be expropriated has a unique feature. In *Durban Corporation v Lewis*³³⁵ the court ruled that in cases where “the land to be valued possesses some unusual, and it may be, unique features”, the arbitrator has to consider all the material in front of him and determine “what a willing vendor might reasonably expect to obtain from a willing purchaser, for the land in that particular position and with those particular potentialities”.³³⁶ This problem seems largely to have been solved by the insertion into the act of section 12(aa) and (bb) in 1992.³³⁷

2.4.4.8.3 The land residual technique³³⁸

This valuation method first looks at the purpose for which the land was purchased by the expropriatee. Thereafter the cost of improvements to get the land suitable for such a potential is deducted. Revenue is estimated by putting a sales value on the property, and added to the total. The total is discounted against the time it will take to develop the land.³³⁹ The technique rests on the assumption that a person would not pay more for renovating or upgrading property than (s)he would spend on similar renovations else-

³³³ *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 516. For further criticism of the method, see *Sher and Others NNO v Administrator, Transvaal* 1990 (4) SA 545 (A) 265 where the court stated that the valuation before it did not account for the property’s unique characteristics. In *Minister of Agriculture v Davey* 1981 (3) SA 877 (A) 903 the court stated that, although the comparative method is the best method to employ, the evidence on which it rests must also be considered with care. One has to take into account that property is acquired in different circumstances, and that no two properties are exactly similar. In *Minister van Waterwese v Von Doring* 1971 (1) SA 858 (A) 904, the fact that there is no other comparable land does not mean that the property is without value. Reasons for inactivity in an area should be treated as opinion evidence and with caution.

³³⁴ *Pietermaritzburg Corporation v South African Breweries Ltd* 1911 AD 501 516. See also *Estate Marks v Pretoria City Council* 1969 (3) SA 227 (AD) 254.

³³⁵ 1942 NPD 24.

³³⁶ *Durban Corporation v Lewis* 1942 NPD 24 49.

³³⁷ By the Expropriation Amendment Act 45 of 1992.

³³⁸ Also referred to as the “cost method” or the “replacement cost”.

³³⁹ *Southern Transvaal Buildings v Johannesburg City Council* 1979 (1) SA 949 (W); *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (C) 677; M Jacobs *The Law of Expropriation in South Africa* (1982)130.

where.³⁴⁰ This is seen as a secondary method of determining market value,³⁴¹ since more variables mean that there is a greater risk of uncertainty.³⁴²

2.4.4.8.4 Economic approach

This approach requires the valuator to value the expropriated property by capitalising its *netto* rental income.³⁴³ This approach assumes that a buyer would not pay more for land providing a certain income if (s)he could get a similar income elsewhere for less.³⁴⁴ Although this method has not been used by the South African courts, it is often mentioned as a third possibility.

2.5 Conclusion

The purpose of this chapter is to describe the legal culture of pre-1994 expropriation law from a historic perspective as well as the Expropriation Act.³⁴⁵

Expropriation law in South Africa stems from Roman-Dutch law influenced by English law, as was shown above. From the Roman-Dutch law side we inherited a property law system that jealously guards property and ownership, while the Expropriation Act³⁴⁶ that is still in force today was based on predecessors that were heavily influenced by English expropriation law. The Roman-Dutch roots, with its emphasis on ownership, fit in more comfortably in the private law tradition, while the (English) administrative nature of expropriation, as contained in the Expropriation Act,³⁴⁷ fits more comfortably into the public law tradition. Notwithstanding, the court at times tried to find common ground be-

³⁴⁰ A Gildenhuys "Markwaarde as Vergoedingsmaatstaf by Onteining" 1977 TSAR 1 7.

³⁴¹ It is not a popular method and was rejected in *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (C) 677 but was used in *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W).

³⁴² *Opera House (Grand Parade) Restaurant (Pty) Ltd v Cape Town Municipality* 1989 (2) SA 670 (C) 677. M Jacobs *The Law of Expropriation in South Africa* (1982) 131 criticises this approach by looking at the purpose of the act. He states that the purpose of the act is to put the owner in the same position (s)he would be, if not for the expropriation, which is not the case when one follows the above approach.

³⁴³ M Jacobs *The Law of Expropriation in South Africa* (1982) 121-123.

³⁴⁴ A Gildenhuys "Markwaarde as Vergoedingsmaatstaf by Onteining" 1977 TSAR 1 7.

³⁴⁵ 63 of 1975.

³⁴⁶ 63 of 1975.

³⁴⁷ 63 of 1975.

tween the English compensation principles and the Roman-Dutch law compensation principles,³⁴⁸ while at other times clearly rejecting the influence of Roman-Dutch law when interpreting expropriation statutes.³⁴⁹ Despite this, a fair conclusion would be that South African expropriation law has adopted the strong administrative features of English law and is almost exclusively legislation driven. Authority emanates from legislation and must be strictly circumscribed. When exercising this authority, adherence to a procedure that is fair, as laid down in the act, is a requirement for a valid expropriation.

This does not imply that pre-1994 expropriation law is not influenced by the general notions of ownership that are so prevalent in Roman-Dutch law. Ownership in this context is regarded as the paramount right in property.³⁵⁰ Ownership of property received the highest level of protection, namely that full market value compensation is due on expropriation of property, regardless of the context. Other rights in property were protected, but only insofar as they were either brought to the attention of the authorities and, after the amendment, only if they were among the listed, protected right holders.

From Roman-Dutch and English law, South African compensation principles emerged. The idea that compensation should equal the value of the property was incorporated into case law by relying on English and Roman-Dutch authorities. This was incorporated into the 1975 Expropriation Act. The Expropriation Act³⁵¹ states that all expropriations, regardless of whether they are authorised by other acts, would be subject to the compensation principles laid down in the Expropriation Act.³⁵² The act stipulates that compensation should be paid for the value of the property, the value being market value. Market value, in turn, is determined by looking at what a willing buyer would pay a willing seller for the property.

The compensation requirement has certain characteristics. It is part of the interpretative presumption that the legislature does not intend to take away rights without compensation. Therefore compensation is due when an owner

³⁴⁸ *Minister of Agriculture v Federal Theological Seminary* 1979 (4) SA 162 (E) 168.

³⁴⁹ As in *Joyce & McGregor Ltd v Cape Provincial Administration* 1946 AD 658 671.

³⁵⁰ AJ van der Walt "Property Rights and Hierarchies of Power: An Evaluation of Land Reform Policy in South Africa" (1999) *Koers* 259.

³⁵¹ 63 of 1975.

³⁵² 63 of 1975.

is deprived of rights for a public purpose, as authorised by an act.³⁵³ This does not adequately explain why compensation would be paid for the potential of the property.

Under the Expropriation Act³⁵⁴ compensating the value of the property means that the market value of the property is paid to the owner. Market value is calculated based on what a willing buyer would pay a willing seller in the open market. Despite the impossibility of mimicking a (relatively free) market value transaction when the transaction is constrained by the threat of expropriation, this method was used and incorporated into case law.

The market value compensation requirement was further strengthened by the seemingly neutral and scientific nature of the calculation of compensation on that basis. The market is portrayed as an independent and reliable forum, where the hypothetical seller and buyer would consider certain predictable factors and where a hypothetical value can easily and objectively be ascertained. Added to this, the artificial nature of expropriation is ignored. Even if the courts on various occasions mention the irony of having to imagine a sale between a willing buyer and a willing seller in what is essentially a forced sale, they nonetheless find it easy to do so. This, indeed, makes the task of the court in determining market value “curiouser and curiouser”.³⁵⁵

Despite such imagining leading the courts down a rabbit hole of hypothetical guesswork, the pre-1994 expropriation law left us with a legacy where market value is the central focus when calculating compensation. The methods used place the owner central to the inquiry. Parties with other rights and interests in the land were further marginalised by having to comply with certain (further) requirements. The ownership paradigm is thereby entrenched, and other rights left with lesser protection. The culture of full market value compensation therefore meant that the owner of property was fully protected against state interference.

³⁵³ The owner is then compensated for the rights in property that is lost. Some cases stated that it is the loss of the property self that is compensated. See n 272. This position is doubtful.

³⁵⁴ 63 of 1975.

³⁵⁵ *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) 956.

It is not surprising that with the advent of constitutional democracy, when market value was listed as one of many factors to be taken into account when determining compensation, the courts were unsure how to approach the calculation question. The courts faced an unknown, undeveloped notion of just and equitable compensation, armed only with the certainty of market value compensation as developed in pre-1994 case law. The courts had to develop a new body of case law, based on the constitutional imperatives of just and equitable compensation, in order to reach the constitutional (transformative) goal, but they seem stuck in the market value paradigm. When they are faced with a choice, the courts often seem unsure in what direction to go, and often they revert to the familiar concepts. The courts' reluctance to move away from the market value paradigm will be explored in the next chapter.

3 The Impact of Constitutional Democracy

“Would you tell me, please, which way I ought to go from here?”

“That depends a good deal on where you want to get to,”

“I don't know where. . .”

“Then it doesn't matter which way you go,” said the Cat.

...

“But I don't want to go among mad people,” Alice remarked.

“Oh, you can't help that,” said the Cat: “we're all mad here. I'm mad. You're mad.”

“How do you know I'm mad?” said Alice

“You must be” said the Cat “or you wouldn't have come here”¹

3.1 Introduction

The advent of the democratic era of constitutionalism and the insertion of a property clause in the bill of rights brought a new dimension to South African property law. The Constitution imposes new constraints and restrictions on private ownership by including the land reform provisions in the property clause, thereby subjecting private property to the broader public land reform objectives. Initially there were fears, on the one hand, that the inclusion of a property clause in the bill of rights would entrench property rights too strongly (thereby impeding land reform). On the other hand, some feared that the inclusion of a property clause like the current one could undermine existing private property for the sake of land reform.² Since the Constitution now does contain a property clause, the question is, can the current property clause do both: Protect existing rights while also promoting land reform? This chapter will look at the impact of the Constitution on expropriation in that context. The question is therefore: What role does expropriation play in realising the constitutional goal, namely to heal the divisions of the past and improve the quality of life for all citizens? A second question is: How does the constitutional balance between protection of existing property rights and land reform affect our understanding of expropriation?

In order to answer these questions, this chapter will start by sketching the background to the negotiations process and the drafting of the property clause

¹ L Carroll *Alice's Adventures in Wonderland* (2007) 89 <http://books.google.co.za/books?id=DHkIMoOUac4C> [as on 6 November 2008].

² AJ van der Walt *The Constitutional Property Clause* (1997) 8.

in order to place it into the greater context of the transformation process, followed by a short explanation of the Constitution's impact on existing expropriation legislation and case law. Thereafter the property clause and its impact on expropriation will be dealt with by looking at the most prominent cases that were decided under the Constitution, including but not restricted to land reform cases. The chapter concludes with a critical commentary on the shortcomings of the constitutional jurisprudence regarding expropriation.

3.2 A short history of the constitutional property clause

The Constitution is the outcome of negotiations and compromises intended to "heal the divisions of the past...lay the foundations for a democratic and open society...[and] improve the quality of life for all citizens".³ In order to understand the complexities of the property clause and specifically the difficulties surrounding expropriation and compensation, it is necessary to highlight the issues that were prominent during the drafting of the Constitution.⁴

During apartheid, land law played a significant role in social engineering enabling the government to enforce and maintain spatial race-segregation. This was done by promulgating new legislation and manipulating existing land rights.⁵ For example, the Group Areas Act⁶ and Native Lands Acts⁷ created black and white areas where people were statutorily prevented from owning and using land in the area that was assigned to another group. In the process, rights were customised to suit the perceived needs of each group, which in effect meant that black land rights were downgraded to rights that are more

³ Preamble to the final Constitution.

⁴ The summary is based on the information on the Constitutional Court's website www.constitutionalcourt.org.za/text/Constitution/history.html [as on 5 February 2008] as well as the relevant sections in the interim Constitution. A more thorough and in depth account of the drafting process can be found in LM du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994); W du Plessis & N Olivier "The Old and New Property Clause" (1997) 1 *HRCLJSA* 11; LM du Plessis "A Background to Drafting the Chapter on Fundamental Rights" in B de Villiers (ed) *Birth of a Constitution* (1994) 89; LM du Plessis "The Genesis of the Chapter on Fundamental Rights in South Africa's Transitional Constitution" (1994) 9 *SAPR/PL* 1.

⁵ M Chaskalson & C Lewis "Property" in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) 31-2.

⁶ 41 of 1950; 77 of 1957 and 36 of 1966.

⁷ Native Land Act 27 of 1913 and the Development Trust and Land Act 18 of 1936.

insecure.⁸ Apartheid land law, and therefore property law, was one of the more important instruments that the apartheid government used to advance its dream of a segregated nation. It is not surprising that high on the agenda at the multi-party negotiating forum was the issue of constitutional protection of property rights in the context of land law and land reform.⁹

From the outset the African National Congress was clear that a constitution-alised property right should not hinder the transformation process, especially concerning the redistribution of land, while the National Party feared that the existing property rights of white owners might be compromised if not adequately protected by the Constitution. The National Party initially wanted the Constitution to protect existing owners by stating that no expropriation may take place unless it is sanctioned by a court order for a public purpose and against payment of market value compensation.¹⁰ Soon the National Party conceded that compensation for expropriation of property should not necessarily be tied to market value. This concession was important for the African National Congress because if compensation was paid only at market value it would impede land reform.

It was agreed that compensation should be “just and equitable”, taking into account certain factors, of which market value was only one. It was important for the National Party that reference should be made to market value when dealing with compensation for expropriation, and as a compromise the African National Congress agreed to list it among the factors that should be taken into account when calculating compensation. Chief Justice Corbett objected to the inclusion of this list of factors because he foresaw application and interpretation problems. He, supported by opposition parties, wanted to leave it in the court’s discretion to determine what is “just and equitable” in every case.¹¹

⁸ AJ van der Walt “Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State” (2001) 118 *SALJ* 258 268.

⁹ See J Murphy “Property Rights in the New Constitution: An Analytical Framework for Constitutional Review” (1993) 56 *THRHR* 623 – 644 for a discussion of the Law Commission and the African National Congress’s proposals for a property clause, the debates surrounding the drafting of the property clause and his suggestions on how, with reference to foreign law, the property clause should be interpreted.

¹⁰ LM du Plessis & H Corder *Understanding South Africa’s Transitional Bill of Rights* (1994) 182 – 183.

¹¹ M Chaskalson “Stumbling Towards s 28: Negotiations over the Protection of Property Rights in the Interim Constitution” (1995) 11 *SAJHR* 222 232.

Other members were sceptical that the inclusion of such a clause could lead to an interpretation where compensation higher than market value is possible.¹² For Chaskalson¹³ the inclusion of such factors could lead to the opposite; compensation less than market value.¹⁴

Land reform was not included in the interim Constitution's property clause,¹⁵ seemingly because the National Party was concerned that putting land reform and property in the same clause would not provide adequate protection for white farmers.¹⁶ Land reform was therefore included in section 8(3)(b) and provided that "[e]very person or community dispossessed of rights in land before the commencement of this Constitution...[as a result of discriminatory legislation that existed before the commencement of the Constitution]...shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123."

Section 28 of the interim Constitution and section 25 of the final Constitution should be understood in this context. It was a compromise reached at multi-party negotiations.¹⁷ Section 25 is evidence of this compromise, as it not only protects existing property holdings from unlawful state interference, but also provides for land reform, including the possibility of expropriating property for land reform purposes.¹⁸

¹² M Chaskalson "Stumbling Towards s 28: Negotiations over the Protection of Property Rights in the Interim Constitution" (1995) 11 *SAJHR* 222 233.

¹³ M Chaskalson "Stumbling Towards s 28: Negotiations over the Protection of Property Rights in the Interim Constitution" (1995) 11 *SAJHR* 222 233.

¹⁴ See M Chaskalson "Stumbling Towards s 28: Negotiations over the Protection of Property Rights in the Interim Constitution" (1995) 11 *SAJHR* 222 233 where his opinion is based on comparative studies that have shown that in the absence of a list of factors, market value becomes the default method of calculating compensation. The list was initially removed from the draft, but re-inserted when the National Party insisted that there should be at least some mentioning of market value as a factor for the court to consider when calculating compensation.

¹⁵ LM du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 183.

¹⁶ M Chaskalson "Stumbling Towards s 28: Negotiations over the Protection of Property Rights in the Interim Constitution" (1995) 11 *SAJHR* 222 231.

¹⁷ See M Chaskalson "Stumbling Towards s 28: Negotiations over the Protection of Property Rights in the Interim Constitution" (1995) 11 *SAJHR* 222 226-227 for details about the negotiation around s 28 as well as the role of the technical committees in the drafting of the section. M Chaskalson & C Lewis "Property" in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) 31-2.

¹⁸ S 25(3) read with s 25(4).

An interim Constitution was signed in November 1993, and part of the process required that a democratically elected National Assembly should adopt a final Constitution to be certified by a newly created Constitutional Court. The final text was adopted by the National Assembly, but the Constitutional Court¹⁹ refused to certify the Constitution as part of the text (not the property clause) did not comply with the constitutional principles, and these had to be clarified before the court could certify the Constitution. In the *First Certification* case,²⁰ the court briefly discussed the three objections to the property clause. The first objection was that the clause did not make explicit provision for the right to acquire, hold and dispose of property,²¹ the second that it did not make adequate provision regarding the payment of compensation upon expropriation²² and the third that it did not protect intellectual property.²³ The court had to judge whether the provisions complied with internationally accepted human rights standards. All three objections were rejected on the ground that there are no universal requirements for such provisions, and that the provisions provided for were internationally acceptable.²⁴ The court dismissed the objection regarding expropriation by saying that internationally there are many criteria for the calculation of compensation, and that these criteria were not restricted to market value. The court therefore found section 25 adequately provides for compensation.²⁵

After the amendment of certain other provisions, the text was once again adopted by the Constitutional Assembly in November 1996 and finally certified on in the Constitutional Court's second hearing 4 December 1996.²⁶ The

¹⁹ *Ex parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC).

²⁰ *Ex parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC).

²¹ *Ex parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC) par 70.

²² *Ex parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC) par 70.

²³ *Ex parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC) par 75.

²⁴ *Ex parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC) pars 71 – 72, 73-74, 75.

²⁵ *Ex parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*, 1996 1996 (10) BCLR 1253 (CC) pars 71 – 72.

²⁶ *Certification of the Amended Text of the Constitution of the Republic of South Africa*, 1996 1997 (1) BCLR 1 (CC).

Constitution was signed into law by then President Mandela in Sharpeville on 10 December 1996 and came into effect on 4 February 1997.

3.3 The influence of the Constitution on the existing law

3.3.1 Introduction

Section 7(1) of the Constitution reaffirms the importance of the bill of rights as the cornerstone of democracy in South Africa, while section 7(2) states that the state must “respect, protect, promote and fulfil the rights in the bill of rights”. Parliamentary sovereignty was replaced with a constitutional democracy and all legislation and state action can now be tested against the Constitution.²⁷ A bill of rights regulates the relationship between the state and its subjects and guarantees certain rights, including the right to property.²⁸

This does not mean that the bill of rights ignores existing rights and freedoms as they exist under common law, customary law and legislation, since the Constitution recognises them insofar as they are consistent with the bill of rights.²⁹ Section 8(3) further allows the court to develop the common law where legislation does not give effect to a right, or to limit the right in accordance with section 36(1). Rights that are constitutionally recognised can be enforced and developed through legislation, as in the case of land reform.³⁰ The interpretation of legislation must promote the “spirit, purport and objects of the Bill of Rights”,³¹ and not frustrate it.³²

The Interim Constitution provided that all laws that were in force immediately before the commencement of the Constitution remained in force,³³ but subject to them being consistent with the Constitution.³⁴ The Expropriation Act³⁵ was

²⁷ S 4 of the interim Constitution and s 2 of the final Constitution.

²⁸ S 28 of the interim and s 25 of the final Constitution. See M Chaskalson “The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth” (1995) 11 *SAJHR* 388 – 411 where he discusses the plausibility of including a property clause in a bill of rights as a method to reduce poverty.

²⁹ S 39(3) of the Constitution.

³⁰ See paragraph 3.7 for a discussion on the land reform legislation.

³¹ S 39(2) of the Constitution.

³² AJ van der Walt *Constitutional Property Law* (2005) 401.

³³ S 229 of the interim Constitution.

³⁴ Item 2(1)(b) Schedule 6 of the Constitution.

³⁵ 63 of 1975.

the main expropriation legislation that was in force when both the interim and final Constitution came into force and remains the act applicable in all expropriation cases.

It is not clear how the Constitution complements or restricts current legislation that provides for expropriation and compensation. There are grey areas where the Expropriation Act³⁶ conflicts with the Constitution. For example, the Expropriation Act³⁷ only refers to “public purpose”³⁸ while the Constitution refers to “public purpose” and the wider “public interest”.³⁹ When it comes to the calculation of compensation, the act prescribes “market value”,⁴⁰ while the Constitution makes provision for “just and equitable” compensation with market value being one of the factors to take into account when determining compensation.⁴¹

In general, it seems as if the Expropriation Act⁴² should be re-interpreted to give content to the values enshrined in the Constitution, until a new Expropriation Act is promulgated.⁴³ Gildenhuys⁴⁴ asserts that if specific legislation provides for expropriation and the calculation of compensation, it should be used. If the application of such provisions leads to unjust results or collides with the Constitution, such provisions should not be followed. He does not make it clear what *should* be used in such a case.⁴⁵ He does state that since the Expropriation Act⁴⁶ has not been adjusted to correlate with the section 25(3) requirements concerning compensation, compensation can be adjusted

³⁶ 63 of 1975.

³⁷ 63 of 1975.

³⁸ Expropriation Act 63 of 1975 s 2.

³⁹ S 25(2).

⁴⁰ Expropriation Act 63 of 1975 s 12.

⁴¹ S 25(3).

⁴² 63 of 1975.

⁴³ At time of writing the Expropriation Bill B16-2008 that provided for the calculation of compensation in line with the Constitution was withdrawn. See paragraph 3.9 for a discussion of the Bill. This was based on the Draft policy on the Expropriation Bill named “Expropriation for public purpose in public interest” GG 30468 of 13 November 2007.

⁴⁴ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 164. Gildenhuys J imported this view into the case law during his time as judge at the Lands Claim Court. See paragraph 3.6 for a discussion of this method.

⁴⁵ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 164 uses the example of the last part of s 22 of the 1975 Expropriation Act. It states that the expropriation of any unregistered rights in the property will not be compensated. This is presumably so because many people do not have a formal registered right in land, or have not acquired such rights by tenure yet, and therefore expropriating their rights without compensation can be unjust and inequitable.

⁴⁶ 63 of 1975.

by applying the norms laid out in section 25(3).⁴⁷ This approach will be analysed later in the chapter, but it is worth mentioning now that such an approach will probably not be in line with section 39 because it means that the starting point is the Expropriation Act⁴⁸ and not the Constitution. When interpreting the Expropriation Act⁴⁹ it is important to recognise that pre-constitutional legislation now needs to be interpreted in light of the Constitution. The interpretation of the Expropriation Act⁵⁰ should therefore “*promote the spirit, purport and objects of the Bill of Rights*” (own emphasis),⁵¹ and not merely be adjusted so as not to be unconstitutional.

3.3.2 A new constitutional interpretive framework

The Constitution therefore provides a new purposive framework in which the Constitution itself, as well as legislation and state action, should be interpreted. Section 39 of the Constitution provides the framework for the development of the common law and interpretation of interpretation of legislation in view of the bill of rights, while section 25(4) provides additional interpretive indicators for section 25.

In the context of property law, this has various implications. Firstly, it demands that the property clause, like the other provisions in the bill of rights, be interpreted in such a way as to “*promote the values that underlie an open and democratic society*”⁵² when developing the common law or customary law,⁵³ while recognising the existing rights and freedoms recognised or conferred by common law, customary law or legislation insofar as it is consistent with the bill of rights.⁵⁴ Secondly, it instructs the courts to consider international law, and allows the courts to consider foreign law. Section 25(4) adds other interpretive guidelines by emphasising that public interest includes the nation’s commitment to land reform, and that property is not limited to land.

⁴⁷ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 164.

⁴⁸ 63 of 1975.

⁴⁹ 63 of 1975.

⁵⁰ 63 of 1975.

⁵¹ S 39(2) of the Constitution.

⁵² S 39(1). Donen AJ confirmed this in *South Peninsula Municipality and Another v Malherbe NO and Others* 1999 (2) SA 966 (C).

⁵³ S 39(2).

⁵⁴ S 39(3).

The courts must therefore interpret the bill of rights purposively in such a way as to promote the values that underlie a free and democratic society. This requires a special awareness of the interaction between the Constitution, the bill of rights and other legislation and the common law. In doing this, it is particularly important to acknowledge the Constitution's superiority and the obligation to bring the common law, customary law and legislation in line with the Constitution.⁵⁵ In the expropriation context, this requires an acute awareness of the Constitution in expropriation matters, even more so when developing the framework for post-constitutional property law.

Section 39(1)(b) and (c) regarding the use of international and foreign law should be approached with caution. Comparison for the mere sake of comparison is senseless, so comparison should be done while being mindful that not all comparative information is necessarily applicable in South Africa. Only the information that provides different solutions or to clarify problems in other jurisdictions should be retained. It should be restricted to the specific points in law or interpretation.⁵⁶ Case law referred to until now in interpreting the property clause focussed mostly on the European Convention of Human Rights as a source of comparative international law, which is not binding.⁵⁷ It is possible that reference to international law will be restricted in cases of expropriation, since expropriation is a domestic law issue. International tribunals, like the Europeans Court of Human Rights, will mostly restrict themselves to the question whether there is provision for compensation and recourse to the courts.⁵⁸

Using foreign law as a comparative source requires even more sensitivity. One must be aware of the differences between the common-law and civil-law traditions as well as the contextual (historical, social and political) differences between the comparative foreign jurisdiction and South Africa.⁵⁹ In the expropriation context, Germany is commonly used as a comparative source because the structure of the German property clause is similar to the South African property clause.⁶⁰ Contextually there are similarities too, as the German

⁵⁵ AJ van der Walt *Constitutional Property Law* (2005) 42.

⁵⁶ AJ van der Walt *Constitutional Property Law* (2005) 19.

⁵⁷ AJ van der Walt *Constitutional Property Law* (2005) 20.

⁵⁸ *James v United Kingdom* (1986) 8 ECHR 123 pars 85 – 86.

⁵⁹ AJ van der Walt *Constitutional Property Law* (2005) 21.

⁶⁰ For a comparative study see chapter 4.

Basic Law initially arose from a similar social context with an acute reform-awareness.⁶¹ The United States of America serves as another fruitful comparative source, if approached with the necessary caution, due to the vast amounts of academic literature and the big body of case law on the matter.⁶²

As far as the interpretation techniques are concerned, the Constitutional Court tends to follow a purposive interpretation when interpreting the bill of rights.⁶³ The tension in section 25 between the protection afforded to existing rights and the reformist imperatives makes it a particularly difficult clause to interpret. If section 25 is read as a whole and the aspirations of the Constitution are taken into account, section 25 can be read as a whole.⁶⁴

It has been said that the fact that an interpretation of section 25 rests on three premises. The first premise is that all constitutional property clauses have this inherent tension between the protection of existing rights and the state's power to infringe on it. In this regard, the land reform provisions of sections 25(5) – (9) only add a context-specific dimension to the idea that the state has the power to infringe on existing property rights.⁶⁵ Secondly, the power to infringe on private property for the purposes of land reform developed from a specific historical context in South Africa. This historical context can therefore not be divorced from a proper interpretation of the property clause, when the state limits private property.⁶⁶ Thirdly, the fact that the property clause is transformative does not imply that the Constitution does not value existing private property. It means that the classic protection of private property is standing alongside the transformative purpose.⁶⁷ In the expropriation law context, these premises will be especially important to keep in mind when applying and interpreting the property clause. These premises must at least be considered in every expropriation case.

⁶¹ AJ van der Walt *Constitutional Property Law* (2005) 21.

⁶² When using the United States as comparative source, care must be taken not to get caught up in the regulatory takings debate. See paragraph 4.3.2.

⁶³ *Brink v Kitshoff* NO 1996 (4) SA 197 (CC).

⁶⁴ AJ van der Walt *Constitutional Property Law* (2005) 23.

⁶⁵ AJ van der Walt *Constitutional Property Law* (2005) 23.

⁶⁶ AJ van der Walt *Constitutional Property Law* (2005) 23.

⁶⁷ AJ van der Walt *Constitutional Property Law* (2005) 23.

3.3.3 Horizontal application

Another issue that seems to be undecided is whether section 25 has horizontal application. Deprivation of property for regulatory or police power purposes, and expropriation of property by eminent domain, are the most common instances where the state exercises its powers. When private persons perform state actions, their actions will be ascribed to the state.⁶⁸ This is not horizontal application. In instances where private persons exercise powers that are not authorised by a law that regulates state power, it is unlikely that such actions will be treated as deprivation or expropriation in terms of section 25, because expropriation is an exclusive state power. It therefore seems unlikely that section 25(3) will apply horizontally.⁶⁹

This view is endorsed by the *Nhlabathi* decision,⁷⁰ where the court ruled that section 6(2)(dA) of ESTA⁷¹ that allows a (private) occupier of land to bury a family member could amount to an expropriation of the (private) landowner's rights. In this case, the absence of compensation would be justifiable by section 36. Even though it was the constitutionality of section 6(2)(dA) that was in issue (thus, strictly speaking, not horizontal), it made it possible to imagine that section 25 might apply horizontally. However, as stated before, it is doubtful that section 25(3) can have horizontal application, since it is a power conferred on the state only.

Roux and Davis⁷² insist that section 25 is only applicable where the *state* deprives, expropriates or otherwise infringes private property rights.⁷³ They find support in *Phoebus Appollo Aviation CC v Minister of Safety and Security*⁷⁴

⁶⁸ AJ van der Walt *Constitutional Property Law* (2005) 48 is of the opinion that it might well be possible, not only in expropriation for land reform purposes, but also deprivation by private persons, such as the common law rules that relate to the original acquisition of ownership. See T Roux "Property" in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46-7 – 46-8 for a criticism of this approach.

⁶⁹ AJ van der Walt *Constitutional Property Law* (2005) 48.

⁷⁰ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC). For a discussion of the case, see paragraph 3.6.2.

⁷¹ The Extension of Security of Tenure Act 62 of 1997.

⁷² T Roux & D Davis "Property" in MH Cheadle et al (eds) *South African Constitutional Law: the Bill of Rights* (2007) 20-9.

⁷³ T Roux & D Davis "Property" in MH Cheadle et al (eds) *South African Constitutional Law: the Bill of Rights* (2007) 20-9. See also I Currie & J de Waal *The Bill of Rights Handbook* 5th ed (2005) 558.

⁷⁴ 2003 (1) BCLR 13 (CC).

where the court ruled that “[i]t is clear, however, that [the provisions of section 25(1)] are inapposite here. They are aimed at protecting private property rights against governmental action and are quite irrelevant here where the appellant was originally deprived of its property by robbers and recovery of part of it was later frustrated by the three thieves.”⁷⁵ This is an indication, albeit *obiter*, that the courts do not think that section 25 applies horizontally. The *Phoebus* case, however, is distinguishable from the *Nhlabathi* case in that the latter was concerned with expropriation under land reform legislation, while in *Phoebus* the issue was whether a case where police officers stole money from the appellant amounted to expropriation. Although the horizontal application of section 25 seems unlikely in cases where the state exercises its normal police power or power of eminent domain, the *Nhlabathi* case raised the possibility that it might be applicable in land reform cases (but then probably restricted to deprivation).

3.4 The property clause

3.4.1 Introduction

As was mentioned in the introduction, the property clause was one of the more contentious issues during negotiations, with the African National Congress fearing that protecting property rights too strongly will make land reform difficult, if not impossible, and the National Party fearing that the absence of such protection will make current property holdings unstable. What emerged from the negotiations is a property clause that protects property rights, but also promotes land reform. What follows is a discussion of the property clause in general, and its deprivation and expropriation provisions in particular, before moving on to the compensation requirement.

⁷⁵ *Phoebus Appollo Aviation CC v Minister of Safety and Security* 2003 (1) BCLR 13 (CC) par 4.

3.4.2 What constitutes property?

South African courts adopted a two-stage approach to adjudicate the infringement of rights in the bill of rights. In the first stage, the court has to determine whether there is a constitutionally entrenched right that is infringed, and if the answer is positive, then the party who infringed the right (usually the state) has an opportunity to justify the infringement with reference to the general limitation clause, section 36. If the court finds that no right was infringed, the enquiry stops there.⁷⁶

In order to show that a constitutionally protected right to property is infringed, it is important to determine what is meant by property. The answer is not clear from the constitutional text.⁷⁷ The only indication of what is included in the constitutional notion of property is found in section 25(4)(b), which states that property is not restricted to land. In *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*⁷⁸ the court followed a very restrictive interpretation when it decided that mineral rights are not protected under the property clause because, if it was the intention of the drafters to include mineral rights, they would have been provided for expressly. The *Lebowa* case indicates that the court is willing to consider the meaning of property, in those cases where it is not sure whether the interest infringed constitutes property. This means that property is not restricted to the private law definition of property, and that non-traditional property (such as welfare rights), might be regarded as property in the constitutional context.

Currie and De Waal⁷⁹ are of the opinion that in the constitutional context property does not only refer to the limited, traditional, private law concept of property, but that it is not just “any relationship or interest having an exchange value” either.⁸⁰ Van der Walt⁸¹ is of the opinion that what will be regarded as

⁷⁶ I Currie & J de Waal *The Bill of Rights Handbook* 5th ed (2005) 561.

⁷⁷ See *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) par 51 where the court stated that “[a]t this stage of our constitutional jurisprudence it is, for the reasons given above, practically impossible to furnish - and judicially unwise to attempt - a comprehensive definition of property for purposes of s 25”.

⁷⁸ 2002 (1) BCLR 23 (T) 29.

⁷⁹ I Currie & J de Waal *The Bill of Rights Handbook* 5th ed (2005) 537.

⁸⁰ I Currie & J de Waal *The Bill of Rights Handbook* 5th ed (2005) 538.

property in the constitutional context will probably differ from the private law concept of property. The meaning of property will have to be decided on a case-to-case basis by employing the (transformative) interpretation imperatives in the Constitution.⁸²

In the expropriation context, the concept of property usually becomes important when the courts have to rule whether the discontinuation of welfare rights, in some cases regarded as “new property”,⁸³ amounts to an expropriation. The notion of dephysicalization⁸⁴ can also give rise to certain commercial interests being protected as property rights that can be expropriated. Most importantly, conceptual severance,⁸⁵ where property is regarded as a bundle of sticks (entitlements), makes it possible to argue that severing one stick from the bundle of entitlements amounts to a compensable expropriation.⁸⁶ This is especially the case in the United States of America, where compensation is often paid for a regulation that limits or takes away one entitlement while leaving the rest intact.⁸⁷

However, the concept of property might have lost some of its importance in South Africa after the *FNB*⁸⁸ decision, where the Constitutional Court found it “practically impossible and judicially unwise”⁸⁹ to define property and rather

⁸¹ AJ van der Walt *Constitutional Property Law* (2005) 113.

⁸² AJ van der Walt *Constitutional Property Law* (2005) 114.

⁸³ See CA Reich “The New Property” (1964) 73 *Yale LJ* 733-787. With reference to the Interim Constitution the Transkei High Court in *Transkei Public Servants Association v Government of the Republic of South Africa and Others* 1995 (9) BCLR 1235 (Tk) 1246 – 1247 acknowledged that the notion of property in s 28 is probably wide enough to include state housing subsidy.

⁸⁴ Dephysicalization is the notion whereby certain intangibles, mostly rights, become so important and valuable that they have to be treated as property for constitutional purposes even when it have not been treated as such in the private law tradition. For a discussion on dephysicalization and the possible impact on section 25, see AJ van der Walt *Constitutional Property Law* (2005) 65 – 68.

⁸⁵ MJ Radin “The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings” (1988) 88 *Col LR* 1667. See AJ van der Walt *Constitutional Property Law* (2005) 68 – 70 for a discussion of conceptual severance and the likelihood of it being applied in South Africa.

⁸⁶ This is Radin’s theory, although it is not accepted by the American courts. See MJ Radin “The Liberal Conception of Property: Crosscurrents in the Jurisprudence of Takings” (1988) 88 *Col LR* 1667. See also the theoretical discussion in paragraph 5.4.2.

⁸⁷ See 4.3.2 for a discussion of the American approach.

⁸⁸ *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) par 57. See also AJ van der Walt *Constitutional Property Law* (2005) 71.

⁸⁹ *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) par 51.

focused on the arbitrariness test.⁹⁰ Notwithstanding Roux's criticism, the Court did indicate in *FNB* that if ownership of land or a corporeal movable, or "all the incidents of ownership" are taken away, it would amount to a deprivation. This indicates that the court considers at the very bottom, land and corporeals, ownership and all incidents of ownership to be protected by the property clause. The court expressly said it is, in the *FNB* judgement, not concerned with incorporeals.⁹¹

Although after *FNB* defining property might be seen as redundant,⁹² it is hopeful that the courts will approach the question of "property" on a case-to-case basis. Once the courts found that there is a constitutionally protected (property) right that is infringed, it can move on to the issue of infringement, either by deprivation or by expropriation.

3.4.3 Limitations of the right to property

Deprivation needs to be distinguished from expropriation of property, for which the state is obliged to pay compensation. The absence of the compensation requirement in the case of deprivation allows the state to regulate the use of property for the public good without incurring liability.⁹³

Deprivation is usually referred to as the state's police power. The police power principle legitimises state interference with and limitations on the use, enjoyment and exploitation of property in the public interest (public health and safety for everyone's benefit).⁹⁴ Based on this principle, regulatory limitations of property (for instance in town planning) are allowed insofar as they are legitimate and necessary and not arbitrary or unfair.⁹⁵

⁹⁰ T Roux refers to this as the "vortex effect" of the *FNB* arbitrariness test in T Roux "Section 25" in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed (2003) 46-2 – 46-5, 46-9 – 46-11, 46-23 – 46-25.

⁹¹ *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) par 100.

⁹² T Roux "The 'Arbitrary Deprivation' Vortex: Constitutional Property Law after *FNB*" available at http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf [as on 22 September 2008].

⁹³ M Chaskalson & C Lewis "Property" in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) 31-16.

⁹⁴ AJ van der Walt *Constitutional Property Law* (2005) 128.

⁹⁵ AJ van der Walt *Constitutional Property Law* (2005) 13.

The courts have attempted to define deprivation on a number of occasions,⁹⁶ the most important case to date being *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*.⁹⁷ The court, per Ackerman J, defined deprivation as follows:

“In a certain sense any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned. If s 25 is applied to this wide *genus* of interference, ‘deprivation’ would encompass all species thereof and ‘expropriation’ would apply only to a narrower species of interference.”⁹⁸

In the subsequent case *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)*⁹⁹ the court per Yacoob J re-defined¹⁰⁰ deprivations based on the *FNB* judgement, focussing on the extent of the interference (and not any interference per se) by stating that:

“[w]hether there has been a deprivation depends on the *extent* of the interference with or limitation of use, enjoyment or exploitation... No more need be said than that at the very least, *substantial interference or limitation that goes beyond the normal restrictions* on property use or enjoyment found in an open and democratic society would amount to deprivation.”¹⁰¹ [my emphasis].

⁹⁶ See AJ van der Walt “Retreating from the FNB Arbitrariness Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality Bisset v Buffalo City Municipality Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*” (2005) 122 SALJ 75 for a comparative discussion of the two cases, including the two definitions.

⁹⁷ 2002 (4) SA 768 (CC).

⁹⁸ *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) par 57.

⁹⁹ 2005(1) SA 530 (CC). See AJ van der Walt “Retreating from the FNB Arbitrariness Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality Bisset v Buffalo City Municipality Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*” (2005) 12 SALJ 75 for a discussion of the differences between the *FNB* and the *Mkontwana* definition of deprivation.

¹⁰⁰ I say redefined because Ackerman J in *FNB* ruled that “any interference with the use, enjoyment or exploitation of private property involves some deprivation” [my emphasis], while Yacoob J restricted it to only certain interferences, and this depends on the *extent* of the interference.

¹⁰¹ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC,*

*Harksen v Lane NO*¹⁰² was the court's first opportunity to define and circumscribe deprivation under the interim Constitution.¹⁰³ The court distinguished between deprivation and expropriation, focusing on the permanent acquisition of property by the state as the criterion.¹⁰⁴ The court ruled that the particular instance was a case of deprivation and not expropriation because ownership did not pass permanently to the state.¹⁰⁵ Van der Walt¹⁰⁶ criticised this categorical distinction where state interference with property must fit into the category of either an expropriation or a deprivation, with no room for cases that do not fit neatly into either category. To determine which is which, according to the *Harksen* case, permanent state acquisition of the property will determine if it is a deprivation or an expropriation. Therefore, a litigant wishing to challenge the validity of state interference will have to argue either expropriation or deprivation since they seem to be mutually exclusive.¹⁰⁷

*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*¹⁰⁸ was the first case to define and circumscribe deprivation in terms of section 25 of the final Constitution. The court did not follow the *Harksen* case,

Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC).

¹⁰² 1998 (1) SA 300 (CC), see AJ van der Walt "Striving for the Better Interpretation – A Critical Reflection on the Constitutional Court's *Harksen* and *FNB* Decisions on the Property Clause" (2004) 121 *SALJ* 854 for a discussion of the case.

¹⁰³ In this case, the court had to rule on s 21 of the Insolvency Act 24 of 1936 that determines that upon sequestration of the insolvent's spouse estate, the property of the solvent spouse will also vest in the mater of the Supreme Court. The court, per Goldstone J, ruled that the transfer of property is of a temporary nature and that the purpose is not to acquire the property, but to ensure that the insolvent estate is not deprived of property that is rightfully its (the solvent spouse can reclaim his/her property if he/she can show ownership). The court found that in this case deprivation does not amount to expropriation and therefore s 28 (3) of the Constitution was not violated.

¹⁰⁴ *Harksen v Lane NO* 1998 (1) SA 300 (CC) pars 30 – 39.

¹⁰⁵ *Harksen v Lane NO* 1998 (1) SA 300 (CC) par 36. See AJ van der Walt "Striving for the Better Interpretation – A Critical Reflection on the Constitutional Court's *Harksen* and *FNB* Decisions on the Property Clause" (2004) 121 *SALJ* 854 -878; AJ Van der Walt *Constitutional Property Law* (2005) 181,185.

¹⁰⁶ AJ van der Walt "Striving for the Better Interpretation – A Critical Reflection on the Constitutional Court's *Harksen* and *FNB* Decisions on the Property Clause" (2004) 121 *SALJ* 854 862; 876.

¹⁰⁷ See AJ van der Walt "Striving for the Better Interpretation – A Critical Reflection on the Constitutional Court's *Harksen* and *FNB* Decisions on the Property Clause" (2004) 121 *SALJ* 854 876 for a criticism of this approach.

¹⁰⁸ 2002 (4) SA 768 (CC).

an indication that Harksen has limited application and that FNB¹⁰⁹ should be followed in deprivation cases. As will be shown below, FNB will also be applicable in expropriation cases, although this approach is not free from criticism.

The Constitutional Court per Ackerman J laid down the interpretative framework for section 25 in *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*.¹¹⁰ The court in essence ruled that the overriding purpose of section 25 is to strike a “proportionate balance”¹¹¹ between protecting existing property rights and promoting the public interest, by prescribing an interpretation mechanism to achieve this end.

The effect of the *FNB* decision is that the inquiry is caught up in the test for arbitrariness, step 3.¹¹² Roux¹¹³ sets out the inquiry in seven questions:

“(a) Does that which is taken away from [the property holder] by operation of law [the law in question] amount to property for the purpose of section 25?”

¹⁰⁹ *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).

¹¹⁰ 2002 (4) SA 768 (CC). In this case, FNB remained the owner of some vehicles under an instalment sale agreement. SARS established a lien for custom debts and penalties owed on the vehicles for a debt owed by a company in the instalment sale. S 114 of the Customs and Excise Act 91 of 1964 allows the Commissioner of SARS to sell these vehicles without prior judgment or court authorisation, including goods belonging to a third party (and not the customs debtor). The constitutionality of this provision was challenged in the Constitutional Court, where FNB as owners contended it infringed on their property rights and that since FNB is not the customs’ debtor it amounted to an expropriation of property for which compensation should be paid. SARS contended that FNB’s interests in the vehicle was a mere contractual device that reserved ownership of the vehicles, and furthermore that the Constitution did not purport to protect reservation of a financial institution’s ownership rights in leased goods. The cars did not relate to the debts, but since the cars were on the company’s premises, SARS was statutory allowed to establish a lien over it. The crux of the case concerned the state’s interest in taking possession and selling the car to cover the company’s tax debts and the bank’s interest in reserving ownership of the cars until the contractual debt was paid. Therefore, the question was whether the state’s actions in such a case constitute an unconstitutional limitation of the bank’s property. In effect, the bank’s reserved ownership had a direct relation to the property, while the state’s lien was over the property of a bank that was not related to the debt. The court found that this was an arbitrary deprivation of property and thus unconstitutional. See pars 24 – 26 for the arguments.

¹¹¹ *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) par 50.

¹¹² T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 3.

¹¹³ T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 3.

- (b) Has there been a deprivation of such property by the [organ of state concerned]?
- (c) If there has, is such deprivation consistent with the provisions of section 25(1)?
- (d) If not, is such deprivation justified under s 36 of the Constitution?
- (e) If it is, does it amount to expropriation for purpose of s 25(1)?
- (f) If so, does the [expropriation] comply with the requirements of s 25(2)(a) and (b)?
- (g) If not, is the expropriation justified under s 36?"

Once the court decided that the interest at stake is constitutionally protected property, the inquiry moves on to the question if there was a deprivation of such property.¹¹⁴ Ackerman J gave a wide meaning to the term “deprivation” when he stated that “any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned”,¹¹⁵ and therefore this stage of the inquiry will not receive too much attention in most cases.¹¹⁶ Instead, the focus will be on “the level of intrusiveness of the deprivation”¹¹⁷ to determine whether the requirements of section 25(1) have been met. The fact that it was not total deprivation will be relevant when the court needs to determine in the next stage whether there is a sufficient reason for the deprivation.¹¹⁸

FNB further confirmed that expropriation is a form of deprivation. Therefore, if a law allows for the expropriation of property, it will first be seen as a deprivation. This means that a law that allows for expropriation must fulfil the requirements of section 25(1) before it will even be treated in terms of section 25(2) and (3). The implication of *FNB* is that the court will in the future first

¹¹⁴ For purposes of this dissertation the discussion on *FNB* will be restricted to (b) – (f) of the inquiry. For a thorough step-by-step discussion, see T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006).

¹¹⁵ *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) par 57.

¹¹⁶ T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 18.

¹¹⁷ T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 18.

¹¹⁸ T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 18.

test for compliance with section 25(1) before moving on to section 25(2) and (3).¹¹⁹

For Roux,¹²⁰ the fact that all expropriation inquiries will first have to pass the section 25(1) requirements diminishes the role of the potential balancing at other stages of the constitutional inquiry in favour of the court's test for arbitrariness. This includes the distinction between deprivation and expropriation. What is normally a flexible test (the test for arbitrariness), becomes a very rigid test. Where compensation can be used to balance the interest of the individual with that of the public in expropriation cases,¹²¹ the role of compensation is obscured by the test for arbitrariness. This is because, if the court found that a deprivation was arbitrary in terms of section 25(1), the inquiry will stop there, and the potential of compensation as a balancing factor will not be considered.¹²² Even if the court considered the fact that compensation is offered (in cases where it was clearly an expropriation), it would have to do so when it considers the deprivation question. This would "have the effect of sucking the inquiry into the amount, time and manner of payment of compensation into the arbitrariness test".¹²³

The test for arbitrariness is not clear either. The level of scrutiny lies on a continuum. On the one end, it amounts to mere rationality review,¹²⁴ and on the other end, it tends more towards proportionality.¹²⁵ Roux is of the opinion that, where a claimant is totally deprived of all his/her rights in land or a corporeal movable, then the law would probably only be constitutional if it provides for market value compensation. However, when only some rights are affected

¹¹⁹ T Roux "Property" in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 18.

¹²⁰ T Roux "Property" in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 18.

¹²¹ See chapter 5.5.6 for an explanation on how this can be done.

¹²² T Roux "Property" in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 19.

¹²³ T Roux "Property" in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 20.

¹²⁴ As in *Geyser v Msunduzi Municipality* 2003 (3) BCLR (N) 235.

¹²⁵ T Roux "Property" in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 24.

in comparison to the purpose it wishes to achieve, especially if the aim is land reform, then it is unlikely to be found unconstitutional.¹²⁶

In a subsequent Constitutional Court decision, *Mkontwana v Nelson Mandela Metropolitan Municipality*,¹²⁷ the court was again confronted with the question whether a deprivation for fiscal purposes was a valid deprivation under section 25(1). The court had to rule whether certain legislation establishing a security interest in favour of the municipality that affected the landowner's right of disposing of the property amounted to a deprivation.¹²⁸ The court applied a low level of scrutiny and only asked whether the regulatory measure was rationally related to a legitimate government function.¹²⁹ The court, relying on *FNB*, found that the legislation was not arbitrary by focussing on the extent of the deprivation.¹³⁰ The court ruled that where the deprivation is minimal, a rational connection between the means and the ends is adequate. Where the infringement is more compelling, the reason for the infringement must be more compelling and the reason and means and the end must be in closer relationship.¹³¹ Van der Walt¹³² views this as a departure from *FNB*, in that

¹²⁶ T Roux "Property" in S Woolman et al (eds) *Constitutional Law of South Africa 2nd ed*, original service (2006) 46 – 25.

¹²⁷ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC). For a case discussion and a comparison with the *FNB* case, see AJ van der Walt "Retreating from the FNB Arbitrariness Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality Bisset v Buffalo City Municipality Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*" (2005) 12 SALJ 75.

¹²⁸ S 118(1) of the Local Government: Municipal Systems Act 32 of 2000 limited an owner's right to transfer property by providing that a certificate issued by the municipality stating that all consumption charges have been paid must be shown to the Registrar of Deeds before the property can be transferred. The legislation was challenged on the basis that it amounts to arbitrary deprivation because it gives preference to the municipality over mortgage bonds registered against such property, and effectively requires from the owners to ensure that the consumption charges are paid, even if it was not the owners themselves who incurred the debts.

¹²⁹ AJ van der Walt "Retreating from the FNB Arbitrariness Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality Bisset v Buffalo City Municipality Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*" (2005) 12 SALJ 75 82.

¹³⁰ *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) par 35.

¹³¹ With this in mind the court had to decide whether the relationship between the means and the ends *in casu* provided sufficient reason for the deprivation. The court found that the current deprivation is a substantial one, but that the relationship between the consumption charges and the property relative to the relationship between the consumption charges is not arbitrary. This is because the owner is closely connected to the property because he is

Mkontwana requires not only a lower level but also a substantially different kind of scrutiny.

The court in *FNB* did not separate the question into whether the property expropriated was property in terms of the constitution, whether it was deprived, whether such deprivation fulfilled the requirements of section 25(1), whether it amounted to an expropriation, whether such an expropriation satisfied the requirements in section 25(2) and whether the deprivation or expropriation in conflict with section 25 could be justified in terms of section 36, but they were rather reduced to the question of whether there was sufficient reason for the deprivation. This is what Roux calls the “arbitrariness vortex”,¹³³ where every step of the constitutional inquiry is subject to the arbitrariness test. The level of scrutiny will be determined from case to case, with the lowest level being a mere rationality review, and the highest level something short of a proportionality test. Van der Walt¹³⁴ does not see this as a necessary problem, as long as the property issue remains a threshold function in some instances.

The problem with this “vortex” is that the focus is on the arbitrariness of the *deprivation*. This means that deprivation takes the centre stage, and issues surrounding expropriation can be ignored. Even if it is obvious that the problem is with the expropriation requirements of section 25(2), the effect of *FNB* is that the limitation must first be judged as a deprivation. Where the question for instance is about the adequacy of compensation, then it might never reach the stage of the expropriation inquiry, because a deprivation without adequate

owner, and that affords him certain rights, but also certain responsibilities. The debt is connected to the property because it is consumption charges of the property. Therefore, the link between the owner and the debt is a close link. Since there is a close link, it is reasonable and justifiable to expect an owner to choose his tenants carefully and make sure that the consumption charges are paid. The risk of non-payment and the consequences of non-payment is therefore not an unreasonable risk for the owner to bear, and the deprivation therefore not arbitrary. *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) pars 35; 41 – 42; 53.

¹³² AJ van der Walt “Retreating from the FNB Arbitrariness Test Already? *Mkontwana v Nelson Mandela Metropolitan Municipality Bisset v Buffalo City Municipality Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng*” (2005) 12 SALJ 75 82.

¹³³ See T Roux “The ‘Arbitrary Deprivation’ Vortex: Constitutional Property Law after *FNB*” available at http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf [as on 22 September 2008] for an earnest discussion of the vortex effect of the arbitrariness test.

¹³⁴ AJ van der Walt *Constitutional Property Law* (2005) 165.

compensation would never pass the non-arbitrariness test of *FNB*. The courts should in the future, when it is confronted with such a case, decide whether such an approach is desirable.

3.4.4 Justification of limitations

Once it is determined that a constitutionally protected right has been infringed, the focus moves to possible justifications for such an infringement. Section 25 provides its own internal modifiers, while section 36 is the general limitation clause applicable to the bill of rights. The manner in which these two sections interact have been the topic of much debate.¹³⁵

Currie and De Waal¹³⁶ are of the opinion that section 36 does not have a meaningful application to section 25. The applicant that alleges that the state infringed a property right must show that section 25 has been violated. In the case of deprivation and expropriation, one of the allegations that the applicant can make is that the deprivation or expropriation was not authorised by a law of general application. Normally, once the court found that a right has been infringed, it will give the state a chance to justify it in terms of section 36. In terms of section 36, the rights in the bill of rights may be limited in terms of law of general application by taking into account certain factors. The state will therefore have to prove that the infringement was done in terms of law of general application. However, if the court already found in the first step that the rights were infringed because the deprivation or expropriation was not done in terms of law of general application, the state cannot justify such an infringement by saying that it was done in terms of law of general application. Likewise, an arbitrary deprivation of property (section 25(1)) would not easily be “reasonable and justifiable in an open and democratic society” (section 36(1)).¹³⁷

¹³⁵ See S Woolman & H Botha “Limitations” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006); I Currie & J de Waal *The Bill of Rights Handbook* 5th ed (2005) 562

¹³⁶ I Currie & J de Waal *The Bill of Rights Handbook* 5th ed (2005) 562.

¹³⁷ I Currie & J de Waal *The Bill of Rights Handbook* 5th ed (2005) 562.

This was the position before the *FNB*¹³⁸ decision, a decision Roux¹³⁹ regards as confirming the view that section 36 does not have a meaningful application where a section 25(1) right is infringed, even if the court assumed in favour of the state that section 36 was applicable in section 25(1) infringements.¹⁴⁰ According to Roux, the court, when considering the section 36(1) justifications, addressed the same issues it addressed under the arbitrariness test.¹⁴¹ Roux concludes, “where the test for arbitrariness approximates rational basis review rather than proportionality, the conceptual case for the non-application of s[ection] 36 is the strongest”.¹⁴² This would be the case because a law that infringes section 25(1) because there is no means-end rationality will not be justified under section 36(1). Likewise, where the test for arbitrariness is a proportionality test, “the application of s[ection] 36 can at best confirm a conclusion already reached under section 25(1), as illustrated by *FNB*”.¹⁴³ The Land Claims Court in *Nhlabathi and others v Fick*,¹⁴⁴ without considering the effect of *FNB*, accepted that section 36 limitations could apply in certain circumstances. This would be the case when expropriation without compensation was mandated by law, and the limitation could be reasonable and justifiable.¹⁴⁵

3.5 Expropriation

3.5.1 Introduction

Section 25(2) gives three requirements for a valid expropriation, namely that it must be carried out in terms of law of general application, secondly that it

¹³⁸ *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) pars 61 – 70. See paragraph 3.5 for a discussion of the case.

¹³⁹ T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46-27.

¹⁴⁰ *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) par 110.

¹⁴¹ T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 27.

¹⁴² T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 27.

¹⁴³ T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 27.

¹⁴⁴ 2003 (7) BCLR 806 (LCC).

¹⁴⁵ AJ van der Walt *Constitutional Property Law* (2005) 56.

must be in the public interest or for a public purpose, and thirdly that compensation must be provided for. For purposes of this dissertation, the implicit requirement of procedural fairness will be dealt with as a fourth requirement, distinct from the law of general application requirement.

The implication of *FNB*, as was shown above, is that these requirements are additional to the section 25(1) deprivation requirements. The first requirement, that the expropriation must be authorised in terms of law of general application, is also a requirement under section 25(1). This implies that, apart from the section 25(2) requirements, there must be sufficient reason for depriving an owner of property through expropriation.¹⁴⁶ Expropriation is therefore a subtype of deprivation,¹⁴⁷ with two extra requirements namely public purpose and compensation.¹⁴⁸

3.5.2 Law of general application

Pre-constitutional expropriation law did not have the “law of general application” requirement, although it required that the expropriation must be authorised by state. The presumption that the legislator does not intend to infringe on rights without paying compensation, coupled with the procedural protections, would probably have ensured the law authorising the expropriation does not single out a specific person. It was specifically inserted in section 25(2).

In view of the *FNB* decision it is unlikely that this requirement will be problematic in the constitutional expropriation inquiry, since it would already have been dealt with in the equivalent section 25(1) deprivation requirement.¹⁴⁹

Since expropriation is usually carried out in terms of statutory authorisation, the focus will be on legislation. In this context, this requirement means that

¹⁴⁶ T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa 2nd ed*, original service (2006) 46 – 29.

¹⁴⁷ *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) pars 57 – 60.

¹⁴⁸ In American law, the main concerns facing courts in eminent domain cases is whether the regulation of property “goes to far” and therefore is not a mere deprivation of property, but an expropriation. See paragraph 4.3.2 for a discussion on the United States expropriation law. This was also the issue in many of the Australian cases with regards to compulsory acquisition. See 4.4 for a discussion on Australian law of compulsory acquisition.

¹⁴⁹ AJ van der Walt *Constitutional Property Law* (2005) 239.

the law must apply generally and not single out a certain person.¹⁵⁰ The law should furthermore also be officially published, accessible, and clear to citizens.¹⁵¹

3.5.3 Public purpose

Once the expropriation passed the section 25(1) test, it must also fulfil the section 25(2) and (3) requirements. Section 25(2)(a) requires that the expropriation must be for a public purpose or in the public interest.¹⁵² In chapter 2 it was shown that the pre-constitutional expropriation law was restricted to public purpose. The pre-constitutional public purpose requirement was interpreted in its wider sense, not restricting it to government purposes, but not so wide that expropriation for the benefit of a third can be regarded as being in the public interest.

The main concern during the drafting of the Constitution was that expropriation should be possible for land reform purposes, and that public purpose could be interpreted too narrowly,¹⁵³ not allowing expropriation for private beneficiaries. Public interest was added in the final Constitution as a requirement, alongside public purpose, and qualified in section 25(4) to ensure that land reform is included.¹⁵⁴ This means that an expropriation for the benefit of an individual for land reform purposes will be permissible. This means that

¹⁵⁰ AJ van der Walt *Constitutional Property Law* (2005) 240. See also *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T). This might be possible in deprivation cases, where the state takes regulatory steps to protect public health, welfare and safety without compensation. This was not considered in *Minister of Agriculture and Another v Bluelilliesbush Dairy Farming (Pty) Ltd and Another* (270/07) [2008] ZASCA 60.

¹⁵¹ AJ van der Walt *Constitutional Property Law* (2005) 240.

¹⁵² It is important to distinguish the public purpose in section 25(2) from the public purpose in section 25(3)(e). The former is a requirement for a valid expropriation, justifying the expropriation, while the latter is a factor to consider when determining compensation.

¹⁵³ For a discussion on the different ways to interpret public purpose in a constitutional property clause, see AJ van der Walt *Constitutional Property Law* (2005) 243 – 244.

¹⁵⁴ See LM du Plessis & H Corder *Understanding South Africa's Transitional Bill of Rights* (1994) 183 where the authors discuss the reasoning of the Technical Committee. Public purpose was the term settled on in the negotiations because of the erroneous belief that “public purpose” has a wider meaning than public interest. This was erroneous because the term “public purpose” has been interpreted narrowly in South African case law.

the transfer of property to third party beneficiaries now becomes possible, subject to the payment of compensation.¹⁵⁵

The inclusion of both public purpose and public interest can lead to interpretive difficulties.¹⁵⁶ On the one hand, public purpose refers to the idea that something cannot be taken for a public purpose at the private owner's expense unless the private owner is compensated. Since compensation is paid from public funds, it must be for a public purpose.¹⁵⁷ Public purpose should not be interpreted too narrowly¹⁵⁸ to mean only public use, but also not too widely to include any purpose that is vaguely beneficial to the public. If public purpose is not interpreted too narrowly, section 25(2) has a double function: it serves as a justification and authority for expropriation as is the case in most constitutional property clauses, but it also ensures that the normal function of the requirement does not impede land reform objectives.¹⁵⁹ The public interest is further qualified in section 25(4)(a) as including the nation's commitment to land reform. This makes it possible for land to be expropriated and transferred to third party if they are beneficiaries of land reform.¹⁶⁰

In the *FNB* scheme of reasoning,¹⁶¹ Roux is of the opinion that an expropriation that passes the deprivation test in section 25(1) is unlikely to be tested separately for the public purpose requirement. For Roux a law that is not for a public purpose is not likely to provide sufficient reason for the deprivation it authorises and will therefore be arbitrary in terms of section 25(1). On the other hand, laws that are not arbitrary will not be set aside in terms of section 25(2)(a) because the state has broad powers to expropriate for a public purpose or in the public interest.

¹⁵⁵ See paragraphs 4.2.4.3, 4.3.3.2 and 4.4.4.3 for a comparative perspective.

¹⁵⁶ AJ van der Walt *The Constitutional Property Clause* (1997) 135.

¹⁵⁷ I Currie & J de Waal *The Bill of Rights Handbook* 5th ed (2005) 554.

¹⁵⁸ AJ van der Walt *Constitutional Property Law* (2005) 244.

¹⁵⁹ AJ van der Walt *Constitutional Property Law* (2005) 245.

¹⁶⁰ This is expressly provided for in Chapter III of the Land Reform (Labour Tenants) Act 3 of 1996. See also T Roux "Property" in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 33. I Currie & J de Waal *The Bill of Rights Handbook* 5th ed (2005) 555. See also M Chaskalson "Stumbling Towards s 28: Negotiations over the Protection of Property Rights in the Interim Constitution" (1995) 11 *SAJHR* 222 237. M Chaskalson & C Lewis "Property" in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) 31-21.

¹⁶¹ T Roux "Property" in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 33.

3.5.4 Procedural fairness

In pre-constitutional expropriation law, procedural fairness played an important role in protecting the individual. This protection only existed once the notice was served and the expropriatee could no longer contest the expropriation itself. The *audi alteram partem* rule also had extremely limited application. This changed radically with the advent of constitutional democracy, since under the Constitution everybody has a right to just administrative action.¹⁶²

Section 33 of the Constitution guarantees just administrative action, and Promotion of Administrative Justice Act¹⁶³ was promulgated to give effect to this right. Administrative review in the Constitutional era is therefore done in terms of the act, and not the Constitution.¹⁶⁴ The Constitution therefore influences the procedural aspect of expropriation insofar as the time and manner of payment is concerned,¹⁶⁵ as well as the fairness of the administrative action.

Section 25(2) and (3) states that the manner of payment of compensation must be just and equitable, reflecting “an equitable balance between the public interest and the interests of those affected”. This probably means that compensation need not be paid in cash, but can also be paid, for example, in the form of government bonds, as long as it is “just and equitable”.¹⁶⁶ When the court has to determine whether compensation previously awarded was just and equitable, the court may take into calculation alternative land that was given.¹⁶⁷

¹⁶² S 33.

¹⁶³ 3 of 2000.

¹⁶⁴ AJ van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *Constitutional Court Review*, forthcoming.

¹⁶⁵ It is a constitutional requirement, although, when a litigant wishes to challenge it, they would probably have to do it in terms of the Promotion of Administrative Justice Act 3 of 2000. AJ van der Walt “Normative Pluralism and Anarchy: Reflections on the 2007 Term” (2008) 1 *Constitutional Court Review*, forthcoming. See *Buffalo City Municipality v Gaus and Another* 2005 (4) SA 498 (SCA) where the court focused mainly on s 33 of the Constitution.

¹⁶⁶ T Roux “Property” in S Woolman et al (eds) *Constitutional Law of South Africa* 2nd ed, original service (2006) 46 – 35.

¹⁶⁷ *Haakdoornbult Boerdery CC and Others v Mphela and Others* 2007 (5) SA 596 (SCA) par 61. See also The Restitution of Land Rights Act 22 of 1994 s 2(b),

The expropriator can decide to expropriate without consulting the expropriatee. The expropriatee will, after the service of the notice,¹⁶⁸ have 60 days to respond to the notice.¹⁶⁹ Badenhorst¹⁷⁰ avers that the fact that the expropriatee is not consulted *before* the servicing of the expropriation notice, leaves a *lacuna* in the Expropriation Act¹⁷¹ that should be amended in line with the just administrative requirements of section 33 of the Constitution.

Notwithstanding, expropriation is an administrative process, and therefore subject to section 33 of the Constitution. The expropriator has a choice whether or not to consult the expropriatee before the decision to expropriate. If the expropriator decides to consult with the expropriatee, it is subject to the dicta in *Premier Eastern Cape and Others v Cekeshe and Others*,¹⁷² according to which all the relevant factors must be taken into account before the administrative functionary makes a decision that can adversely affect the rights of an individual. Failure to do so will be a violation of the *audi alteram partem* rule. The court thereby rejected the pre-constitutional rule, as set out in *Pretoria City Council v Modimola*,¹⁷³ that the *audi alteram partem* rule does not find application in the decision to expropriate. The 60-day objection period afforded after the serving of a notice, as provided for in the Expropriation Act¹⁷⁴ and other statutes authorising expropriation, is deemed sufficient time to enable the expropriator to comply with the *audi* principle.¹⁷⁵

The Constitution therefore brought along more encompassing administrative protection for the expropriatee, and the Promotion of Administrative Justice Act¹⁷⁶ promulgated in terms of the Constitution enables the expropriatee to

¹⁶⁸ Served in terms of the Expropriation Act 63 of 1975 s 7(1).

¹⁶⁹ Expropriation Act 63 of 1975 s 9.

¹⁷⁰ P Badenhorst "Enkele Opmerkings na Aanleiding van die Moderne Suid-Afrikaanse Ontteieningsreg" (1998) 18 *Obiter* 32.

¹⁷¹ 63 of 1975.

¹⁷² 1999 (3) SA 56 (Tk). This was decided before the Promotion of Administrative Justice Act 3 of 2000. See *Buffalo City Municipality v Gauss and Another* 2005 (4) SA 498 (SCA) that was decided after the Promotion of Administrative Justice Act 3 of 2000, without making reference to the act.

¹⁷³ 1966 (3) SA 250 (A).

¹⁷⁴ 63 of 1975.

¹⁷⁵ See *M&J Morgan Investment (Pty) Ltd and Another v Pinetown Municipality and Others* 1997 (4) SA 427 (SCA) 339 where the court per Olivier JA ruled, without reference to the Constitution, that the Local Authorities Ordinance 25 of 1974 (N) that provides for a 30 day objection period gives the appellant ample time for objecting to the expropriation. Therefore, the natural justice principle of *audi alteram partem* were complied with.

¹⁷⁶ 3 of 2000.

ask for administrative review more effectively. In terms of the procedural requirement, therefore, there seems to be a clear difference between pre-constitutional democracy and post-apartheid.

3.5.5 Compensation

Section 25(2)(b) sets out the requirement that compensation is due upon expropriation. Section 25(3) determines that at the time of expropriation the compensation amount and the time and manner of payment must be just and equitable,¹⁷⁷ striking an equitable balance between the person whose property is expropriated and public interest.¹⁷⁸ All relevant circumstances must be taken into account, including the factors listed in section 25(3)(a)-(e). Since the compensation requirement is the subject of this dissertation, it will be discussed separately in paragraph 3.6.

3.6 Compensation

3.6.1 Introduction

In chapter 2 it was shown how the compensation requirement was dealt with in the pre-Constitutional era. Compensation was calculated in terms of section 12 of the Expropriation Act,¹⁷⁹ which was interpreted to be full compensation, and therefore full market value of property. This was based on the assumption that the legislator does not intend to take away rights without compensation, and that a single individual cannot be required to sacrifice their property without compensation for something that will benefit the broader pub-

¹⁷⁷ The general norm that compensation paid should be just and equitable is not a strange concept, and similar norms are found in other constitutions. See AJ Van der Walt *Constitutional Property Clauses: A Comparative Perspective* (1999). The difference lies in the fact that in most other constitutions the Constitution merely instructs the legislator, not creating any direct rights that a person can rely on. In South Africa the bill of rights entrenches a right to just and equitable compensation, implying that a person expropriated can directly rely on the right to be compensated, as set out in the Constitution. A Gildenhuys *Onteieningsreg* 2nd ed (2001) 163. Procedurally, this has been construed to mean that the plaintiff who relies on the Constitution must aver the particulars of claims, as in *De Villiers en 'n Ander v Stadsraad van Mamelodi en 'n Ander* 1995 (4) SA 347 (T) 35.

¹⁷⁸ S 25(3) of the Constitution.

¹⁷⁹ 63 of 1975.

lic. Even though the Expropriation Act¹⁸⁰ is still valid, the Constitution now provides a new framework in which the act should be interpreted.

The Constitution requires that compensation must be “just and equitable” with regard to the relevant factors listed in section 25(3), while the Expropriation Act¹⁸¹ contains detailed provisions of what should be compensated, and how such compensation must be calculated.¹⁸² The Expropriation Act,¹⁸³ like other legislation dealing with expropriation, is only valid insofar as it is consistent with the Constitution.¹⁸⁴ The Constitutional Court¹⁸⁵ stated that it is the Constitution, and not legislation, that provides the principles that are applicable when property is expropriated. These are principles that the courts *must* adhere to, and it requires a balancing of the listed factors¹⁸⁶ with no one factor carrying more weight than the others do.¹⁸⁷

Either the compensation can be agreed to by those affected, or it can be decided or approved by a court. When there is no agreement, the Constitution provides the court with the principles in section 25(3) that should be used when calculating compensation.¹⁸⁸ The central principle is that the amount of compensation must reflect an equitable balance between the public interest and the interests of those affected. This balance must be established with reference to the relevant circumstances, including, but not restricted to, the list of factors in section 25(3). This requires looking at each case individually with regard to the individual property interest that might stem from the pre-constitutional era, and the constitutional framework and its legitimate land reform efforts. A decision on what is just and equitable cannot be made in the

¹⁸⁰ 63 of 1975.

¹⁸¹ 63 of 1975.

¹⁸² See paragraph 3.3 for a discussion on the impact of the Constitution on existing law. In *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 17 the Constitutional Court ruled that compensation should be paid under the correct section of the Expropriation Act. If it is paid under the wrong section, it may be unconstitutional. See PJ Badenhorst “Compensation for Purposes of the Property Clause in the New South African Constitution” (1998) 31 *De Jure* 251 – 270 for an overview of the interaction between the Expropriation Act and the Constitution.

¹⁸³ 63 of 1975.

¹⁸⁴ AJ van der Walt *Constitutional Property Law* (2005) 269.

¹⁸⁵ In *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 31.

¹⁸⁶ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 33.

¹⁸⁷ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 34. Despite ruling that market value is but one of five factors, the court applied the *Highlands* test, which places market value central in the determination of compensation (par 37).

¹⁸⁸ S 25(2)(b). See AJ van der Walt *Constitutional Property Law* (2005) 272.

abstract without due regard to the context of the expropriation. When determining compensation, due regard should therefore be paid to the broader scheme of the Constitution.¹⁸⁹

The aim of compensation under the constitutional dispensation seem to be not to let the individual carry the burden of something that is in the public benefit on its own, as in pre-constitutional expropriation. However, the Constitution aims to do this by balancing the interest of the public with the interest of those affected (the individual), and this might not always mean paying market value.

The fact that the interest of the individual should be weighed up against the public interest means that the centrality of market value in pre-constitutional expropriation law should be revised. Market value is only *one* of the factors that should be considered, and must therefore be considered alongside other factors.¹⁹⁰ The weight that each factor carries would be determined by the facts and the circumstances of each case. Care should therefore be taken to ensure that the Expropriation Act¹⁹¹ is interpreted in line with the Constitution, with special caution not to over-emphasise the market value.

3.6.2 Market value

Where market value plays a central role in the calculation of compensation according to section 12 of the Expropriation Act,¹⁹² market value is listed as just one factor amongst many to be taken into account when determining constitutional compensation under section 25(3)(c). Before the final Constitution was enacted, Claassens¹⁹³ warned that entrenching a property clause that provides for compensation at market value would fuel the tension by protecting existing strong, white land rights at the expense of fragile black land rights. White people who acquired land relatively inexpensively from black people or the state during apartheid will be able to rely on their right to market value compensation. That, in turn, will make land reform expensive, if not unafford-

¹⁸⁹ AJ van der Walt *Constitutional Property Law* (2005) 272.

¹⁹⁰ AJ van der Walt *Constitutional Property Law* (2005) 273.

¹⁹¹ 63 of 1975.

¹⁹² 63 of 1975.

¹⁹³ A Claassens "Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation" (1993) 9 *SAJHR* 422 422.

able. If the government cannot pay the bill for land reform, it means that the dispossessed would not receive equitable redress as section 25(8) requires. It was therefore imperative that the constitutional property clause would also include factors other than market value that black people could rely on in order to ensure that land reform is just and equitable in the sense of affordable and possible.¹⁹⁴ This was done by agreeing on four other factors that should be taken into account when calculating compensation,¹⁹⁵ as well as including the land reform objectives in section 25.¹⁹⁶

In *City of Cape Town v Helderberg Park Development (Pty) Ltd*¹⁹⁷ the Supreme Court of Appeal ruled that compensation for expropriation is a constitutional issue by virtue of section 25 of the Constitution. This implies that compensation must be paid in accordance with the bill of rights. This requires a balancing of interests to determine just and equitable compensation. The court focused on market value since it is the only quantifiable value. Market value thus remains pivotal when determining compensation.

The Constitutional Court rule in *Du Toit v Minister van Transport*¹⁹⁸ that compensation may not exceed market value,¹⁹⁹ it must simply be just and equitable, meaning that the individual may not benefit unduly at the expense of the public. Rather, the expropriatee must be put in the same position (s)he would have been, but for the expropriation.²⁰⁰ In the *Helderberg* case,²⁰¹ the Supreme Court of Appeal said that compensation cannot be more than market value since an owner may not be better or worse off because of the expropriation. Rather, a monetary award must restore the *status quo ante*. In *Khumalo*²⁰² the Land Claims Court stated that compensation is paid to ensure that the expropriatee is justly and equitably compensated for his loss. In *Her-*

¹⁹⁴ A Claassens "Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation" (1993) 9 *SAJHR* 422 423.

¹⁹⁵ Section 25(3). This is not an exhaustive list.

¹⁹⁶ Section 25(5) – (9).

¹⁹⁷ 2007 (1) SA 1 (SCA) par 19.

¹⁹⁸ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 21.

¹⁹⁹ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 21.

²⁰⁰ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 22.

²⁰¹ *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) par 21.

²⁰² *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC) par 22.

*manus*²⁰³ the Land Claims Court also ruled that the expropriatee is compensated for the loss of the property, and that the value the property has for the owner should be calculated under actual financial loss. The court further ruled that it is in the interests of justice that the injuriously affected be compensated. Gildenhuys²⁰⁴ is of the opinion that it should be *possible* to pay more than market value compensation, as the Constitution merely sets the minimum standards that must be adhered to. This should be approached with caution, since the balancing of interests in section 25(3) requires that the state should not pay more than is *due* as this will have a negative effect on the taxpayers.²⁰⁵ Chaskalson and Lewis²⁰⁶ argue that such a balancing test might allow for compensation that is *more* than market value in instances where the property, due to particular circumstances, has a value to the owner that is more than market value. Thus, in order to balance out the benefit to the state with the affected owner might require the state to pay more.²⁰⁷ Gildenhuys J ruled in *Ex Parte Former Highlands Residents*²⁰⁸ that the interest of the expropriatee requires full indemnity when expropriated, and therefore it is possible to pay *more* than market value. In the case of *Nhlabathi v Fick*²⁰⁹ the Land Claims Court paved the way for expropriation without compensation in certain circumstances, when it ruled that where the infringement is minimal to the owner's rights, it should not be necessary to pay full market value compensation, or in this case compensation. This would probably be more likely in land reform instances. The Land Claims Court argued, in line with *FNB*,²¹⁰ that the right to bury family in a family grave does deprive the owner of his land, and could be an expropriation, but that compensation need not be paid. In *Nhlabathi*, a widow tried to bury her husband in a family graveyard (according to

²⁰³ *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 (1) SA 1030 (LCC) par 15.

²⁰⁴ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 164 – 165.

²⁰⁵ A Gildenhuys *Onteieningsreg* 2nd ed (2001) 165.

²⁰⁶ M Chaskalson & C Lewis "Property" in M Chaskalson et al (eds) *Constitutional Law of South Africa* (1996) 31-24.

²⁰⁷ See also I Currie & J de Waal *The Bill of Rights Handbook* 5th ed (2005) 556.

²⁰⁸ *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) par 34 – 35.

²⁰⁹ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) pars 32 – 35..

²¹⁰ *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).

an established custom), but the owner, Mr Fick, refused. Ms Nhlabathi went ahead with the arrangements to bury her husband nonetheless, and upon return to the farm found that the owner locked her out of the property. This prompted Ms Nhlabathi to apply for an interdict to allow her to bury Mr Nhlabathi.²¹¹

This interdict was based on section 6(2)(dA) of ESTA,²¹² that allows burial of family members against the will and without permission from the landowner, if they were occupiers of land at the time of death and if there was an established practice on the farm. The amendment therefore added the right to bury a family member to the occupier's tenure right. This right, the court highlighted, is not absolute, and must be balanced with the rights of the owner, and is only enforceable if there is an established practice on the farm to bury members.²¹³ The owner argued that section 6(2)(dA) is unconstitutional because it does not protect his property.²¹⁴

The court, following the *FNB* methodology, ruled that section 6(2)(dA) is a deprivation in terms of law of general application (ESTA).²¹⁵ The court also found that it is not arbitrary deprivation because the right has to be balanced against the right of the landowner, in light of the fact that the section is enacted as part of the state's constitutional duties to provide security of tenure. On balancing the right the court found that there must be an established practice on the part of the occupier before they can bury the family members, and that such an intrusion is minor.²¹⁶

The court then had to decide whether the burial right is an expropriation. In *Serole v Pienaar*²¹⁷ the court had stated that the right to establish a grave could amount to a servitude, and when such a servitude is granted without consent of the owner, it could amount to an expropriation. In *Nhlabathi* the

²¹¹ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) pars 1 – 4.

²¹² Extension of Security and Tenure Act 62 of 1997.

²¹³ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) pars 16 & 18.

²¹⁴ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) par 20. For purposes of this dissertation the second argument is not important and will therefore not be dealt with. The court rules (pars 25 – 26) that s 6(2)(dA) deals with the relationship between the owner and occupier and not with the land regarding burials. It is furthermore also not applicable to established cemeteries.

²¹⁵ Extension of Security and Tenure Act 62 of 1997.

²¹⁶ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) par 29.

²¹⁷ 2000 (1) SA 328 (LCC).

court assumed, without deciding the point, that it could be a *de facto* servitude, and therefore an expropriation.²¹⁸ The court then ruled “[t]here can be circumstances where the absence of a right to compensation on expropriation is reasonable and justifiable, and in the public interest (which includes the nation’s commitment to land reform)”. This was justifiable under section 36 of the Constitution, which the court found to run cumulatively with the section 25(2) and (3) limitations.²¹⁹

The court held that the interference with the landowner’s property rights is reasonable and justifiable as per section 36 because 1) the right does not constitute a major intrusion on the landowner’s property rights; 2) the right is subject to balancing with the rights of the landowner, whose right can sometimes weigh more; 3) the right only exists where there is a past practice of burials on the land, and that granting the right will provide the occupiers with security of tenure in the land since it will enable them to comply with their religious and cultural beliefs; 4) it will enable the occupiers to comply with their cultural and religious beliefs, since they need to be close to their ancestors.²²⁰

The court found that, even if it amounts to expropriation of the property in order to use it for burial purposes, it does not require compensation. This is because the intrusion to the owner’s property, weighed up against the gains for the occupants, is a minor intrusion. Alternatively, the absence of compensation could be justified in terms of section 36.²²¹

It should be noted that the court in this case applied a modified version of the *FNB* methodology, by making certain assumptions with regard to expropriation, in order to go to the crux of the case. The court did not ponder the arbitrary deprivation question for too long, and concentrated on the question whether compensation should be paid for the expropriation.²²²

This is also one of the more significant cases where the court made an effort to comply with the reformist principles of the Constitution in section 25. In

²¹⁸ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) pars 32 -35.

²¹⁹ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) par 35.

²²⁰ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) par 35.

²²¹ *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) pars 31 – 36.

²²² Theunis Roux made this clear in a lecture on “Deprivation and Forfeiture” at the South African Research Chair in Property Law, University of Stellenbosch, 26 May 2008.

doing so, the court acknowledged that expropriation without compensation could be possible in certain circumstances.²²³

While verdict is still out on the question whether the Constitution sets a minimum or a maximum standard, but what is clear is that compensation must be just and equitable, taking into account the five factors in section 25(3). In chapter 2, it was shown that market value played a central role in the calculation of compensation. Every intrusion required full indemnification of the owner, which is market value. The Constitution brought a new requirement, namely that compensation must be “just and equitable”, by considering and weighing up a non-exhaustive list of factors to take into account. Market value is only one of five factors listed, and therefore market value should not be the centre of the inquiry into compensation. *Nhlabathi*, in this context, serves as a good example how the weighing up process works, and how compensation need not always be market value.

3.6.3 The list in section 25(3)

3.6.3.1 Introduction

The Constitution provides us with a non-exhaustive list of factors to take into account when determining just and equitable compensation. What follows is an introductory discussion of the five listed factors, before a discussion of the *Du Toit* case, as an example of how the courts applied this list.

The first factor in section 25(3)(a) provides that the current use of the property can be a relevant circumstance that can influence the compensation amount. This subsection seems to justify cases where scarce resources, like agricultural land, might be expropriated for land reform because it is not otherwise used productively and can be used for housing or the establishment of new farmers. For example: where labour tenants apply to become owners of land²²⁴ it should be borne in mind that the owner did not have use of the

²²³ AJ van der Walt *Constitutional Property Law* (2005) 346.

²²⁴ S 1 of the Land Reform (Labour Tenants) Act 3 of 1996.

land.²²⁵ It might be possible, therefore, that the owner's loss is not substantial. This might mean that the owner should not necessarily receive full market value of the property. This factor cannot be used as a punitive measure as that would be against the public purpose.²²⁶ This means that the owner cannot be punished for not using the land in a certain way. It remains a balancing test, where the interest of those affected is weighed up with the public interest. The use of the property could be applicable in *Modderklip*²²⁷- type cases: when land is occupied unlawfully, and the market value is depressed because of it, the court could adjust compensation upwards to equalise the negative effect of the unlawful occupation.²²⁸

It is not only the current use of the property, but also the history of the acquisition of the property that can influence the compensation amount. Section 25(3)(b) includes cases where the state expropriated property and sold it well below market value during apartheid.²²⁹ In many of these cases the state made land available to white farmers well below market value.²³⁰ If such an owner is now expropriated for land reform purposes, it would be unfair to offer full market value compensation. Such an owner should not be allowed to benefit twice from apartheid.²³¹

Section 25(3)(c) lists market value as a factor to take into account when calculating just and equitable compensation. Market value in section 25(3)(c) prob-

²²⁵ G Budlender "The Constitutional Protection of Property Rights" in G Budlender, J Latsky & T Roux *Juta's New Land Law* original service (1998) 1 – 59.

²²⁶ AJ van der Walt *Constitutional Property Law* (2005) 274.

²²⁷ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2005 (5) SA 3 (CC).

²²⁸ G Budlender "The Constitutional Protection of Property Rights" in G Budlender, J Latsky & T Roux *Juta's New Land Law* original service (1998) 1 – 60.

²²⁹ W Du Plessis & N Olivier "The Old and the New Property Clause" (1997) 3 *BPLD* 11. See also AJ van der Walt *Constitutional Property Law* (2005) 275.

²³⁰ G Budlender "The Constitutional Protection of Property Rights" in G Budlender, J Latsky & T Roux *Juta's New Land Law* original service (1998) 1-59. See n 234 for an example.

²³¹ G Budlender "The Constitutional Protection of Property Rights" in G Budlender, J Latsky & T Roux *Juta's New Land Law* original service (1998) 1-59. The question is whether, when an owner that benefited from a reduced price transfer the land to a *bona fide* third, the history of acquiring factor is still applicable. The general feeling is that such a buyer should not be penalised because of the initial history of acquisition. It is also not sure whether the fact that farms were inherited or often sold symbolically to transfer the property to a child before death, for example, should also be taken into account. A Gildenhuys *Onteieningsreg* 2nd ed (2001) 172 for a detailed explanation of how compensation will be calculated in such cases. See also PJ Badenhorst "Compensation for Purposes of the Property Clause in the New South African Constitution" (1998) 31 *De Jure* 251 261.

ably has the same meaning as market value in section 12 of the Expropriation Act,²³² although market value is not the main consideration in section 25(3).

Section 25(3)(d) refers to the instances where the acquisition by the person expropriated and the capital improvement made to such property was made to the land with the assistance of the (apartheid) state.²³³ The rationale underlying this subsection is that the (current) state should not compensate an owner for improvements that they made with (apartheid) state subsidies, as it will not be just and equitable to do so.²³⁴ Budlender is of the opinion that it is only direct subsidies that should be taken into account.²³⁵

Section 25(3)(e) requires the court to have regard to the purpose of the expropriation. It is not clear whether this means that if land is expropriated for land reform purposes the owner should be happy to accept a lower price than where property is expropriated for non-land reform public purposes,²³⁶ or whether it merely confirms the reformist agenda of section 25.²³⁷ Baden-

²³² 63 of 1975. PJ Badenhorst "Compensation for Purposes of the Property Clause in the New South African Constitution" (1998) 31 *De Jure* 251 262

²³³ This only applies to direct subsidies in respect to the property.

²³⁴ See AJ van der Walt *Constitutional Property Law* (2005) 276. An apt example would be the case of the Mfengu people that use to reside in the Tsitsikamma area. Their land was registered in the 1840s under a Moravian Mission's name. The land was later on scheduled for occupation by "natives" under the 1913 Natives Land Act. These people were finally removed from Keiskammahoek in 1977 on the state president's order. They were moved to the old homeland of Ciskei. The apartheid state promised them compensation that they never received. They were given land in Ciskei, but it was substantially smaller and drier than the land in Tsitsikamma. The Tsitsikamma land were allocated to other people or sold to white buyers at a third of the price with a government bond covering the whole amount. In 1990, lawyers and activists became aware that many farmers intended to sell the land for great profits. The land was returned in 1994, before the elections, when Archbishop Tutu initiated a land claim on behalf of the people to the then Minister of Land Affairs and then President FW de Klerk. In terms of the settlement, the farmers were paid an amount of R35million, while the trust that took ownership of the land got a R1,96 million award. See M Everingham & C Janneke "Land Restitution and Democratic Citizenship in South Africa" (2006) 32 *Journal of Southern African Studies* 545 554; A Claassens "Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation"(1993) 9 *SAJHR* 422 424. Such a discount as well as the subsidy should thus be taken into account when those farmers' property, who acquired the farms in such a way, is expropriated for land reform purposes.

²³⁵ G Budlender "The Constitutional Protection of Property Rights" in G Budlender, J Latsky & T Roux *Juta's New Land Law* original service (1998) 1 – 65.

²³⁶ For A Gildenhuys *Ontheieningsreg* 2nd ed (2001) 178 this interpretation would not be just.

²³⁷ AJ van der Walt *Constitutional Property Law* (2005) 276 where he explains that s 25(3)(e) probably aims at avoiding frustrating expropriations aimed at social necessities. If s 25(3)(e) is read in conjunction with s 25(8) where the Constitution directs the state to promote land reform, then such an interpretation would be plausible, especially in cases where paying compensation would impede land reform.

horst²³⁸ states that it is possible that in cases where expropriation is for land reform purposes, compensation can be less than market value. It is, however, important not to interpret this section too widely to include non-land reform purposes.²³⁹ In the *Du Toit* trilogy²⁴⁰ the court took into account the purpose of the expropriation even when it was not for land reform purposes. This has been questioned. The case and criticism on this aspect in particular, will be discussed in the next paragraph.²⁴¹

The purpose of the expropriation in section 25(3)(e) is complimented by section 25(4), which states that public interest includes the nation's commitment to land reform. Section 25(4) therefore circumscribes the content of public interest, while section 25(3)(e) is about the role that public purpose plays in compensation. This should also be distinguished from section 25(3) that states that the expropriation must be in the public interest or for a public purpose, therefore public interest and public purpose as requirements for the expropriation.

Subsections (a) – (e) are not all applicable in all cases, and it might be that in certain circumstances a particular subsection is more relevant than others are. However, it is important that *all* relevant circumstances be taken into account in every case, including those circumstances or factors that might be relevant but not listed in section 25(3).

The courts were left to interpret how these factors interact with one another, and in *Ex Parte Former Highlands Residents*,²⁴² Gildenhuys J formulated a two-step approach when calculating compensation. After discussing foreign law, Gildenhuys J concluded that market value plays a central role in other jurisdictions, even in those with a property clause in the Constitution.²⁴³

²³⁸ PJ Badenhorst "Compensation for Purposes of the Property Clause in the New South African Constitution" (1998) 31 *De Jure* 251 263.

²³⁹ See AJ van der Walt *Constitutional Property Law* (2005) 276.

²⁴⁰ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C); *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA); *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

²⁴¹ See paragraph 3.6.3.2.

²⁴² *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) pars 34 – 35.

²⁴³ This might not be entirely true. Many jurisdictions acknowledge that compensation need not be market value. This is particularly so in Germany, where what is required is an equitable balance between the public interest and the interests of those affected. See for

Therefore, when calculating compensation the courts should first determine the market value of the property (since it is easily quantifiable),²⁴⁴ and then, based on the list in section 25(3), adjust the amount either upwards or downwards.²⁴⁵ Market value was thus elevated to a central or starting position in determining compensation.

The Constitutional Court in *Du Toit*,²⁴⁶ relying on *Ex parte former Highlands Residents*, acknowledged that the Constitution provides for considerations other than market value, but restricted the influence of the other factors by confirming that one should proceed by first determining market value and then adjusting that amount to fit the constitutional list.²⁴⁷ The *Du Toit* trilogy²⁴⁸ will be discussed as an example where the court mechanically applied the factors without due regard to the circumstances and the role of each factor.

3.6.3.2 An application of the section 25(3) list: The *Du Toit* trilogy

In *Du Toit v Minister of Transport*²⁴⁹ the state removed gravel from private land for maintenance of a public road. The South African Roads Board served a notice²⁵⁰ on Du Toit after which the board entered the farm and used a burrow pit on a portion of the farm in order to excavate gravel to enable them to build a public road. Excavation continued for 18 months, during which time 80 000 cubic meters of gravel was extracted. The expropriation was

example *BVerfGE* 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*). See chapter 4 for a thorough discussion of foreign law.

²⁴⁴ G Budlender “The Constitutional Protection of Property Rights” in G Budlender, J Latsky & T Roux *Juta’s New Land Law* original service (1998) 1 – 60 rightly notes that market value is preferred because it is seen as “objective”, but yet it is difficult to determine the exact market value because there are many variables that need to be considered when determining it.

²⁴⁵ *Ex parte former Highland Residents: In Re Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) pars 34 – 35.

²⁴⁶ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) pars 25 – 28.

²⁴⁷ See also *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC) where the court had to determine what is just and equitable compensation for property expropriated under the Land Reform (Land Tenants) Act 3 of 1996. The court ruled that the determination of compensation is a two-stage process. Firstly, the court had to determine the market value of the property with established methods of valuation (read market value), where after the state must consider how market value should be adjusted according to the principles laid down in s 25(3).

²⁴⁸ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C); *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA); *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

²⁴⁹ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C); *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA); *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC).

²⁵⁰ in terms of s 8(1) of the National Roads Act 54 of 1971.

done in terms section 8(1)(c) of the National Roads Act,²⁵¹ which states: “The Board may, subject to an obligation to pay compensation take the right to use land temporarily for any purpose for which the Board may expropriate such land”. Section 8(2) of the act states that the compensation provisions in section 12 of the Expropriation Act²⁵² apply to property taken in terms of section 8.

The state’s subcontractors entered the land for a certain period and excavated and removed 80 000m² of gravel to upgrade the national road. The parties could not reach agreement on the compensation that had to be paid to Du Toit. While the owner’s contention was that he was expropriated of 80 000 m³ of gravel, the state contended that it only expropriated a right to use the owner’s land temporarily, including the right to excavate and remove the gravel from the temporary gravel pit that was established there in order to build the road. Du Toit claimed R800 000 (R10 x 80 000m³) for the expropriated gravel, while the state offered R6 000 for the temporary use of the 3 ha of unimproved farmland.

The Cape High Court per Jamie AJ²⁵³ relied on *South African Roads Board v Bodasing*²⁵⁴ where the Natal High Court ruled that where a right was expropriated, and such a right has a market value, it makes no difference whether the compensation is calculated under section 12(1)(a) (market value) or 12(1)(b) (actual financial loss). To the court, the market value and the owner’s actual financial loss amount to the same amount.²⁵⁵

The Cape High Court found that it was a right that was expropriated, and that the right was the temporary use of the land as well as the taking of the gravel

²⁵¹ 54 of 1971. Ss 8(1)(a) and (b) states: (8) (1) The Board may, subject to an obligation to pay compensation - (a) expropriate land for a national road or for works or purposes in connection with a national road, including any access road, the acquisition, mining or treatment of gravel, stone, sand, clay, water or any other material or substance, the accommodation of road building staff and the storage or maintenance of vehicles, machines, equipment, tools, stores or material; (b) take gravel, stone, sand, clay, water or any other material or substance on or in land for the construction of a road or for works or for purposes referred to in par (a).

²⁵² 63 of 1975.

²⁵³ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) par 51.

²⁵⁴ *Bodasing v South African Roads Board* 1995 (4) SA 867 (D).

²⁵⁵ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) par 32.

during that time.²⁵⁶ The court however found that there was no open market for such a right,²⁵⁷ and that compensation should therefore be determined “in any suitable manner” as section 12(1)(bb) provides. This gives the court a wide discretion as to how to calculate compensation.²⁵⁸ Nonetheless, the gravel was held to have a market value and since that what was expropriated was not the right to use land for a certain period of time but the gravel, the market value of the gravel should be used. Value was therefore determined with reference to the 80 000 m³ gravel taken.²⁵⁹ The court acknowledged that the purpose of the expropriation was to remove gravel, and therefore the state’s contention that it expropriated a right to temporarily use the land was flawed.²⁶⁰ Therefore, compensation had to be paid for the 80 000 m³ excavated gravel. The evidence before the court was that the market value for a large quantity of gravel is R5 per cubic meter, amounting to R400 000.²⁶¹

The court also mentioned that the Expropriation Act²⁶² was applicable with due regard for section 25 of the Constitution. The court ruled that since the act and the common law need to be re-evaluated in light of the Constitution, compensation can be determined with reference to other considerations of which market value is only one. By following the two step approach,²⁶³ the court adjusted the market value with reference to the factors listed in section 25(3).²⁶⁴ The court ruled that the public interest in building roads would be prejudiced if the owner would be paid full market value for the right so expropriated, and this moved the court to reduce the compensation by 40% to R257 000.²⁶⁵

On appeal, the Supreme Court of Appeal²⁶⁶ overturned the High Court decision, ruling that the case should have been decided under section 12(1)(b) of

²⁵⁶ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) par 12.

²⁵⁷ Based on the comparable sales method, see *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) par 13.

²⁵⁸ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) pars 12 – 13.

²⁵⁹ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) par 32.

²⁶⁰ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) par 32.

²⁶¹ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) par 32.

²⁶² 63 of 1975.

²⁶³ As developed by Gildenhuys J in *Ex parte Former Highlands Residents* 2000 (1) SA 489 (LCC). See the discussion in paragraph 3.6.

²⁶⁴ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) par 28.

²⁶⁵ *Du Toit v Minister of Transport* 2003 (1) SA 586 (C) pars 47 – 50.

²⁶⁶ *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA).

the Expropriation Act.²⁶⁷ This means that compensation must be determined by either calculating the replacement cost, or “in any other suitable manner”. The court ruled that the Cape High Court wrongly afforded itself a wide discretion to calculate compensation in terms of section 12(1)(bb), since section 12(1)(bb) is only applicable to section 12(1)(a) and not to a taking of a right as in section 12(1)(b).²⁶⁸ Section 12(1)(b) distinguishes between the permanent expropriation of rights and the temporary taking of rights to use property, without expropriating the property. According to the court, this was a case of temporary expropriation of a right to use the property and compensation should have been calculated under section 12(1)(b) as actual financial loss.²⁶⁹

Since *Du Toit* treated it as an expropriation of property, and therefore pleaded market value, actual financial loss was not proved. The court awarded R6 000 for the temporary use of unimproved agricultural land plus *solatium* as just and equitable compensation within the parameters of section 25(3) without discussing the constitutional requirements.²⁷⁰

The court did not consider the fact that the state obtained gravel while exercising the temporary right to use the land. The court also did not consider whether such an interpretation of section 12(1)(b), which enables the state to enter land temporarily and then take gravel without compensating the gravel taken, is an unconstitutional expropriation of property as per section 25(3).²⁷¹

On further appeal to the Constitutional Court, two issues were argued namely whether leave to appeal should be granted and the case on merits. The majority of the court granted the appeal but rejected the case on its merits,²⁷² while the minority did not grant the leave to appeal and rejected the case on the merits.²⁷³

The majority ruled that what needed to be decided was not whether the act is constitutional, since this was not attacked. They added that the act, however,

²⁶⁷ 63 of 1975.

²⁶⁸ *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA) par 6.

²⁶⁹ *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA) par 8.

²⁷⁰ *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA) pars 14 – 16.

²⁷¹ AJ van der Walt “The State’s Duty to Pay ‘Just and Equitable’ Compensation for Expropriation: Reflections on the *Du Toit* Case” (2005) 122 *SALJ* 765 770.

²⁷² *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 25.

²⁷³ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 88.

had to be interpreted in line with the Constitution.²⁷⁴ Du Toit argued that the Supreme Court of Appeal erred when it awarded actual financial loss under section 12(1)(b) and not market value as per section 12(1)(a).²⁷⁵ He further attacked the interpretation of section 12(1)(b) that makes provision for the state to use the land temporarily while they are in fact taking material from the land permanently.

In its discussion the court found that section 12(1)(a) and 12(1)(b) are methods of calculation. The court added that the Constitution brought a new set of standards that need to be applied in every expropriation.²⁷⁶ The court also noted that there are differences between the Expropriation Act²⁷⁷ and the Constitution, *inter alia* that, unlike section 12, market value is not the only consideration mentioned in section 25. The court must therefore consider the factors listed and balance the interest of the affected individual with the public interest to determine whether just and equitable compensation was paid.²⁷⁸

The majority ruled that the two stage process where the court first determine market value with reference to section 12 and then adjust the amount by using the factors listed in section 25(3) is not ideal. Despite that, the majority nevertheless preferred to follow this approach as set out by Gildenhuys J in the *Former Highlands* case.²⁷⁹ The minority disagreed on this point, refusing to treat section 25 as a “second level ‘review’ test”, since the Constitution clearly insists on a new approach where justice and equity is the most important factor. In their opinion, the majority’s approach will continue to favour market value above the other considerations in section 25(3).²⁸⁰ For them, the only question that needs to be asked is whether the amount of compensation is just and equitable as per section 25(3). They found that the compensation was just and equitable based on the reasoning of the Supreme Court of Appeal and the majority.²⁸¹

²⁷⁴ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) pars 2 and 17.

²⁷⁵ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 29.

²⁷⁶ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 26.

²⁷⁷ 63 of 1975.

²⁷⁸ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) pars 31 and 34.

²⁷⁹ *Ex Parte Former Highland Residents: In Re Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) par 37.

²⁸⁰ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 84.

²⁸¹ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 87.

The majority ruled that the Supreme Court of Appeal was correct in stating that what was expropriated was indeed a right to remove gravel.²⁸² It further ruled that section 8(1)(c) of the National Road Act²⁸³ was the authorising statute. Based on this, the compensation as determined by the Supreme Court of Appeal is just and equitable compensation for the temporary use of land. Even after considering the list, the court found the compensation just and equitable, endorsing the Supreme Court of Appeal's interpretation of the public purpose requirement.²⁸⁴

The *Du Toit* trilogy is an instance where the courts missed an excellent opportunity of clarifying the position about the calculation of compensation and the role of the Constitution when determining the amount of compensation payable. The most pertinent problems will be highlighted before suggesting a more feasible interpretation.

The Cape High Court has been criticised for its consideration of the factors listed in section 25(3).²⁸⁵ The duty to take into account the purpose of the expropriation, as per section 25(3)(e) of the Constitution is considered exaggerated.²⁸⁶ Not every instance where the public benefits will warrant the downward adjustment of the compensation amount. The purpose of compensation is not to let the individual carry a burden for something that benefits the public, and by adjusting the compensation amount downwards in such an instance would burden the individual owner (with the possible exception of land reform). This is a case where expropriation took place for building a public road that served a national interest with no mention of land reform. What thus happened was that Du Toit was expected to bear the sole burden of maintaining a national asset, even when the purpose was not land reform.²⁸⁷

²⁸² *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 39. The minority was of the opinion that it was the gravel itself that was expropriated, but that the amount of compensation was just and equitable nonetheless. *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) par 76 and 78.

²⁸³ 54 of 1971.

²⁸⁴ *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) pars 46 & 51.

²⁸⁵ AJ van der Walt *Constitutional Property Law* (2005) 277.

²⁸⁶ AJ van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" (2005) 122 SALJ 765 771.

²⁸⁷ AJ van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" (2005) 122 SALJ 765 771.

Van der Walt²⁸⁸ argues that the duty to consider the public purpose implies that one should be sensitive to the context within which the property rights are affected by expropriation. Compensation can be less than market value. That does not imply, however, that compensation *should* in all cases of expropriation be adjusted downwards to reflect the legitimacy of the public purpose they serve. This might not be just and equitable. Compensation is a requirement for expropriation because one citizen cannot be expected to carry the cost burden of something that is for the benefit of the public. Compensation is usually paid (from taxes) to compensate the affected individual owner from public funds for something that the public as a whole benefits from. The result of the judgement of the Supreme Court of Appeal and the Constitutional Court is the exact opposite, in that Du Toit was expected to carry a more onerous burden for a national asset from which the public as a whole benefits.²⁸⁹

A better approach is that section 25(3)(e) should only be applicable if there is a unique purpose or value in the Constitution that is applicable. For instance, the reference to the context and history in section 25(3) places the emphasis on land reform as a purpose, and this is highlighted by the fact that the Constitution explicitly states in section 25(4) that “public interest” includes the nation’s commitment to land reform. This means that the public purpose and interest should only have an influence on the compensation amount in exceptional circumstances, and Du Toit was not an exceptional circumstance.²⁹⁰

Section 25(3)(e) might only be restricted to land reform, while the other factors might play a role in non-land reform expropriations. The public purpose of the expropriation factor should be treated with the needed care, in that the term “public purpose” can refer to either the section 25(2) requirement for the ex-

²⁸⁸ AJ van der Walt “The State’s Duty to Pay ‘Just and Equitable’ Compensation for Expropriation: Reflections on the *Du Toit* Case” (2005) 122 SALJ 765 772.

²⁸⁹ AJ van der Walt “The State’s Duty to Pay ‘Just and Equitable’ Compensation for Expropriation: Reflections on the *Du Toit* Case” (2005) 122 SALJ 765 772.

²⁹⁰ AJ van der Walt “The State’s Duty to Pay ‘Just and Equitable’ Compensation for Expropriation: Reflections on the *Du Toit* Case” (2005) 122 SALJ 765 772 – 3. See also *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA) where the Constitution was likewise applied to an expropriation for the purpose of canalisation storm water.

propriation or to the section 25(3)(e) factor that influences the compensation amount.²⁹¹

The question is whether compensation can be reduced to lower than market value solely because the public interest in the property is higher than the individual owner's interest in the property. This is where the distinction between public purpose as a justification for the compensation should be distinguished from public purpose as a factor that should be taken into account when calculating compensation. Just because an expropriation can be justified because it serves a public purpose as required in section 25(2) does not mean public purpose is a factor that justifies lower compensation when determining compensation as per section 25(3)(e). An interpretation of section 25(3)(e) should be context sensitive with due regard to the just and equitable compensation requirement. In the *Du Toit* case, the emphasis on the public purpose requirement meant that too much weight was placed upon the public interest, and too little on the interest of the affected owner.²⁹²

Another criticism is aimed at the fact that the ruling of the Supreme Court of Appeal and the Constitutional Court implies that we can now ignore the market value of the removed gravel, even if the gravel that was required was clearly acquired without payment.²⁹³ The Cape High Court acknowledged that it was a right that was expropriated with the purpose of acquiring gravel, and even if they found that such a right has no market value, they continued to use the market value of gravel as a basis of calculating compensation.

This was a temporary expropriation for an everyday use namely the removal of gravel. The right to use the land temporarily was expropriated to enable the state to remove an asset from the land that would otherwise have had to be purchased in an open market. By deciding that, the court created a precedent where the state could, in the future, excavate gravel for building roads without payment if they only expropriate a right to remove such gravel, and there are

²⁹¹ AJ van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" (2005) 122 SALJ 765 773.

²⁹² AJ van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" (2005) 122 SALJ 765 773.

²⁹³ AJ van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" (2005) 122 SALJ 765 774.

still vast amounts of gravel left after the expropriation.²⁹⁴ This is, of course, nonsense, and Van der Walt's solution to this is that the court should have looked at section 8 of the National Roads Act.²⁹⁵

According to him²⁹⁶ the approach of the Supreme Court of Appeal and the Constitutional Court is that section 8(1) of the National Roads Act²⁹⁷ authorises the state to obtain gravel for road building either by taking and paying for the materials in terms of section 8(1)(b) or by taking a right to use the land with the gravel temporary without paying for any gravel removed in terms of section 8(1)(c). The section 8(1)(b) scenario would require the state to pay market value for the gravel under section 12(1)(a) of the Expropriation Act,²⁹⁸ while under section 8(1)(c) compensation is calculated under section 12(1)(b) of the Expropriation Act²⁹⁹ as actual financial loss. In the latter case, on the Supreme Court of Appeal and Constitutional Court's interpretation, the state could still remove gravel from the land if it needs to. The court also understood section 8(1)(a) of the National Roads Act³⁰⁰ read with section 8(1)(c) as authorising the state to expropriate a right to use the land for any purpose mentioned in section 8(1)(a), including the taking of gravel. It would thus seem foolish for the state to use the first option when it wants to obtain gravel for the purposes of road building.³⁰¹

Van der Walt³⁰² proposes an alternative reading based on categorical distinctions between the subsections. Subsection (a) covers the situations where land is expropriated permanently to build a road or other road building related works. This includes the permanent expropriation of land in order to excavate gravel. Subsection (b) covers the permanent expropriation of materials used to build roads, and subsection (c) covers the temporary use of the land, in-

²⁹⁴ AJ van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" (2005) 122 SALJ 765 775.

²⁹⁵ AJ van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" (2005) 122 SALJ 765 775-776.

²⁹⁶ AJ van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" (2005) 122 SALJ 765 775.

²⁹⁷ 54 of 1971.

²⁹⁸ 63 of 1975.

²⁹⁹ 63 of 1975.

³⁰⁰ 54 of 1971.

³⁰¹ AJ van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" (2005) 122 SALJ 765 775.

³⁰² AJ van der Walt "The State's Duty to Pay 'Just and Equitable' Compensation for Expropriation: Reflections on the *Du Toit* Case" (2005) 122 SALJ 65 775 – 776.

cluding the land that is needed in order to obtain materials but excluding the materials themselves.

Du Toit is an example of how the Constitution influences expropriations that enable the state to fulfil its administrative duties. As mentioned, it is debatable whether the Constitution, and specifically section 25(3)(e), justifies an adjustment to the compensation amount in such circumstances. *Du Toit* is a good example of how to apply section 25(3)(e) wrongly. It should not be possible for the state to burden the individual, by adjusting the compensation amount downwards, with its administrative duties.

What follows is a brief introduction that places the land reform programmes in South Africa in context, before discussing specific cases as illustration of how the courts apply sections 25(2) and (3) in the land reform context.

3.7 Expropriation in the land reform context

3.7.1 Background

Apartheid land law was based on the ideology of racial segregation, and discrimination did not only take place in terms of prohibiting people to live in certain areas, but also affected their rights in property.³⁰³

With the dawn of the new South Africa, land reform was high on the agenda of the new government, and legislation was promulgated to effect transformation

³⁰³ The first of the so-called “land acts” was the Black Land Act 27 of 1913 which provided for the areas where occupation was restricted to black persons only. In the urban areas, segregation was effect by the Natives (Urban Areas) Act 21 of 1923; the Blacks (Urban Areas) Consolidation Act 25 of 1945; the Black Communities Development Act 4 of 1984. The Black Land Act was succeeded by the South African Development Trust and Land Act 18 of 1936 which provided for “released areas”, also restricted to black people. On the other end, the Group Areas Act 41 of 1950 regulated the acquisition, alienation and occupational rights to land and provided for four independent nation states, so-called homelands (Transkei, Bophuthatswana, Ciskei and Venda), and six self-governing territories (KwaNdebele, QwaQwa, Gazankulu, Lebowa, KwaZulu-Natal and KaNgwane). The segregation of people and the division of land was made possible by legislation authorising the (forced) removal and the eviction of the people from their land. Every area had its own specific regulations and town planning rules. At the advent of the new South Africa, about 17 000 statutory measures was issued to segregate and control land division, with 14 different land control systems in South Africa. With the advent of constitutionalism, an estimated 3,5 million people were displaced by apartheid land law. For a more in-depth discussion see PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman’s The Law of Property* 6th ed (2006) 256 and A Claassens “Compensation for Expropriation: The Political and Economic Parameters of Market Value Compensation” (1993) 9 *SAJHR* 422 425.

through land reform.³⁰⁴ The land reform acts that were promulgated are aimed at not only providing equal access and equal rights to land, but also unifying land control legislation. The Constitution provides the basis for land reform in section 25(5) – (9).

The interim Constitution ordered the abolition of racially based measures³⁰⁵ along with the upgrade of certain weak land rights to ownership rights.³⁰⁶ With the final Constitution providing explicitly for land reform in the property section.³⁰⁷ Strengthening the land reform process, section 25(4) states that the requirement that an expropriation must be for “public interest”, also “includes the nation’s commitment to land reform”.³⁰⁸ From the white paper and the final Constitution evolved the three pillars of land reform namely redistribution, tenure reform and restitution.³⁰⁹

The land redistribution programme aims at providing landless people with land through financial assistance from the government, mainly through programmes that provide *inter alia* for financial assistance through grants and subsidies. It is foreseeable that in order to distribute the land it might be necessary for the state to expropriate property. When land is so expropriated, compensation must be calculated with reference to section 25(3).

³⁰⁴ As part of the land redistribution programme, the Land Reform (Labour Tenants) Act 3 of 1996, Extension of Security of Tenure Act 62 of 1997, Provision of Land and Assistance Act 123 of 1993 and the Transformation of Certain Rural Areas Act 94 of 1998 were promulgated. The Extension of Security of Tenure Act 62 of 1997, Interim Protection of Informal Land Rights Act 31 of 1996, Communal Properties Association Act 28 of 1996, Communal Land Rights Act 11 of 2004 was promulgated as part of the land tenure reform programme. The land restitution programme is done in terms of the Restitution of Land Rights Act 22 of 1994.

³⁰⁵ The notorious land acts were repealed using the Abolition of Racially Based Land Measures Act 108 of 1991, within the framework of the Interim Constitution ss 121 -123.

³⁰⁶ Upgrading of Land Tenure Rights Act 112 of 1991.

³⁰⁷ S 28 of the 1993 Constitution did not provide for land reform, but statutory developments were provided for in ss 121 – 123, with special focus on land restitution. Land reform was driven partially by these provision and the institutions like the Commission on Restitution of Land Rights and the Land Claims Court (LCC), and partially by programmes such as the Reconstruction and Development Programme (RDP).

³⁰⁸ S 25 (4) of the 1996 Constitution

³⁰⁹ See The White Paper 1997 available at <http://www.info.gov.za/documents/whitepapers/index.htm> [as on 10 May 2007]. Paragraph 4.1 states that “Land Redistribution makes it possible for poor and disadvantaged people to buy land with the help of a Settlement/Land Acquisition Grant. Land Restitution involves returning land, or compensating victims for land rights, lost because of racially discriminatory laws, passed since 19 June 1913. Land Tenure Reform is the most complex area of land reform. It aims to bring all people occupying land under a unitary legally validated system of landholding. It will provide for secure forms of land tenure, help resolve tenure disputes and make awards to provide people with secure tenure”.

Section 25(6) aims at securing tenure of land that has been made insecure in the past by racially discriminating laws or practices.³¹⁰ Land tenure reform should rectify social imbalances created under apartheid by providing access to land. In the case of tenure reform, land is not redistributed as such, but rights and interests in land are strengthened through reform of the applicable laws.³¹¹ The beneficiaries of the tenure programme are those people who already have interests or rights in land, but whose rights and interests are weak. They thus do not acquire land through restitution or redistribution, but their rights are legally redefined and thereby strengthened.³¹² There are various laws aimed at strengthening these rights.³¹³ In order to transfer the land to

³¹⁰ I Currie & J De Waal *The Bill of Rights Handbook* 5th ed (2005) 564. The Land Act of 1913 consolidated the provincial racial land laws and prohibited black people from acquiring land in white areas. The only way black people could reside on rural land outside the reserve areas was by providing labour for grazing and cropping privileges (Labour Tenants) or by working on the farms. Leases and contracts of sales where black people tried to acquire rights in white land were invalid, and subsequently black people's right to tenure on rural land was at the mercy of the white owner making it insecure. I Currie & J De Waal *The Bill of Rights Handbook* 5th ed (2005) 564; LG Robinson "Rationales for Rural Land Redistribution in South Africa" (1997) 23 *Brook J Int'l L* 472.

³¹¹ AJ van der Walt *Constitutional Property Law* (2005) 308 – 309.

³¹² AJ van der Walt *Constitutional Property Law* (2005) 309. The Land Reform (Labour Tenants) Act 3 of 1996 was promulgated to broaden access to land and to provide security for Labour Tenants who in the past have been denied access to land. As opposed to farm workers, their primary reason for staying on the farm is not to earn a salary. These people are protected from arbitrary eviction, and they can only be evicted with the procedure described in the act.

³¹³ The Land Reform (Labour Tenants) Act 3 of 1996 was promulgated to broaden access to land and to provide security for Labour Tenants who in the past have been denied access to land. As opposed to farm workers, their primary reason for staying on the farm is not to earn a salary. These people are protected from arbitrary eviction, and they can only be evicted with the procedure described in the act. The Communal Property Associations Act 28 of 1996 aims at providing communities with secure tenancy of communal held land. The Extension of Security and Tenure Act 62 of 1997, also referred to as ESTA, lawful occupiers of rural land are protected against eviction. This is one of the more controversial and politically motivated land reform acts. The act aims to provide rural stability by providing rural land occupants with a mechanism through which they can acquire land, controlling the relationship between owners and lawful occupiers and protecting such lawful occupiers against unfair evictions. The act is aimed at rural occupiers that has permission to reside on the land in question and that is not Labour Tenants. The aspect of ESTA that is particularly interesting in an expropriation context is the issue of family graves. Section 6(4) before amendment provided that occupiers had the right to visit and maintain family graves on the farms they were buried, but the section was amended in 2001 adding the right to bury family members on the farm without consent and in some cases against the will of the landowner. This can only be done if it is part of the workers' religious or cultural believe, and there are an established practice to do so. The first two burial cases, based on the old section 6(4), were not decided with reference to expropriation. In *Serole and Another v Pienaar* 2000 (1) SA 328 (LCC) the owner's property rights were weighed up against the right to a cultural life (burial). The court found that such a burial would have a significant effect on the owner's property rights, and cannot be condoned unless sanctioned by legislation or agreed upon. *Serole and Another v Pienaar* 2000 (1) SA 328 (LCC) pars 16-17. In *Nkosi and Another v Bührman* 2002 (1) SA 372 (SCA) the Supreme Court of Appeal ruled that the right to bury outside the municipal

the labour tenants or farm workers, the court might have to expropriate the property from the current owner. Therefore, in future, the court might have to rule on expropriation cases where labour tenants³¹⁴ or farm workers³¹⁵ acquire ownership of land or where the state has to expropriate land where illegal occupiers reside,³¹⁶ in the tenure reform context.

Van der Walt explains³¹⁷ that under apartheid the land rights system entrenched racial segregation with the aid of common law perceptions of ownership, and the system of land rights thus brought about social imbalances. For him³¹⁸ the most challenging aspect of the tenure programme lies in the questions of constitutional validity of the legislation amending the common law. The tension comes in when a court has to consider how far it can limit common law ownership in order to promote the rights of the previously marginalised, in the interests of land reform, without compensation, before it amounts to an uncompensated expropriation.

Restitution is managed by the Restitution of Land Rights Act 2 of 1994 (Restitution Act). Restitution refers to those instances where individuals or communities that were deprived of their land under the apartheid laws, can claim that their land rights be either restored or replaced by other equitable redress

jurisdiction can only be obtained with permission of the landowner. The right to religion, the court ruled, does not include the right to diminish the landowner's property rights. *Nkosi and Another v Bührman* 2002 (1) SA 372 (SCA) pars 49 – 50. For a thorough discussion see J Pienaar & H Mostert "The Balance Between Burial Rights and Landownership in South Africa: Issues of Content, Nature and Constitutionality" (2005) 122 *SALJ* 633 and for the constitutional significance see LM du Plessis "The South African Constitution as Monument and Memorial and the Commemoration of the Dead" in R Christensen & B Pieroth (eds) *Rechtstheorie in rechtspraktischer Absicht* (2008) 189. The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, also known as PIE, is applicable to unlawful occupiers of land (so-called squatters). Since the unlawful occupiers have no right to the land, no rights are created nor protected. The act is aimed at regulating eviction and ensuring that eviction of unlawful occupiers is fair. The act tries to counter the injustices of the apartheid style evictions, limiting landowner's right to evict occupiers of land without due regard to their personal circumstances.

See also AJ van der Walt *Constitutional Property Law* (2005) 315 - 316; PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 6th ed (2006) 593 - 651.

³¹⁴ S 1 of the Land Reform (Labour Tenants) Act 3 of 1996. See *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC), where farm workers acquired land through judicial expropriation.

³¹⁵ In terms of Extension of Security and Tenure Act 62 of 1997, s 26 read with s 4.

³¹⁶ *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC).

³¹⁷ AJ van der Walt "Towards the Development of Post-Apartheid Land Law: An Exploratory Survey" (1990) 23 *De Jure* 1 2.

³¹⁸ AJ van der Walt *Constitutional Property Law* (2005) 353.

(usually monetary compensation). The requirements for restitution are set out in section 2 of the act, and restitution is available to a person or community that was dispossessed of their land after June 1913 as a result of a past racially discriminatory law or practice for which just and equitable compensation was not paid.³¹⁹ It might be necessary for the state, in the instances where the claimants claim their land back, to expropriate land in order to restore it to the previous owner.³²⁰

The noble aspirations of the legislation are often frustrated by interpretation of the reform legislation in the courts. What follows is analysis of four of the most prominent court cases on the issue of compensation for expropriation in the land reform context to date. After the analysis the cases are critically evaluated.

3.7.2 Compensation under the Land Reform (Labour Tenants) Act³²¹

In *Khumalo v Potgieter*³²² the applicants and respondent entered into an agreement for the purchase of the respondent's property under the Land Reform (Labour Tenants) Act.³²³ In terms of the act the owner of a farm can enter into an agreement (deed of settlement) with the farm workers. Based on this agreement the farm workers can get a subsidy once the Director-General of Land Affairs approves the settlement price as "just and equitable". If the Director-General does not approve, (s)he can refer it to the Land Claims Court to determine a just and equitable amount. The second option is the reason why the parties went to court.³²⁴

Applicants and respondent entered into an agreement according to which the selling price of the property was R1,2 million. The agreement was made con-

³¹⁹ PJ Badenhorst, JM Pienaar & H Mostert *Silberberg and Schoeman's The Law of Property* 6th ed (2006) 629.

³²⁰ This is what essentially happened in *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC); *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 (1) SA 1030 (LCC).

³²¹ 3 of 1996.

³²² *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC).

³²³ 3 of 1996.

³²⁴ *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC) par 2.

ditional on the workers getting a subsidy from the Department of Land Affairs, and if the Director General did not approve, it would be referred to the Land Claims Court.³²⁵ The first question was whether the Land Claims Court should only rule on the fairness of the agreement, or whether it could determine the compensation amount and hold the parties to the agreement. The court ruled that it could determine the compensation and hold the parties to it, thereby effecting a judicial expropriation³²⁶ under the Land Reform Act³²⁷ and the Constitution.³²⁸

Thereafter the court went on to determine the compensation amount. The court considered that the respondent bought the farm in 1996 for R210 000. Thereafter, the court looked at the amounts proposed by various valuers. The respondent's valuator valued the property at R1 105 500, the applicant's valuator at R780 000 while the Department of Land Affairs' valuator valued it at R230 000. Based on this discrepancy, the court found it necessary to determine market value based on evidence. The court followed the two-stage approach where the court first had to determine market value and then, based on the factors in section 25(3), adjust the price.³²⁹

As far as market value is concerned, the court had to decide whether the *Pointe Gourde* principle should be applicable. The court found that the Expropriation Act³³⁰ was not applicable, seemingly because section 25(3) was. The court nevertheless found that the *Pointe Gourde* principle was applicable. The underlying scheme in this instance is the Land Reform Act.³³¹ Therefore, the extent to which market value is affected by the act must be ignored. The court ruled that the Land Reform Act³³² has a negative impact on market value

³²⁵ *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC) pars 5 – 6.

³²⁶ The court used this terminology, as does Gildenhuys in his book. It is doubtful, however, if this is judicial expropriation, since judicial expropriation requires the expropriator acquires the property by court order (only), by pleading the necessity of the expropriation as well as the compensation amount. A Gildenhuys *Ontheeningsreg* 2nd ed (2001) 14. In this case, however, the expropriation is authorised by legislation, and done in terms of legislation. The court merely interpret and applies the legislation.

³²⁷ Land Reform (Labour Tenants) Act 3 of 1996.

³²⁸ *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC) pars 7 & 22.

³²⁹ *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC) pars 13, 17 – 19, 23.

³³⁰ 63 of 1975.

³³¹ Land Reform (Labour Tenants) Act 3 of 1996.

³³² Land Reform (Labour Tenants) Act 3 of 1996.

since people will not buy the property in an open market if they know that they are going to be expropriated.³³³

The court determined the market value with the comparable sales method to be R500 000. Moving on to the second stage of the enquiry, the court applied section 25(3)(a). The court considered the current use of the property, and based on the *Pointe Gourde* principle ruled that the underlying scheme should not be taken into account. Despite that, the court ruled that the Land Reform Act³³⁴ (the underlying scheme) protects labourers against eviction. Therefore, the labourers residing on the farm cannot be obliged to provide labour and therefore they add no value to the property. Market value can accordingly be adjusted upward to compensate the owner.

Section 25(3)(b), the history of acquisition, influences the price too. The market value of the property was affected negatively when the labour tenants were awarded rights under the act³³⁵ in 1996. That, the court found, impacted on ownership rights in a negative way and it also affected the respondent who bought the farm from the previous owner (after the promulgation of the act) negatively. The respondent suffered loss because the underlying scheme depressed the value of the farm. However, this loss in value happened before the respondent purchased the property and the price that respondent paid reflected the loss in value. Therefore, market value can be adjusted downwards. A limiting factor, however, is that even though it would be unfair to award respondent compensation at market value because he bought the property under market value because of the effect of the act, the court cannot punish him for buying it at a low price. The court accordingly awarded R400 000 as compensation.³³⁶

There are various criticisms to this case. In *Khumalo* the court clearly focused on the position of the owner when determining compensation, and it seems as if the balancing between the interest of the individual and public interest (in land reform) was somewhat unbalanced. The underlying scheme,

³³³ *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC).

³³⁴ Land Reform (Labour Tenants) Act 3 of 1996.

³³⁵ Land Reform (Labour Tenants) Act 3 of 1996.

³³⁶ *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC) pars 93 – 99.

namely land reform, was in this case used to justify an upward adjustment of the compensation, since it impacted negatively on the owner.

The court's use of the term "judicial expropriation" can also be questioned. Judicial expropriation refers to those instances where the expropriator needs to go to court in order to acquire property. The expropriation is therefore authorised by court order.³³⁷ In this case, the expropriation was authorised by legislation.

The court's reluctance to calculate compensation in terms of the Expropriation Act³³⁸ is indicative of the court's misconception of the role of the Expropriation Act³³⁹ under the Constitution. As was shown in the beginning of this chapter, the Expropriation Act³⁴⁰ should be read in conformity with the Constitution. This does not mean that the Expropriation Act³⁴¹ is not applicable anymore. The court therefore had to apply the act in a manner that is in conformity with the Constitution when calculating the compensation. It missed an excellent opportunity to start building a new body of post-apartheid constitutional case law.

Lastly, it is questionable whether this was an expropriation case at all. The court accepted, without arguing the point, that it is, based on the Dodson J decision³⁴² two months earlier. Dodson J, however, in that paragraph refers to two pre-constitutional expropriation cases, and further debates the "constitutional" argument in a footnote.³⁴³

³³⁷ A Gildenhuys *Onteieningsreg* 2nd ed (2001).

³³⁸ 63 of 1975.

³³⁹ 63 of 1975.

³⁴⁰ 63 of 1975.

³⁴¹ 63 of 1975.

³⁴² *Khumalo v Potgieter* LCC34/99 November 1999.

³⁴³ See *Khumalo v Potgieter* LCC34/99 footnote 16: "There are a number of other indications in the Labour Tenants Act that a scheme of expropriation is indeed intended by chapter III. For example, the cross reference to "just and equitable compensation as prescribed by the Constitution for the acquisition by the applicant of land . . ." in section 23(1) is a cross reference to section 25(3) of the Constitution of the Republic of South Africa Act 108 of 1996, the subsection of the property clause which deals with the determination of compensation for expropriation of property. See also Section 38(1) of the Labour Tenants Act which deals with the registration of deeds of transfer in respect of land awarded in terms of chapter III of the Labour Tenants Act. Transfer takes place in terms of section 31 of the Deeds Registries Act 47 of 1937 which deals with the transfer of expropriated land."

The Land Reform (Labour Tenants) Act³⁴⁴ provides in chapter III a process whereby a labour tenant is able to apply for an award of land, subject to the agreement on a price, which agreement have to be approved by the Director-General of Land Affairs. The question would be whether this is an expropriation. On one level, it satisfies the expropriation requirements: it is authorised by a statute, it is in the public interest (land reform, as per section 25(4)) and compensation is due. Although the owner has little choice whether it wants to part with the land, if the labour tenant fulfils all the requirements in terms of the act, the owner and the tenant still enter into *agreement*, which can leave the impression that the coercion element of expropriation is lacking. The court, however, just accepted that it *is* expropriation, and that what it needs to rule on is whether the compensation for the expropriation was just and equitable in terms of the Constitution. On a certain construction, the court was asked to rule merely on a term in the deed of settlement. Although this probably does amount to an expropriation,³⁴⁵ it is not clear, and the court should have debated the point before accepting it. The case therefore lacks the necessary discussion surrounding *what* constitutes an expropriation, something that can be expected from a court when it is in the beginning stages of building new case law on the matter.

The next two cases are examples of how expropriation and calculation work in the restitution context, with the first one another example of how the underlying scheme of land reform is not taken into account due to the *Pointe Gourde* principle.

3.7.3 Compensation under the Restitution Act³⁴⁶

The courts have wide powers and various remedies to its disposal to effect restitution. Of particular interest is the express provision for the court's expro-

³⁴⁴ 3 of 1996.

³⁴⁵ The coercion argument, but also the terminology used, as highlighted by Dodson J, see n 343.

³⁴⁶ 22 of 1994.

priation powers in section 35(5) of the Restitution Act.³⁴⁷ Expropriation is still done in terms of section 25 of the Constitution and the Expropriation Act.³⁴⁸

In *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs*³⁴⁹ the court had to determine how compensation should be calculated³⁵⁰ in terms of the Restitution of Land Rights Act.³⁵¹ The court per Gildenhuys J first looked at foreign jurisdictions' interpretation of the just and equitable requirement.³⁵² Then, in a strange move, the court discussed the *Pointe Gourde* principle that states that when determining compensation, the purpose for which the land was dispossessed must be disregarded and cannot influence the compensation amount.³⁵³ To add to this, Gildenhuys J referred to section 12(5)(f) of the Expropriation Act to argue that intended use of the property cannot bear an influence on the compensation amount, and concluded that "in this case, the practical and legal restrictions placed by the provisions of the Group Areas legislation on the free marketability of the properties and their effect on the value of the properties, must be thought away".³⁵⁴

Compensation was determined with reference to market value³⁵⁵ at the time of expropriation. The court deemed this to be just and equitable compensation.³⁵⁶ Gildenhuys J did not make any adjustments based on section 25(3), as none of the parties led such an argument in their particulars of claim.³⁵⁷ This is a curious interpretation of the compensation requirement, especially in

³⁴⁷ 22 of 1994.

³⁴⁸ 63 of 1975.

³⁴⁹ *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) par 36.

³⁵⁰ S 2(2) of the Restitution Act states that "No person shall be entitled to restitution of a right in land if (a) just and equitable compensation as contemplated in s 25 (3) of the Constitution; or (b) any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession".

³⁵¹ 22 of 1994.

³⁵² *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) pars 25 – 34.

³⁵³ See *Pointe Gourde Quarrying & Transport Co Ltd v Sub-intendent of Crown Lands (Trinidad)* [1947] AC 565. See paragraph 2.4.4.5.

³⁵⁴ *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) par 38. This despite the fact that section 33 of the Restitution Act instructs the courts to consider it.

³⁵⁵ He did this by adding the depreciated replacement cost of the improvements to the value of the vacant land. See *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) par 81.

³⁵⁶ A equation happily followed by the Supreme Court of Appeal in *Abrams v Allie NO and Others* 2004 (9) BCLR 914 par 15.

³⁵⁷ *Ex Parte Former Highland Residents; In Re: Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC) par 81.

light of the fact that the Restitution of Land Rights Act³⁵⁸ is one of the pillars of land reform, with land reform being a constitutional goal. It is also another good example of how the courts use pre-1994 concepts, such as the *Pointe Gourde* principle, to override the transformative objectives of the Constitution. The Constitution lists the history of the acquisition of the property as a specific factor to take into account when determining compensation. Despite that, the court chose to ignore it, and justified it by employing the pre-constitutional *Pointe Gourde* principle.

In the subsequent case of *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood*³⁵⁹ Gildenhuys J again had to decide on compensation under the Restitution Act.³⁶⁰ In this case the claimant instituted a restitution claim for dispossession under the Group Areas legislation. The claimant did not receive just and equitable compensation back then, and because of being dispossessed, suffered immense hardship.³⁶¹

The court had to determine whether equitable compensation was paid, and if not, what an equitable amount would be. The Restitution Act³⁶² lists additional factors that must be taken into account when determining a compensation amount. These factors expressly make provision for “the desirability of remedying past violations of human rights”,³⁶³ “the requirements of equity and justice”,³⁶⁴ and “the history of the dispossession [and] the hardship caused...”³⁶⁵

³⁵⁸ 22 of 1994.

³⁵⁹ 2001 (1) SA 1030 (LCC).

³⁶⁰ 22 of 1994.

³⁶¹ He acquired the land from his father, situated near the church they frequented. He was under immense stress because of the negotiations with the group areas officials, and felt undignified when they forced him to sell his home. When he moved to his new property, he was unable to pay for his new house, and was forced to sell his house and move to a shack, and later moved to Mitchells Plain. His unstable wife also took some strain and was frequently hospitalised for depression and mental illness and later died in the Valkenberg Hospital. Likewise his son developed a mental illness due to the move, and in a state of mental confusion one evening walked back to their dispossessed house and was killed in a car accident. His daughter was gang-raped while they lived in the shack, which caused her to develop a mental illness which in turn caused her to lose her job. Understandably, the claimant also developed suicidal tendencies, but managed to pull his life together. See *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 (1) SA 1030 (LCC) pars 3 – 7.

³⁶² 22 of 1994.

³⁶³ S 33(b).

³⁶⁴ S 33(c).

³⁶⁵ S 33 (eB).

Just and equitable compensation is determined with reference to section 25(3).³⁶⁶

Gildenhuis J correctly noted that the Restitution Act³⁶⁷ does not break down compensation into different categories, as the Expropriation Act does.³⁶⁸ Nonetheless, he felt it necessary to investigate how restitution claims can be established under existing heads of argument.³⁶⁹ In the end, Gildenhuis J awarded compensation for market value³⁷⁰ and financial loss,³⁷¹ as is the practice under the Expropriation Act.³⁷² The factors listed in section 33 of the Restitution Act³⁷³ were all put under the *solatium* heading as symbolic compensation, which, based on the previous and foreign practices, was calculated at 10 per cent of the sum of market value and financial loss to a maximum of R10 000.³⁷⁴

The *Hermanus* case also serves as an example of how the Land Claims Court still relied on the pre-constitutional procedural measurements to the detriment of transformation. The procedure was clear in pre-constitutional expropriation. If the expropriated property had a market value, it was claimed under three headings: market value, actual financial loss and *solatium*. *Hermanus*' claim did not fit neatly into those categories, and yet the court forced it under those headings and thereby awarded compensation that is arguably neither just nor equitable. Instead of looking at the specific case and the specific circumstances of *Hermanus*, and instead of placing this within the transformative objectives of the Constitution, the court relied on what is familiar to it, based on pre-constitutional procedural practices.

³⁶⁶ *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536*, Goodwood 2001 (1) SA 1030 (LCC) par 10.

³⁶⁷ 22 of 1994.

³⁶⁸ It being market value, financial loss etc. *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536*, Goodwood 2001 (1) SA 1030 (LCC) par 13.

³⁶⁹ *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536*, Goodwood 2001 (1) SA 1030 (LCC) par 14.

³⁷⁰ *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536*, Goodwood 2001 (1) SA 1030 (LCC) par 29.

³⁷¹ *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536*, Goodwood 2001 (1) SA 1030 (LCC) par 30.

³⁷² 63 of 1975.

³⁷³ 22 of 1994.

³⁷⁴ *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536*, Goodwood 2001 (1) SA 1030 (LCC) par 34.

3.8 Conclusion

The advent of constitutional democracy and the inclusion of a property clause in the bill of rights should have bought a new dimension to South African property law. A result of negotiations, section 25 is characterised by a tension between the existing (mainly white) secure property rights and the need for transformation in order to secure or create property rights for those who have insecure or non-existent (mainly black) property interests. Section 25(2) and (3) especially provides the state with the power to interfere with existing property rights by warranting expropriation if certain requirements are met. Read with section 25(4), the suggestion is that in the land reform context even greater government interference with existing private property rights are warranted, in order to meet the transformative goals of the Constitution. This tension can be solved with a purposive interpretation of section 25, as was suggested in paragraph 3.4.

The purpose of this dissertation is to analyse compensation in the constitutional framework, where compensation should not impede the transformative goals of the Constitution, and to question whether the courts are on the right track. This chapter started by explaining how the Constitution impacts on existing law and the imperatives that the Constitution places on the interpretation of the bill of rights and legislation. It was concluded that a purposive interpretation is required. Thereafter a discussion followed on the horizontal application of the bill of rights, concluding that expropriation would probably never apply horizontally, since it is an exclusive state power. Property can, however, be expropriated from a private party and transferred to another private party, but the expropriation will either be done by the state, or a party acting on behalf of the state.

The subsequent discussion of the property clause focussed on the *FNB* decision, a decision that Roux sees as “the framework for all future constitutional property cases”.³⁷⁵ This case is regarded as compromising the opportunities within the constitutional inquiry of balancing the interest of the individual with

³⁷⁵ T Roux “The ‘Arbitrary Deprivation’ Vortex: Constitutional Property Law after *FNB*” available at http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf [as on 22 September 2008].

the interest of the public (which includes the nation's commitment to land reform), sucking the inquiry into the "arbitrary deprivations vortex".³⁷⁶ This includes the question of whether there is a compensable expropriation (as opposed to a non-compensable deprivation), as well as the just and equitable compensation inquiry. This is especially problematic in the instances where compensation was not provided for in the legislation and the inquiry therefore first has to pass the deprivations step. *Du Toit* to some degree solved the problem of the arbitrary vortex by recognising that the dispute is not whether compensation is due or not, but whether it was correctly calculated. Therefore, where the dispute is about the question whether the interference amounts to a compensable expropriation, the dangers are that the inquiry can be sucked into the arbitrary vortex. Where the dispute is about the calculation of compensation, it is best to follow the *Du Toit* approach and go straight to the compensation question.

Once the deprivation inquiry is passed, the inquiry moves on to the expropriation step. The four requirements for expropriation are discussed, with specific emphasis on the compensation requirement. Compensation for expropriation must be just and equitable, as must be the time and manner of payment. The time and manner of payment can therefore also affect the fairness of the compensation. The courts only rule on the compensation matter when the parties could not reach agreement on the amount. In such cases, the courts will determine compensation based on the evidence placed in front of it.

From the discussion on compensation, it became clear that market value still plays a central role in the calculation of compensation. Market value is the starting point of the calculation of compensation, whereafter the remaining factors in section 25(3) are utilised to adjust the compensation amount upwards or downwards. The problem with such an approach is that if the owner of expropriated property is always compensated at market value the aims of land reform, as instructed by section 25 of the Constitution, might be just too expensive to reach. The factors in section 25(3) seem to be specifically aimed at making land reform affordable. Thus, in order to adhere to both

³⁷⁶ T Roux "The 'Arbitrary Deprivation' Vortex: Constitutional Property Law after *FNB*" available at http://www.saifac.org.za/docs/res_papers/RPS%20No.%2039.pdf [as on 22 September 2008].

sides of section 25 of the Constitution, a new method of interpreting expropriation legislation needs to be considered, where the focus is on just and equitable compensation and not just on market value.

The case discussion that followed highlighted the problems surrounding the interpretation of legislation authorising expropriation in the constitutional context. Firstly, there seems to be confusion as to the place of the provisions of the Expropriation Act³⁷⁷ in the constitutional context. The *Highlands* case illustrates how the court can disregard the impact of the Group Areas legislation because of the *Pointe Gourde* principle contained in section 12(5)(f). The court relied on the *Pointe Gourde* principle to disregard the underlying scheme of the expropriation, despite the fact that the Constitution in section 25(3)(b) instructs the courts to have regard to the history of the acquisition of the property. If the aim of the Constitution, and specifically section 25, is to remedy the injustices of the past, the past cannot be ignored in the process of finding the suitable constitutional remedy. Moreover, section 33 of the Restitution Act³⁷⁸ instructs the court to take the past into account, and since legislation should be read in conformity with the Constitution, the legislative measures aimed at redressing the results of racial discrimination cannot be relegated to the background when calculating compensation. This was also the problem in the *Hermanus* case, which serves as an equally apt example of how the Land Claims Court showed some reluctance to make a transformative judgement because of the *Pointe Gourde* principle. The same can be said of *Khumalo*, where the court disregarded the underlying reason for the expropriation (land tenure reform), then put it through the “section 25(3) adjustments” without even considering section 25(3)(e) read with section 25(4). In fact, the *Pointe Gourde* principle was favoured over section 25(3)(e), since the court chose to ignore the underlying purpose of the expropriation.

The bigger questions that remain unanswered is *when* “constitutional compensation” should be paid, and *how* it should be calculated. The *Du Toit* and *Helderberg* decisions raise a sense of injustice in the sense that constitutional principles were applied to situations where expropriation was clearly not for

³⁷⁷ 63 of 1975.

³⁷⁸ 22 of 1994.

the advancement of land reform. Ironically, in cases like *Khumalo* and *Highlands*, the constitutional principles were not applied in land reform settings, which had a detrimental impact on transformation. On the other hand, the Constitution is the supreme law of the land, and all legislation and administrative acts should be in accordance with the Constitution. This means that every expropriation case that is brought to court should argue the constitutional relevant issues too. It should be asked whether the factors listed in section 25(3) are applicable, and *should* be applicable, and to what extent. The courts must give reasons for their inclusion / exclusion of constitutional considerations. This will leave us with a large body of case law that is well argued on the constitutional issues, with reference to the transformative goals of the Constitution. This new case law will replace the previous, pre-constitutional (and possibly unconstitutional) case law where necessary. Through *stare decisis* the new body of case law will be reduced as time passes, and the transformative goals of the Constitution should be possible. The question that remains is what such an inquiry entails. To answer this question it might be useful to look at foreign law, which will be done in the next chapter.

3.9 Excursus: the draft Expropriation Bill 2008

On 13 November 2007 the Government published a draft policy on the Expropriation Bill.³⁷⁹ This bill sets out “the current expropriation framework in light of the Constitution” and proposes amendments to the framework.³⁸⁰ It starts with an introduction, giving the background of dispossession in South Africa starting from 1659, and then explains that the property clause in Constitution committed itself to rectifying these wrongs, focussing on the expansion of expropriation with regard to the public purpose requirement.³⁸¹ The introduction ends with a call for a debate about expropriation, against the backdrop of the history of dispossession in South Africa.

³⁷⁹ GN 1654 GG 30468 of 13 November 2007.

³⁸⁰ J Pienaar “Land Reform” *Juta’s Quarterly Review* 2007(4).

³⁸¹ GN 1654 GG 30468 of 13 November 2007 par 9.

The introduction is followed by a section discussing the property clause and its compromise character, whereafter the objects of the policy framework are set out. This establishes the policy framework from which the guidelines of the new Expropriation Act are drawn. It emphasises the values of equality, human dignity and the achievement of freedom. It also acknowledges that expropriated must be constrained by the requirement that property must be expropriation in terms of a law of general application, and that it should be regulated by the constitutional right of just administrative action.³⁸²

This is followed by a discussion of the current framework. Interestingly this document makes it clear that the “decided” in section 25(2) must be read conjunctively, meaning that the Constitution does not permit the court to make a primary decision about compensation. It remains an executive decision, subject to section 25(3) and in some instances subject to court approval, by way of judicial review.³⁸³ This would prove to be one of the contentious issues in the bill.

The next section discusses the difference between the Expropriation Act³⁸⁴ (being the legislation that is still applicable to expropriations) and the Constitution with reference to the “public purpose” requirement. It notes that the “public interest” requirement is a “radical departure from the restrictive definition of the Expropriation Act”.³⁸⁵ This highlights the difficulties with the act, which are also set out in the document. Firstly, since it pre-dates the Constitution, the bill is not “infused with the transformative intent”.³⁸⁶ Secondly, it is not consistent with comparable foreign statutes and, thirdly, it is inconsistent with the Constitution, especially as far as the public purpose and (market value) compensation requirements are concerned.³⁸⁷

Foreign jurisdictions, namely the United States of America and Germany, are discussed with reference to the interpretation of “just compensation”, before the bill proposes some principles for draft legislation. These principles provide that expropriation must be in the public interest; that the scope of the pro-

³⁸² GN 1654 GG 30468 of 13 November 2007 par 17.

³⁸³ GN 1654 GG 30468 of 13 November 2007 par 20.

³⁸⁴ 63 of 1975.

³⁸⁵ GN 1654 GG 30468 of 13 November 2007 par 22.

³⁸⁶ GN 1654 GG 30468 of 13 November 2007 par 23.

³⁸⁷ GN 1654 GG 30468 of 13 November 2007 par 24.

tected rights must be expanded; that compensation should be just and equitable, focussing on balancing the individual's interest with the interests of those affected; that a "common framework to guide the processes and procedures for the expropriation of property by all organs of state" should be set out; and that the phases of expropriation be set out in a certain manner.³⁸⁸

The Draft Policy was followed by the Expropriation Bill,³⁸⁹ introduced by the Minister of Public Works. The preamble of the Bill promises "[t]o provide for the expropriation of property, including land, in the public interest or for public purposes and subject to compensation, including compensation to holders of unregistered rights; to provide for the establishment of Expropriation Advisory Boards; to provide for the approval of compensation by a court; to provide for matters connected therewith".

The Expropriation Bill³⁹⁰ developed parallel to the writing of this dissertation. Heavy debates, often politically and emotionally laden, erupted when the bill was tabled in parliament. These debates not only serve as an apt example of the tension in the property clause that protects existing property rights while simultaneously commanding land reform, but also highlight the need for thorough study of compensation for expropriation. The Expropriation Bill³⁹¹ was tabled in parliament early in 2008 and aimed to replace the 1975 Expropriation Act with an act that is in line with the Constitution,³⁹² in order to, *inter alia*, speed up land reform.³⁹³ It therefore provided for compensation that is not solely based on market value. The bill hit the emotive nerve of landowners in South Africa, with Afrikaans (traditionally white) newspapers referring to it as the "land-grab act". Critics from the farming and real estate community protested against the idea that market value should not be the sole determinant when calculating compensation, claiming that the fact that compensation may be less than market value would deter investment.³⁹⁴ The African National Congress, as the governing party, later on acknowledged that market

³⁸⁸ GN 1654 GG 30468 of 13 November 2007 pars 30 – 35.

³⁸⁹ B 16 – 2008.

³⁹⁰ 16 – 2008.

³⁹¹ 16 – 2008.

³⁹² A discussion of the bill is found in paragraph 3.9.

³⁹³ W Hartley "Controversial Expropriation Bill is 'Shelved'" *Business Day* (28 August 2008) 1.

³⁹⁴ W Hartley "Controversial Expropriation Bill is 'Shelved'" *Business Day* (28 August 2008) 1.

forces might be a better way than expropriation to obtain land for land reform, presumably because expropriation might lead to an exodus of (skilled) white people, whose skills are needed in various sectors.³⁹⁵ Other groups feel that there are other adequate ways in which the government can effect land reform, such as upgrading black urban land rights and distributing state-owned land instead of expropriating private land.³⁹⁶ Even church bulletins commented on the bill, noting their fears of the unconstitutionality of the bill.³⁹⁷ Land activists disagreed. According to the Congress of South African Trade Unions, the bill is necessary because the market approach has failed in that it allows sellers to hold out for the highest price, thereby debilitating land reform.³⁹⁸ For them, the bill, coupled with post-expropriation support that helps the beneficiaries to cultivate the land profitably, is needed. Lawyers who helped with the drafting of the bill highlight the necessity of the bill, namely the need for an expropriation act that rectifies historical injustices, as is constitutionally provided for.

When the bill was withdrawn (much to the relief of opposition parties, farmers' organisations and business),³⁹⁹ land activists proclaimed that they were not surprised, since the government is committed to protect private property, and adding that the bill was simply "radical posturing".⁴⁰⁰ Others warned that the shelving of the bill might give rise to the landless and their allies using their mass power to shape the land struggle.⁴⁰¹ The Department of Land Affairs also warned that the shelving of the Expropriation Bill⁴⁰² could see the cost of land reform rise dramatically.⁴⁰³ Some commentators believed the bill was shelved due to the political tension between the African National Congress and government and speculated that it is likely to be tabled again after the 2009 elections.⁴⁰⁴ Whichever way, the debate surrounding compensation for

³⁹⁵ A Musgrave "Market Forces 'are the Best Way to Obtain Land'" *The Weekender* (30 August 2008) 3. C Kgosana "Land Reform vs Investment" *City Press* (31 August 2008) 21 questions whether the fear of offending foreign investors should override the public interest.

³⁹⁶ F Rabkin "Seeking a New Tool for Land Reform" *The Weekender* (30 August 2008) 5.

³⁹⁷ Anon "SA Grondwet Staans Dalk Gou Voor Grootste Toets" *Kerkbode* (1 August 2008) 4.

³⁹⁸ F Rabkin "Seeking a New Tool for Land Reform" *The Weekender* (30 August 2008) 5.

³⁹⁹ C Kgosana "Land Reform vs Investment" *City Press* (31 August 2008) 21.

⁴⁰⁰ F Rabkin "Seeking a New Tool for Land Reform" *The Weekender* (30 August 2008) 5.

⁴⁰¹ M Jara "Expropriation is Just and Rational" *City Press* (7 September 2008) 21.

⁴⁰² 16 – 2008.

⁴⁰³ S Mkhwanazi "Land Reform Delay Set to Cost R74bn" *Cape Argus* (4 September 2008) 3.

⁴⁰⁴ M Jara "Expropriation is Just and Rational" *City Press* (7 September 2008) 21.

expropriation remains on the agenda of controversial constitutional issues to deal with.

A few provisions deserve mentioning. As in the current Expropriation Act⁴⁰⁵ the power to expropriate rests with the Minister of Public Works who, in terms of the bill, would also be able to expropriate property on behalf of a juristic person for a public purpose or in the public interest.⁴⁰⁶ This differs from the act only insofar as the juristic persons on behalf of whom the minister may expropriate are not listed. This was, however, one of the main points of criticism against the bill.

An interesting addition to the bill is the establishment of expropriation advisory boards.⁴⁰⁷ These boards will advise the expropriating authority on aspects of expropriation, including compensation. This looks like the land tribunals of the United Kingdom, and will presumably deal with the technical aspects of expropriation, such as identifying land and determining the compensation price.

An aspect that received relatively little attention in discussions of the bill is the fact that the bill makes extensive provision for compensation for expropriation of unregistered rights.⁴⁰⁸ This is aimed at people like farm workers who are allowed to farm a piece of land as part of their remuneration but who only have unregistered rights in the land.⁴⁰⁹ This clearly demonstrates the transformative aim of the bill, and its commitment to land reform.

The provision that is especially relevant for purposes of this dissertation is the provision regarding compensation. The basis on which compensation is to be determined changed radically from the Expropriation Act⁴¹⁰ and mirrors the Constitution's wording. It requires that the amount of compensation must be "just and equitable, reflecting an equitable balance between the public interest and the interest of those affected",⁴¹¹ also listing the five section 25(3) factors. Although the move away from market value was a point of criticism (as will be

⁴⁰⁵ 63 of 1975.

⁴⁰⁶ Clause 4 of the Expropriation Bill 16 – 2008.

⁴⁰⁷ Clauses 6 – 9 of the Expropriation Bill 16 – 2008.

⁴⁰⁸ Clause 14 of the Expropriation Bill 16 – 2008.

⁴⁰⁹ J Oelofse "MPs Assure Owners of 'No Land Invasions' under New Law" *The Herald* (23 May 2008) 2.

⁴¹⁰ 63 of 1975.

⁴¹¹ Clause 15 of the Expropriation Bill 16 – 2008.

discussed below), the most contentious issue was the approval of compensation by a court.⁴¹²

An ad hoc Committee for the Defence of Property Rights drafted a petition against the bill, highlighting perceived flawed areas of the bill.⁴¹³ The main points of criticism were that compensation would be determined by “executive diktat”; market value would be downgraded as a factor in deciding compensation; it will undermine the economy by undermining investor confidence; it would empower the state to expropriate any property for “public interest”; it would make ownership of property insecure and thus take away a fundamental requirement for a successful economy; it would threaten food security, since expropriated farms are not farmed productively on large-scale; it would strain interracial relations; it would undermine the national accord as negotiated in the early 1990s and therefore national unity; it was unnecessary, since there is enough government land to redistribute.

De Havilland⁴¹⁴ lashed out against the bill by comparing it to Zimbabwe’s land redistribution. Her objection lies in the fact that expropriation is an executive decision, with the courts only having review powers in terms of procedure (and not the merits of the decision), which to her indicates that the executive decision to expropriate would not be subject to judicial scrutiny. She bases this on the (wrongly) assumed premise that the decision to expropriate in the past was that of the judiciary and not the executive. As was shown in chapter 2, expropriation is a legislative driven process with the decision to expropriate

⁴¹² Clause 24 of the Expropriation Bill 16 – 2008. The relevant sub-clauses are:
“24(1) The compensation to be paid for any property expropriated by an expropriating authority and the time and manner of payment must, in the absence of agreement between the expropriated owner or the expropriated holder and the expropriating authority and subject to section 25 of the Constitution, be determined by the expropriating authority.
(2) The taking of a decision to expropriate for a public purpose or in the public interest in terms of this Act constitutes an administrative action as defined in section 1 of the Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000), and, subject to subsection (5), is subject to review by a court in accordance with that Act.
(3) (a) Any party to an expropriation may request a court, subject to subsection (5), to approve any of the following actions undertaken in terms of this Act:
(i) Any final determination of compensation contemplated in section 18(4);
(ii) the determination of the time of payment of compensation; or
(iii) the determination of the manner of payment of compensation.”

⁴¹³ Sapa “Civil Rights Groups Slam Land Bill” *Business Report* (17 June 2008) <http://www.busrep.co.za/index.php?fSectionId=561&fArticleId=4459300> [as on 6 November 2008].

⁴¹⁴ N de Havilland “Draft Bill Contains Seeds of Zimbabwe-Style Disaster” *Business Day* (3 April 2008) 9.

resting with the minister (thus the executive).⁴¹⁵ It would indeed be problematic if there was no substantive recourse to the courts. However, on a different interpretation proposed by Roux,⁴¹⁶ substantive review is possible under the bill. According to him, the fact that the Promotion of Administrative Justice Act⁴¹⁷ is mentioned in the bill, coupled with the use of the word “approve” in clause 24(3)(a), shows that the courts have the power to review the merits of the case. The “reasonableness review” of the Promotion of Administrative Justice Act⁴¹⁸ does not allow a court to substitute its view for that of the administrative agency, but the review is substantive nonetheless in that the court is allowed to strike down decisions that a reasonable decision-maker would not have made. Furthermore, should such a decision touch on fundamental rights (which include the right to property), then the standard of reasonableness rises to “an inquiry in terms of which the court asks whether the invasion of the aggrieved party’s rights was proportional to the legislative end sought to be achieved”.⁴¹⁹ The use of the word “approve” in clause 24(3)(a) of the bill can also be linked to the use of the same word in section 25(3) of the Constitution, and will be consistent with the Constitution if interpreted to mean a merits-based review authorised by the Promotion of Administrative Justice Act.⁴²⁰ It can also be interpreted to mean a higher standard, where the court can revisit the decision taken by the authority, since the use of the word “approve” links up with the same word in section 25(3) of the Constitution. In either case, the courts will be able to rule whether the expropriating authority’s decision struck a balance between the public interest and the interest of those affected, based on the enumerated factors.

The fears that market value might be downgraded as a factor in deciding compensation are also ill founded. If the Expropriation Act⁴²¹ is (correctly) interpreted in line with the Constitution, as this chapter proposed,⁴²² then market value was already “downgraded” by the adoption of the (negotiated) Constitu-

⁴¹⁵ See paragraph 2.3.2.2.

⁴¹⁶ T Roux “Alarmist Claims About Land Bill Ignore the Facts” *Business Day* (14 April 2008) 7.
⁴¹⁷ 3 of 2000.

⁴¹⁸ 3 of 2000.

⁴¹⁹ T Roux “Alarmist Claims About Land Bill Ignore the Facts” *Business Day* (14 April 2008) 7.

⁴²⁰ 3 of 2000.

⁴²¹ 63 of 1975.

⁴²² In paragraph 3.8.

tion. The only reason why it is still central to the compensation inquiry, as noted earlier in this chapter,⁴²³ is the courts' faulty elevation of market value to the first step of the compensation inquiry, after which the other factors are used to adjust the amount upwards or downwards. In that sense property owners correctly anticipate that market value will not be central to the compensation inquiry anymore, but wrongly attribute this change to the Expropriation Bill.⁴²⁴ In fact, this change was already brought about by the Constitution.

This links up with the fear that the bill will "threaten the very foundation of South Africa's economy ... leading to massive disinvestment and capital flight".⁴²⁵ As long as land reform takes place within the constitutional framework, this statement is unfounded. Government has so far not launched any surprise attacks on property rights and land reform thus far has taken place within the constitutional framework. The government's land reform programme is clearly spelt out and provides for an adequate measure of security as far as property is concerned. The fears that it will discourage investment are based on the idea that investors will not invest in a country where property rights are unstable and insecure. However, recent discussions on property law question the premise that the law *can* always provide certainty and therefore security in property rights. It therefore seems likely that the fear of investment is based on a misinterpretation of the bill for political purposes, where fears of disinvestment are fired by those who are afraid to lose their apartheid-acquired privileges to land reform or redistributive programmes. This, to quote Roux, "is likely to backfire...[as] South Africans have enough real problems without being alarmist about problems that don't exist".⁴²⁶

The rhetoric of disinvestment links up with the fear that the bill would inevitably threaten food security, because expropriated farms are not farmed productively. If these claims are more than mere political rhetoric, the inefficiency of the land reform programme is not a problem with the bill, but with the im-

⁴²³ In paragraph 3.8.

⁴²⁴ B 16 – 2008.

⁴²⁵ J Keet "Between a Land Bill and a Hard Place" *Sunday Independent* (20 July 2008) 11.

⁴²⁶ T Roux "Alarmist Claims About Land Bill Ignore the Facts" *Business Day* (14 April 2008) 7.

plementation of the land reform programme, that should be addressed in the appropriate forum.

The fear that the minister may expropriate any property for the benefit of a juristic person seems to stem from a joint reading of the Expropriation Bill and the Provision of Land and Assistance Amendment Bill.⁴²⁷ On such a reading, the Minister of Agriculture and Land Affairs is supposedly able to “expropriate shares of a thriving gold mining company ... for poverty allocation schemes”.⁴²⁸ This was denied by Land Affairs Director-General Tozi Gwanya, who insists that the Provision of Land and Assistance Amendment Bill⁴²⁹ will enable the government to assist land reform beneficiaries with farming equipment, enabling the government to acquire both the farm and the business upon expropriation. Similar concerns were noted by especially (white) farmers,⁴³⁰ who believe that black economic empowerment can also be in the public interest. This means that ownership will not be protected by section 25(2) when a white farmer’s interest competes with that of a black economic beneficiary. This, coupled with the problem that the courts only have limited (procedural) review powers and the fact that recourse to courts is allegedly taken away by the bill, means that (white) farmers’ farms can be expropriated for ridiculous amounts, and transferred to (black) aspirant farmers as part of the black economic empowerment programme. This will, according to the critics, in the end have a serious effect on property owners and financial institutions, since it will lead to uncertainty with property owners and security holders about their property rights that are now vulnerable to expropriation.⁴³¹ These fears are also founded in political rhetoric. The land reform programme is specifically aimed at a certain group of people and run by the Department of Land Affairs. Black economic empowerment is a policy aimed at broad based economic growth, run by the Department of Trade and Industry. It would seem that they focus on different groups and on different methods of attaining

⁴²⁷ B 40 – 2008.

⁴²⁸ This was the view of DA MP Maas Nel, as reported by M Mkhabela “Land-Reform Bill Tabled in Parliament” *Sunday Times* (8 June 2008) 4.

⁴²⁹ B 40 – 2008.

⁴³⁰ See the statement made on 19 May 2008 by AfriForum “Staat sal Enige Maatskappy teen Minder as Markwaarde kan Onteien en Oordra aan Swart Bemagtigingsgroepe” <http://www.afriforum.co.za/?p=1155> [as on 6 November 2008].

⁴³¹ W Hartley “ABSA Comes under Fire over Expropriation Bill” *Business Day* (19 August 2008) 3.

their aims. Furthermore, “just and equitable” compensation will always have to be paid for expropriation, with due regard to the public *and* the owner. It is doubtful if expropriation will be allowed if it leaves the individual (white) farmer insolvent, since it will hardly be fair to require the individual to bear such a heavy burden alone for land reform. Financial institutions would therefore not be exposed to more risks by the bill.

The insertion of the “public interest” requirement and the subsequent criticism of the insertion rest on the same flawed conception that the second argument (about “just and equitable compensation”) is based on. The “public interest” requirement is already a constitutional requirement, and an interpretation of the Expropriation Act’s⁴³² public purpose requirement already requires the courts to read the act in conformity with the Constitution. This would mean that “public interest” is added as a requirement with “public purpose” in any event. Reading legislation in conformity with the Constitution is an interpretation method that construes legislation to promote the spirit, purpose and objects of the Bill of Rights.⁴³³ Such a reading, also called “reading down” a provision, can save legislation from constitutional invalidity by restricting the reading to a constitutional acceptable reading. Likewise, “reading up” can save a provision by expanding the reading to include certain words.⁴³⁴ If the provision is attacked for its constitutionality, the court can also give a remedy of “reading-in”,⁴³⁵ that is, to read the added “public interest” requirement into the “public purpose” requirement. Therefore, on a constitutional reading of the existing Expropriation Act⁴³⁶ the “public interest” requirement should be added to the “public purpose” requirement, whether the bill says so or not.

The other two fears, that the bill would undermine the national accord (and therefore national unity) and that it is unnecessary because there is enough government land to redistribute, are also based on political rhetoric. The national accord of the early 1990s resulted in the Final Constitution with a

⁴³² 63 of 1975.

⁴³³ LM du Plessis “Interpretation” in S Woolman et al *Constitutional Law of South Africa* 2nd edition, original service (2008) forthcoming.

⁴³⁴ See *Daniels v Campbell NO and Others* 2004 (5) SA 331 (CC).

⁴³⁵ LM du Plessis “Interpretation” in S Woolman et al *Constitutional Law of South Africa* 2nd edition, original service (2008) forthcoming.

⁴³⁶ 63 of 1975.

property clause that protects ownership and promotes land reform. As mentioned earlier in the chapter,⁴³⁷ this creates a tension. However, since the advent of constitutional democracy little progress has been made as far as land reform is concerned, as the majority of the country's population still owns only a small percentage of agricultural land.⁴³⁸ This undermines the national accord, not from the perspective of the owners, but from the side of the landless. Once the bill is seen in the framework of the Constitution that requires a balancing act, ensuring that both the existing landowners' interests and the transformative interest of the Constitution are taken into account, the fear that it will undermine national unity is unfounded. If expropriation is unnecessary because there is other (similar) government land available, an aggrieved individual can object to the decision to expropriation his/her particular piece of property before the expropriation.⁴³⁹

This discussion is only an "excursus", since, seemingly acknowledging that the bill might be unconstitutional due to the limit placed on the individual's right to appeal to a court,⁴⁴⁰ the bill was shelved in August 2008.⁴⁴¹ However, the Minister of Land Affairs, although not the minister responsible for the bill, recently re-iterated that the bill is not unconstitutional and that it is an important instrument to facilitate land reform and will therefore be re-introduced.⁴⁴² It is still relevant, since there are rumours that the African National Congress will re-introduce the bill in parliament after the 2009 elections, but not worth more detailed analysis because of the preliminary status and uncertainty about the final content.

⁴³⁷ See paragraphs 3.2 and 3.4.1.

⁴³⁸ M Mgibisa "Bill Addresses Land Parity Erosion" *City Press* (23 March 2008) 2.

⁴³⁹ Clause 11(3)(e).

⁴⁴⁰ N Visagie "Parliament won't Accept Bill" *Cape Times* (12 June 2008) 1.

⁴⁴¹ L Donnelly "Expropriation Bill Shelved 'For Fear of Backlash'" *Mail and Guardian* (11 September 2008) 6.

⁴⁴² J Leuvenink "Lulu het Golfbane, Wildsplase in Haar Visier" *Die Burger* (13 November 2008) available at http://www.news24.com/Sake/Algemene_nuus/0..6-1607_2424661.00.html [as on 13 November 2008].

4 Compensation for Expropriation: a Comparative Overview

“You!” said the Caterpillar contemptuously. “Who are YOU?”¹

4.1 Introduction

Both the United States of America and German law recognise that property is not absolute and can be regulated by legislation. In the United States of America it is particularly clear that it must be possible to regulate property without the state having to pay compensation every time,² even though the practice of regulatory takings developed through case law. In Germany the principle was laid down in the *Contergan* case³ that when the legislature makes laws, it must strike a balance between the public interest and the interest of the individual. Regulations that strike such a balance are allowed to infringe on property rights.⁴ This chapter will discuss how courts in Germany, the United States of America and Australia interpret their property clauses with regard to the compensation requirement.

The aim of this chapter is to investigate how the compensation question is dealt with in the three jurisdictions. The United States of America provides an extensive range of literature on when compensation should be paid, due to the unique nature of their regulatory takings law.⁵ Germany, by contrast, does not recognise compensation for excessive regulation and serves as an interesting example of how to clearly distinguish between deprivation and expropriation. The German example is also interesting insofar as it does not refer to deprivation, but to the state having the power to determine the content and limits of property rights. This means that when the state determines the content and limits, compensation is not due. Furthermore, the *Junktim-Klausel* requires the authorising act to provide for compensation, which means that

¹ L Carroll *Alice's Adventures in Wonderland* (2007) 60 <http://books.google.co.za/books?id=DHkIMoOUac4C> [as on 6 November 2008].

² AJ van der Walt *Constitutional Property Law* (2005) 133.

³ BVerfGE 42, 263 [1976] (*Contergan*).

⁴ AJ van der Walt *Constitutional Property Law* (2005) 133.

⁵ AJ van der Walt *Constitutional Property Law* (2005) 216.

the question of when compensation is due is not left to the court, but is made by the legislature.⁶ In Australia compensation is also not paid for regulations, but for a different reason.⁷ These distinctions between deprivation and expropriation in each jurisdiction will be discussed, in order to show when compensation is due, and therefore what is compensated. At the end of each discussion, a technical discussion of how compensation is calculated in each jurisdiction will follow.

These jurisdictions are interesting in the South African context due to the relative novelty of constitutional property law in South Africa. Chapter 2 showed that pre-constitutional expropriation law placed a heavy reliance on market value and on indemnifying the property owner fully, which reinforced the sanctity of property. With constitutional democracy, the focus should have shifted to a more balanced approach, where the interest of the public is weighed against the interests of those affected. As was shown in chapter 3, this rarely happened. This chapter therefore aims to show that it is possible to limit private property without having to pay compensation in each instance. The question is therefore: When is it possible? To answer this question, this chapter will look at when compensation is due, which also indicates why compensation is paid.

While dealing with these jurisdictions one must be mindful of the differences in order to do a valuable comparison. The United States of America takings jurisprudence (which is seemingly unique to the States), for instance, must be regarded in the proper economic background in which it developed, and cannot be transplanted without regard to the economic background of the donor country.⁸ A comparative study with the Australian Commonwealth must also be approached with the necessary caution, since their Constitution does not contain a bill of rights. Even so, section 51(xxxi) is regarded as a property

⁶ AJ van der Walt *Constitutional Property Law* (2005) 129; *BVerfGE* 58, 300 [1981] (*Naßauskiesung*). In Germany the decisions of the Federal Constitutional Court (*Bundesverfassungsgerichtesentscheidungen*, *BVerfGE*) are merely cited with reference to the volume number and page number, for example *BVerfGE* 58, 300. Some cases have names, like the *Naßauskiesung*, given to it by the media. For ease of reference, the case names will be added where possible. The year in which the case was decided will also be added to put it into historical context.

⁷ AJ van der Walt *Constitutional Property Law* (2005) 129.

⁸ AJ van der Walt *Constitutional Property Law* (2005) 216.

clause. However, due to the structure and aim of the Australian Constitution the focus is not on protecting the individual, but rather on protecting federalism (in other words, sustaining the divide between the federal government and the states).⁹ The German example is perhaps the closest to South Africa, since the South African property clause was partly based on the German equivalent. This will be discussed in the next paragraph.

4.2 Germany

4.2.1 Introduction

Section 25 of the South African Constitution was heavily influenced by article 14.3 of the German Basic Law.¹⁰ The property clause was one of the most contentious issues in the drafting of the bill of rights,¹¹ and the drafters of the Constitution sought assistance from foreign constitutions.¹² However, De Waal states, “like any other Constitution, the Basic Law is more than a tree from which one can pluck little BMWs which could happily be driven on South African roads”.¹³ Most constitutions are born out of a history of past struggles, and when doing a comparative analysis, one should be careful not to lose sight of the histories that go with the birth of a Constitution.¹⁴ Nevertheless,

⁹ AJ van der Walt *Constitutional Property Law* (2005) 250.

¹⁰ Basic Law of the Federal Republic of Germany. The term *Verfassung* (constitution) is not used.

¹¹ M Chaskalson “Stumbling towards section 28: Negotiations over the protection of property rights in the interim Constitution” (1995) 11 *SAJHR* 222. See paragraph 3.2.

¹² For De Waal it is not surprising that South African lawyers and politicians turned to Germany for help with the advent of constitutionalism in South Africa, since many scholars studied in Germany with the help of research grants. They are, for instance, DG Kleyn, S Scott, TJ Scott, JC Sonnekus, CG van der Merwe and AJ van der Walt. A Rabie, S Van der Merwe & JMT Labuschagne “The Contribution of the Alexander von Humboldt Foundation to the Development of the South African Legal System and Literature” (1993) 56 *THRHR* 608 611 - 612; LM du Plessis “German *Verfassungsrecht* under the Southern Cross” in F Hufen *Verfassungen: Zwischen Recht und Politik (Festschrift zum 70. Geburtstag für Hans-Peter Schneider)* (2008) 524. During the drafting of the Constitution, there were at least five Humboldt scholars involved as technical advisors. LM du Plessis “Learned *Staatsrecht* from the Heartland of the *Rechtsstaat*” (2005) 1 *PER* 1 6 www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/PER/issues/2005_1_Du_Plessis_article_tdp.pdf [as on 27 September 2007]. J de Waal “A Comparative Analysis of the Provisions of the German Origin in the Interim Bill of Rights” (1995) 11 *SAJHR* 1.

¹³ J de Waal “A Comparative Analysis of the Provisions of the German Origin in the Interim Bill of Rights” (1995) 11 *SAJHR* 1 2.

¹⁴ J de Waal “A Comparative Analysis of the Provisions of the German Origin in the Interim Bill of Rights” (1995) 11 *SAJHR* 1 2.

as a young democracy, South Africa can learn from the experience of Germany since both entailed setting up a constitutional democracy with a “*nie wieder!*” inspiration for drafting a bill of rights.¹⁵ Some of the provisions in the South African bill of rights are directly copied from the German Basic Law, and it is therefore helpful to look at Germany for interpretation possibilities and guidelines.¹⁶ The German example is interesting since they distinguish between deprivations and expropriations. The state is allowed to determine the contents and limits of property without compensation (deprivation), and when the state wants to expropriate property, it must do so in terms of an act that states that compensation is due, and how it should be calculated. The decision whether something amounts to an expropriation therefore lies with the legislature. The German example is therefore relevant in the South African context since it can serve as an example of how *not* to pay for every interference with property, making the regulation of property by the state affordable.

In order to understand the context of expropriation in the property clause, a short summary of the structure and application of the German property clause follows in the next paragraph.

4.2.2 The German property clause

Article 14 of the Basic Law states:

- (1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
- (2) Property entails obligations. Its use shall also serve the public good.
- (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute

¹⁵ LM du Plessis “German *Verfassungsrecht* under the Southern Cross” in F Hufen *Verfassungen: Zwischen Recht und Politik (Festschrift zum 70. Geburtstag für Hans-Peter Schneider)* (2008) 524; LM du Plessis “Learned *Staatsrecht* from the Heartland of the *Rechtsstaat*” (2005)1 *PER* 1 8 www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/PER/issues/2005_1_Du_Plessis_article_tdp.pdf [as on 27 September 2007].

¹⁶ J de Waal “A Comparative Analysis of the Provisions of the German Origin in the Interim Bill of Rights” (1995) 11 *SAJHR* 1 3.

respecting the amount of compensation, recourse may be had to the ordinary courts.¹⁷

The fundamental purpose of article 14 provides the interpretive framework for the section. The fundamental purpose regards the property guarantee as “[...] a fundamental (human) right, [...] which is meant to secure, for the holder of property, [...] an area of personal liberty [...] in the patrimonial sphere, [...] to enable her to take responsibility for the free development and organization of her own life [...] within the larger social and legal context”.¹⁸ The purpose of article 14 is to protect not property, but individual liberty. Liberty is important to enable the individual to participate in society in developing a social, legal and political order.¹⁹ Since article 14 provides for the utilisation of property to guarantee personal liberty, the individual is enabled to live an autonomous life in the broader social, legal and economic order.²⁰ Article 14 is characterised by the tension between the liberal view of property that emphasises the individual’s rights as justified by natural law, and the social function of property according to which property rights are created and restricted in the social context.²¹ This tension between the protection of individual autonomy and the social aspect of property results in the German concept of property²² not be-

¹⁷ For purposes of this dissertation the format of citing article 14 would be 14.3.1 where the 1 refers to the first sentence of article 14.3. In Germany, the custom is to cite it as article 14, subsection 3, first sentence. The most important courts for purposes of this dissertation are the Federal Constitutional Court (*Bundesverfassungsgericht* or *BVerfG*) that decides whether legislation, state action or decisions of the federal courts and lower courts are in line with the Basic Law; Federal Administrative Court (*Bundesverwaltungsgericht* or *BVerwG*) that decides on the validity of the administrative action; Federal Court of Justice in Civil Matters (*Bundesgerichtshof* or *BGH*) that decides on the compensation issue.

¹⁸ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 124.

¹⁹ GS Alexander *The Global Debate over Constitutional Property* (2006) 114. The *Deichordnung* case confirms that the property guarantee is not for the protection of property as such, but serves as a guarantee for the protection of personal liberty, which in turn serves dignity. *BVerfGE* 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*) 400. In English it is also referred to as the Hamburg Flood Control Case. For an English abstract, see DP Kommers *The Constitutional Jurisprudence of the Federal Republic of Germany* (1997) 250.

²⁰ M Sachs *Grundgesetz Kommentar* 3rd ed (2003) 612 7.

²¹ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 122. See also G Alexander “Constitutionalising Property: Two Experiences, Two Dilemmas” in J McLean (ed) *Property and the Constitution* (1999) 88 93 – 96 for a discussion of the dualistic nature of property in the German property clause and a comparison with the United States.

²² Article 14 specifically protects a constitutional right. Private law (property) rights are protected by the German Civil Code (*Bürgerliches Gesetzbuch* or *BGB*). The type of protection afforded under the Civil Code is different from the protection under the Basic Law, but property rights in the Civil Code still need to adhere to the article 14 requirements of the Basic Law. The concept of property (*Eigentum*) that is protected by the Basic Law is more comprehensive than the Civil Code’s property (also referred to as *Eigentum*) that restricts

ing static, but rather a concept that develops along with the ever-changing society.²³

The Federal Constitutional Court²⁴ has stated that this individual freedom and the social function of property are not mutually exclusive, since the same right that protects the individual's freedom makes it possible for the individual to participate in the formation of society and an economic order, thereby building a social order. This becomes visible in article 14 of the Basic Law, where the individual's property rights are both guaranteed in article 14.1 and limited and subjected to expropriation in article 14.3. Furthermore, if there is an infringement of the individual's property right such as expropriation, a balancing of the individual's interest against that of the society needs to take place.²⁵

Article 14.1 is a positive guarantee. It is not absolute, but limited by articles 14.2 and 14.3. Article 14.1 contains two guarantees. Firstly, it is an individual guarantee (*Bestandsgarantie*) that protects the individual from specific state interferences because it lays down specific boundaries and sets down certain requirements for government interference.²⁶ Secondly, it is an institutional guarantee (*Institutionsgarantie*) where the whole system or institution of private property is protected. The state is prohibited from removing certain categories of property (for example mineral rights or water rights) from the private property sphere.²⁷ This needs to be seen in the framework of the fundamental purpose of article 14. A category of property may sometimes be removed

property to tangible, corporeal things. See AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 127.

²³ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 127.

²⁴ Regulatory deprivation may affect property negatively, and the degree of severity will depend on the nature of the property and the relation to the autonomy of the person. If the property has a strong social relation, then the state has wider powers to regulate it. If the property serves a personal function, then the state has limited power to regulate the property. *BVerfGE* 89, 1 [1993] (*Besitzrecht des Mieters*); *BVerfGE* 50, 290 [1979] (*Mitbestimmung*).

²⁵ D Kleyn "Constitutional Protection of Property: A Comparison between the German and the South African Approach" (1996) 11 *SAPR/PL* 402 412 - 413; AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 344. The same tension is present in the South African property clause, where the individual is guaranteed rights in property while the welfare of society is also protected through the limitations put on individual property rights, such as the requirement that expropriation of property must be in public interest. As with the German interpretation of the property rights, in South Africa it is even more so that the balancing of the private and the social interest will determine the application of the clauses.

²⁶ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 128.

²⁷ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 129.

from the private sphere if it can be more effectively regulated publicly in order to secure the sphere of personal liberty.²⁸

Article 14.2 read with article 14.1.2 indicates that the constitutional protection of property is not absolute, but subject to social limitations.²⁹ The individual property interest should be balanced with the social or public interest in the use of the property. The fundamental guarantee is also important in this context, as it serves as a prohibition against regulatory excess in that the more security an individual property right provides for personal liberty of a holder, the more restricted the legislature is from interfering with that right.³⁰

Article 14.3 is the authority for expropriation, and limits the state's power to expropriate by requiring that it must be authorised by law, that it be for a public purpose, that there is a *Junktim-Klausel*³¹ and that compensation is paid.

From this introduction it is therefore clear that the German property clause does not distinguish between deprivation and expropriation, but states that where the content and limits of property is determined, the state need not pay compensation. Article 14.3 furthermore states that expropriation is possible, but only by a law that makes provision for compensation. Such an outline of the property clause therefore makes it clear that in Germany, there is a sharp distinction between the state determining the content and limits, and expropriation. What is also evident is that, when the courts have to determine whether such limitations are constitutional, they have to do so within the framework of the fundamental purpose of constitutional property.

4.2.3 Deprivation and expropriation

Since the individual guarantee of property is not an absolute guarantee, the interests of the individual are only protected insofar as such protection can be

²⁸ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 130. See also *BVerfGE* 42, 263 [1976] (*Contergan*); *BVerfGE* 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*); *BVerfGE* 112, 93 [2004] (*Zwangsarbeitsentschädigung*).

²⁹ Article 14.1.2 refers to state interferences through regulation that determine the content and limits of property rights. Article 14.1.2, read with the public interest requirement in article 14.2, can be seen as deprivation, although this terminology is not employed in Germany.

³⁰ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 133, 135.

³¹ See paragraph 4.2.4.4 for a discussion and definition of the *Junktim-Klausel*.

justified in the broader society.³² In the context of expropriation this means that the individual is protected insofar as the individual guarantee (*Bestandsgarantie*) is replaced with a guarantee of value (or *Wertgarantie*).³³ This contains the property holder's right to compensation.³⁴

The courts draw a distinction between constitutional expropriations and other similar forms of limiting property.³⁵ *Enteignung* (expropriation) refers only to the instances that meet the requirements of article 14.3.³⁶ *Enteignungs-gleiche Eingriffe* are instances where legislation unintentionally infringes on an owner's property rights with regulations. It is the unforeseen consequence of a legal administrative action that oversteps the boundaries of the sacrifice an owner is expected to make with regards to his/her property. Usually these infringements are justified by article 14.1.2, but in these cases the nature, character and intensity would require an exceptional sacrifice from the owner.³⁷ There is a clear distinction between a deprivation and an expropriation, since the *Junktim-Klausel*³⁸ makes provision for compensation a pre-requisite for a valid expropriation. An expropriatory infringement is not an expropriation and compensation is not payable.³⁹

There have been cases in the civil courts⁴⁰ where compensation-like monies have been paid for *enteignungsgleiche Eingriffe*, but that is more the exception than the rule. It is important to know that these payments are not compensation for expropriation (*Enteignungsentshädigung*), but payments to reduce the burden of the individual property holder (*Ausgleich* payment) or

³² BVerfGE 104, 1 [2001] (*Baulandumlegung*).

³³ See M Sachs *Grundgesetz Kommentar* 3rd ed (2003) article 14 par 9 – it is only the *Wert* interests that are guaranteed, and not the economic interests that can change with the market. Usually the property is removed from the owner's sphere of influence and requires compensation to be paid, and in this instance, article 14.3 serves as a *Wertgarantie* or a guarantee of value. H Mostert "Does German Law Still Matter?" (2002) 3 available at: <http://www.germanlawjournal.com/article.php?id=183> [as on 29 October 2008] par 14; AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 146.

³⁴ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 129.

³⁵ H Büchs *Handbuch des Eigentums- und Entschädigungsrechts* 3rd ed (1996) 5.

³⁶ BVerfGE 58, 300 [1981] (*Naßauskiesung*).

³⁷ H Maurer "Der enteignende Eingriff und die ausgleichspflichtige Inhaltsbestimmung des Eigentums" (1991) *DVBI* 106 782 782.

³⁸ See 4.2.4.4.

³⁹ H Maurer "Der enteignende Eingriff und die ausgleichspflichtige Inhaltsbestimmung des Eigentums" (1991) *DVBI* 106 782 782.

⁴⁰ *BGHZ* 6, 270 [1952]; *BGHZ* 64, 220 [1975]; *BGHZ* 54, 384 [1970]; *BGHZ* 57, 359 [1971].

“equalisation payments”.⁴¹ According to the proportionality requirement, the individual cannot be expected to bear the extraordinary sacrifice in the public interest and the monies paid lessened the burden to restore the balance between the individual and the public interest. These equalisation payments are calculated with reference to the loss of the owner and not the value of the property because there is no expropriation.⁴²

Compensation for expropriation is only due once all the article 14.3 requirements are met. Expropriation in terms of article 14.3 is a partial or complete taking of individual property holdings for the realisation of specific public duties. It is a lawful limitation of property, subject to the requirements of article 14.3. These requirements will be discussed in paragraph 4.2.4. What follows is a discussion of the *Naßauskiesung* case to illustrate the difficulties that arise when legislation, meant to determine the content and limits of property, has an expropriatory effect.

In the *Naßauskiesung* case⁴³ the question arose what to do in cases of *enteignungsgleiche Eingriffe*.⁴⁴ The Federal Water Resources Act⁴⁵ required that a person whose activities affect the quantity or quality of groundwater had to obtain a permit. This permit was only valid for a limited period and had to be used for the specific purposes that were allowed by statute. The aim of the law was to protect underground water from pollution and waste. The statutory provision did not provide for compensation or expropriation. The plaintiff in this case was the owner of a parcel of land and has been excavating gravel from it for decades. He applied for a permit to excavate and therefore influence the underground water, but was not granted one. He subsequently could not excavate gravel, and suffered a loss. The plaintiff claimed that the denial of the permit violated his right to property as well as his occupational

⁴¹ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 144. This is one instance where the German approach can be distinguished from the American approach. In the United States, compensation for expropriation is sometimes paid for a regulation that “goes too far”. See 4.3.2.

⁴² AJ van der Walt *Constitutional Property Law* (2005) 135.

⁴³ BVerfGE 58, 300 [1981] (*Naßauskiesung*) 300 – 309.

⁴⁴ H Mostert “Does German Law Still Matter?” (2002) 3 *German Law Journal* available at <http://www.germanlawjournal.com/article.php?id=183> [as on 29 October 2008] par 16.

⁴⁵ *Wasserhaushaltsgesetz* or *WHG*.

rights. The question was whether the effect of the regulation amounts to over-regulation and was thus incompatible with article 14 of the Basic Law.

The problem is that the property clause allows for the regulation of property (article 14.1.2) that determines the content and limits of property, as well as expropriation (article 14.3.2). In the *Naßauskiesung* case the regulation determined the limits and content of property. The Federal Constitutional Court made it clear that expropriation under the property clause is a restricted category of limitations and the specific requirements of article 14.3 must be fulfilled to render it an expropriation. If the requirements are not met, then it does not amount to expropriation and no compensation is needed. The law will be declared unconstitutional. Likewise, where the law determines the content and limits of the property, and is unduly burdens one person (regulatory access), then the court can declare such a law invalid. In some instances of regulatory access, an equalisation payment is sometimes paid to counter the disproportionate effect of the regulation, and save it from invalidation.⁴⁶

The court therefore held⁴⁷ that compensation for expropriation is due only when an expropriation satisfies the requirements of article 14.3. If a statutory regulation contravenes articles 14.1 and 14.2, it is invalid. It cannot be an expropriation, even if it requires sacrifices from the individual, as expropriation has its own strict requirements such as the *Junktim-Klausel*.⁴⁸ This means that a law can only expropriate if it provides for compensation. Regulatory laws that do not provide for compensation can never be an expropriation because of these requirements and payment of compensation does not change that.

The court ruled that in instances where a regulation has an expropriatory effect, the validity of the law must be attacked and not the absence of compensation. The court further made it clear that when the Federal Court of Justice awards compensation for the expropriatory effect of such a regulation, that it is not within the parameters of article 14.3.⁴⁹

⁴⁶ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 146.

⁴⁷ BVerfGE 58, 300 [1981] (*Naßauskiesung*) 335.

⁴⁸ See paragraph 4.2.4.4.

⁴⁹ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 142. The Federal Courts, however, kept on making these *Ausgleich* payments, see BGHZ 90, 17

The Basic Law's concept of property means that a property system must be just towards the interests of both the individual and society. Private law legislation, as made by the legislature, must provide for this balancing of rights. This means that the Water Act did not expropriate or diminish existing property rights and entitlements pertaining to the use of the groundwater. Instead, it (re)established the content and limits of the rights to use groundwater with reference to the property rights of a landowner. Therefore, the only question that remained was whether the legislature "over-regulated" by not adhering to its duty in terms of article 14.1.1 to protect individual property holdings and the article 14.2 duty to do so with regard to the public purpose.⁵⁰

Despite the Federal Constitutional Court ruling in the *Naßauskiesung* case that these equalisation problems are problematic in the expropriation context, the lower civil courts continued to make these payments in instances where the regulation imposed an unusual sacrifice on the owner.⁵¹ This created some tension between the Federal Constitutional Court and the Federal Court of Justice in Civil Matters and the Federal Administrative Courts.⁵² The 1999 *Denkmalschutz* case⁵³ of the Federal Constitutional Court solved some of the tensions.

In this case the constitutionality of the Monument Protection Act of Rhineland-Palatinate⁵⁴ was challenged. The claimant was the owner of a villa built in the *Grunderzeit*, an era that was famous for the grandeur of its buildings. The villa was protected under the act and the state's permission had to be obtained to demolish the building. The owner was not allowed to use the building as an apartment or for any non-residential purposes, and had to pay a lot of money just to own the building. The owner tried to sell the building, but could not find a buyer. The upkeep of the building became too expensive, and the owner applied for a demolition order. His application to demolish the

[1984], *BHGZ* 91, 20 [1984]. In *BGHZ* 64, 220 [1975] the court re-iterated that this is not payment of compensation under article 14.3, but a payment to soften the impact of the regulation and thereby save it from constitutional invalidity. See also the Federal Constitutional Court case *BVerfGE* 79, 174 [1988] that admitted that these payments sometimes solve a problem that cannot be otherwise solved.

⁵⁰ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 145.

⁵¹ *BGHZ* 90, 17 [1984], *BGHZ* 91, 20 [1984].

⁵² GS Alexander *The Global Debate over Constitutional Property* (2006) 119.

⁵³ *BVerfGE* 100, 226 [1999] (*Denkmalschutz*).

⁵⁴ *Denkmalschutz- und -pflegegesetz* or *DSchPflG*.

building was denied because, according to the act, only the public interest had to be taken into account when the owner applied for a demolition order.

The Federal Constitutional Court found that the restriction amounted to a regulation and not an expropriation, based on the *Naßauskiesung* case.⁵⁵ Therefore, the only remedy available for the regulation that violated the owner's article 14.1 rights was to rule that the statute should be invalid. The court then looked at the intention of the regulation to confirm that it is a regulation and not an expropriation. The court found that the intention of the legislature was not to remove the asset from the owner that requires compensation. The court therefore made a categorical distinction between regulation and expropriation. The court found that the act is invalid as no meaningful possible use of the building remained. This heavy burden in effect deprives the owner of ownership.⁵⁶

The court thereafter considered whether the impact of the regulation could be remedied through an equalisation payment. The court ruled that not every interference should end up in court. Where possible, the impact should be lessened administratively with nonmonetary equalisation (such as noise abatement devices) which is already provided for. The legislature should also make provision in the act for the possibility of equalisation (by way of a *salvatorische Entschädigungsklauseln*).⁵⁷ This means that where the regulation did not foresee the possibility of undue burden it would be invalid because, in the absence of equalisation, the regulation is disproportionate.⁵⁸

The implication of these two cases is that a regulation that has an expropriatory effect can never amount to an expropriation in German Law. The *Denkmalschutz* case made it clear that monetary compensation is not the only way to equalise the unfair burden of a regulation. The payment of the equalisation monies will not convert a regulation into an expropriation; it will remain a regulation.⁵⁹ The equalisation (be it in payment of money or other mitigation) merely saves the regulation from invalidity. All expropriations must therefore

⁵⁵ BVerfGE 100, 226 [1999] (*Denkmalschutz*) 287.

⁵⁶ BVerfGE 100, 226 [1999] (*Denkmalschutz*) C I 1.

⁵⁷ BVerfGE 100, 226 [1999] (*Denkmalschutz*) C II 2.

⁵⁸ GS Alexander *The Global Debate over Constitutional Property* (2006) 120.

⁵⁹ This is an important difference from the American approach, see paragraph 4.3.2.

satisfy the article 14.3 requirements. They will be discussed in the next paragraph.

4.2.4 Expropriation requirements

4.2.4.1 Introduction

In the *Naßauskiesung* case the Federal Constitutional Court made it clear that expropriation must fulfil the requirements of article 14.3.⁶⁰ Other infringements that have the same effect as an expropriation but do not fulfil the article 14.3 requirements cannot be an expropriation; they either will amount to invalid regulation or might be saved from invalidity by equalisation payments.⁶¹

Article 14.3 should be evaluated in the context of the fundamental purpose of article 14, according to which the limitation of property must be justified in that fulfilling the public duty must be more important than securing an individual property right.⁶² Article 14.3 requires that the expropriation must be authorised by a valid law; it must be undertaken for a public purpose (“*Zum Wohl der Allgemeinheit*”)⁶³ must be authorised by a law that determines the nature and the extent of the compensation (the linking clause or *Junktim-Klausel*),⁶⁴ and must be accompanied by compensation.

⁶⁰ The government can convert private land and means of production into public ownership to promote social and political aims, but that will fall under article 15 of the Basic Law. Article 15 includes the requirement of such transfer of property to be in accordance with law and against payment of fair compensation. It differs from expropriation insofar as article 14 expropriations are done for public purposes that are politically neutral, while article 15 is more socio-political reorganisation. The subject of nationalisation is sensitive in light of the German history. Germany prefers to balance economic and political power in other ways, for example by worker participation in their employer's enterprise. The Constitution prohibits expropriation based on political, religious or racial discriminatory grounds in order to prevent a situation, like in Nazi Germany, where the government unlawfully seized the property of Jews, emigrants and political enemies without paying compensation. See Schmidt-Aßmann “Expropriation in the Federal Republic of Germany” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 86.

⁶¹ See paragraphs 4.2.3.

⁶² AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 147.

⁶³ BVerfGE 56, 249 [1980] (*Dürkheimer Gondelbahn*) 259.

⁶⁴ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 146.

4.2.4.2 Authorised by law

Authority for expropriation is not found in German common law foundations, but in laws. It is therefore a legislative-driven process. The executive is only allowed to execute the expropriation and not to create reasons for the expropriation,⁶⁵ otherwise the administration would be making law. Nevertheless, the executive has a great influence over expropriation since expropriation is included in the administrative planning process.⁶⁶

As in South Africa, there is not only one law (or statute) that regulates expropriation in German law, but expropriation is dealt with in various provisions of law that regulate highways, airports and so forth. The Federal Planning Code⁶⁷ of 1986 in sections 85 to 122 regulates expropriation for the purpose of urban development, and many expropriation provisions are modelled on those sections. This is also the case of the statutes enacted by the *Länder* (federal states). Despite the multitude of expropriation laws, on both federal and state level, the law on expropriation seems to be relatively uniform.⁶⁸

The law authorising the expropriation must state the public purpose and must provide for the nature and the extent of the compensation (the *Junktim-Klausel*). If the law does not provide for compensation, it is invalid and no expropriation therefore took place. Compensation is in such instances not an issue.

4.2.4.3 Public purpose

In the *Dürkheimer Gondelbahn* case⁶⁹ Dr Böhmer J discussed the public interest requirement in detail. Dr Böhmer stated that the public interest must be important enough to satisfy the extraordinary disturbance of the constitutional balance in society. The public interest should also be taken into account

⁶⁵ BVerfGE 56, 249 [1980] (*Dürkheimer Gondelbahn*) 262.

⁶⁶ E Schmidt-Aßmann "Expropriation in the Federal Republic of Germany" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 83.

⁶⁷ *Baugesetzbuch* or *BauGB*. A translation can be found on <http://www.iuscomp.org/gla/statutes/BauGB.htm#III1> [as on 15 March 2008].

⁶⁸ E Schmidt-Aßmann "Expropriation in the Federal Republic of Germany" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 82 – 83.

⁶⁹ BVerfGE 56, 249 [1980] (*Dürkheimer Gondelbahn*) 266 - 296.

when determining compensation.⁷⁰ Firstly, the public purpose requirement means that the expropriation must be strictly necessary for the proposed public purpose. Secondly, only public action that is for the general public interest and is strictly necessary is covered. Thirdly, the public interest requirement (*zum Wohle der Allgemeinheit*) as per article 14.3.1 is a narrow category. It must be distinguished from the public necessity (*Interessen der Allgemeinheit*) requirement in article 14.3.3. Roughly, article 14.3 can be divided as follows: article 14.3.1 protects the individual interest since it restricts the scope of expropriation. Article 14.3.3 protects the public interest and article 14.3.2 restricts the measure of compensation. Lastly, it should also be noted that the public interest requirement in article 14.3.1 should not be confused with article 14.2.⁷¹

The individual can only be expected to sacrifice his rights for the realisation of a public purpose. This protects the individual's interest and limits the state's expropriation powers. The proportionality principle is applicable since it requires a weighing up of the individual's right with the public purpose. If the individual's right weighs more than the public right, then expropriation cannot be sanctioned.⁷² Therefore, expropriation will only be sanctioned as a last resort (*ultima ratio*) and not if there are other less drastic measures available to serve the public purpose (*Übermaßverbot*).⁷³ In article 14.3.1 the scope of the expropriation is restricted by public purpose requirement that protects the individual property holders, while in article 14.3.2 the compensation amount is restricted by what is fair, protecting the public interest.⁷⁴

The public purpose requirement is generally regarded as an open-ended requirement that can be limited or expanded by the courts, but it cannot be amended by legislation or by an administrative decision. If a law or action does not comply with the public purpose requirement, it is unconstitutional since it conflicts with the Basic Law.⁷⁵ The courts will defer the indication of

⁷⁰ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 148.

⁷¹ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 148.

⁷² BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*) 421.

⁷³ E Schmidt-Aßmann "Expropriation in the Federal Republic of Germany" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 81.

⁷⁴ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 148.

⁷⁵ AJ van der Walt *Constitutional Property Law* (2005) 254

what is in the public purpose to the legislature when public purpose serves as a justification for the expropriation.⁷⁶ When the public purpose serves as an authority for the expropriation, however, it will be subjected to closer scrutiny, as inefficient reasons for the expropriation can invalidate the expropriation.⁷⁷

Expropriation cannot be for improper purposes (for example increase in state property)⁷⁸ or for the benefit of a third party. The German public purpose requirement is applied very strictly and taken seriously,⁷⁹ but the courts allow room for instances where an expropriation that serves a public purpose although it also benefits private persons. The courts' scrutiny of the authority for the expropriation (for the realisation of a public purpose) and the justification for this purpose means that the courts can control the state's exercise of power to a large extent.⁸⁰ It is only possible to hand over expropriated property to a private party if it is done for the general benefit and not only personal gain (for example supplying electricity).⁸¹ In order to expropriate property for the benefit of a private individual, two requirements must be met. Firstly there needs to be a guarantee that the expropriated land will go to the specific private entity, and secondly, at least part of the overall purpose must be for the benefit of the public.⁸² This approach gives the courts flexibility in developing the public purpose requirements as not to frustrate social or economic reforms in those instances where expropriation is needed for the redistribution of private property.⁸³

⁷⁶ *BVerfGE* 112, 93 [2004] (*Zwangsarbeitsentschädigung*).

⁷⁷ AJ van der Walt *Constitutional Property Law* (2005) 259.

⁷⁸ *BVerfGE* 38, 175 [1979] (*Rückenteignung*) 180.

⁷⁹ Compare with the United States approach in paragraph 4.3.3.2.

⁸⁰ AJ van der Walt *Constitutional Property Law* (2005) 260.

⁸¹ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 148. In *BVerfGE* 56, 249 [1980] (*Dürkheimer Gondelbahn*) 258 expropriation was refused for the building of a (public) cable car over private property. The court ruled that art 14.3 GG does not say anything about the private person as beneficiary of an expropriation, but if a project conducted by a private entity serves a public interest, then the profit made from such a venture is harmless (*unschädlich*). The court added that there is a presumption that a project passed through the official procedure at the municipality is just. In *BVerfGE* 66, 248 [1984] 257 an expropriation was allowed in order to facilitate the installation for electric cable and was constitutional even if it was for the contract of a private company. See also *BVerfGE* 74, 264 [1987] (*Boxberg*) where expropriation to develop a testing ground for a motor-car company was not allowed even if the public would benefit from the jobs and the economic stimulation.

⁸² *BVerfGE* 74, 264 [1987] (*Boxberg*) 285.

⁸³ AJ van der Walt *Constitutional Property Law* (2005) 253.

One of the more interesting implications of this public purpose requirement is that property, when it is expropriated for a public purpose but not used for such a purpose, must be returned to the owner even if compensation was paid.⁸⁴ This is called re-expropriation (*Rückenteignung*), where the expropriatee requests that his expropriated land be returned when it has not been used in the time and matter as dictated by the statute.⁸⁵ The same rules and procedures of expropriation apply, although the compensation payable (now by the expropriatee) may not exceed the market value at the time of the first expropriation. This can penalise the state in times of inflation but is still regarded as fair compensation since it is due to the state's failure to use the property for the proposed public purpose that the property is re-expropriated.⁸⁶

4.2.4.4 Junktim-Klausel

An expropriation is only valid if the law that authorises it also determines the nature and extent of the compensation (*Junktim-Klausel*). The *Junktim-Klausel* serves a dual function. Firstly, it serves as an assurance for the individual owner that expropriation will only occur once the question of compensation has been dealt with in legislation, as made by a democratically elected government. This legislation must stipulate the compensation amount or method to reach that amount explicitly. Secondly, it must protect the public and *fiscus* by not burdening it with unforeseen expenses.⁸⁷

The *Junktim-Klausel* places the decision of whether a particular limitation would amount to an expropriation in the hands of the legislature. This has various implications. Some regulations have the effect of depriving an owner of his property, but do not provide for the payment of compensation and thus

⁸⁴ BVerfGE 38, 175 [1979] (*Rückenteignung*).

⁸⁵ § 102 BauGB. Since the public purpose requirement is not considered in such cases, Schmidt-Aßmann is of the opinion that it is not really expropriation, but rather restitution. See E Schmidt-Aßmann "Expropriation in the Federal Republic of Germany" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 95. The court recently ruled that this rule is not applicable to the expropriations done by the *Deutsche Demokratische Republik* (DDR). BVerfGE 97, 89 [1997] (*Rückübereignungsanspruch*).

⁸⁶ E Schmidt-Aßmann "Expropriation in the Federal Republic of Germany" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 95.

⁸⁷ H Mostert "Does German Law Still Matter?" (2002) 3 *German Law Journal* available at <http://www.germanlawjournal.com/article.php?id=183> [as on 29 October 2008] par 16.

the requirements of article 14.3.2 are not met (*enteignende Eingriffe*). The Federal Constitutional Court held⁸⁸ that in such circumstances the correct route to follow is to attack the validity of the law in the administrative courts. This requirement also makes it easy to distinguish between a regulation that diminishes property rights and an expropriation, since an expropriation must be authorised by a law that provides for compensation.⁸⁹ If it does not provide for compensation, then the regulation that has an expropriatory effect will be either invalid or equalisation payment will be paid to save it from invalidity.

The *Junktim-Klausel* becomes problematic in the case of unintended expropriatory restrictions (*enteignende Eingriffe*), and it has been argued that this makes the idea of constructive expropriation theoretically impossible in Germany.⁹⁰ For an expropriation to be a valid, it needs to fulfil the requirements of article 14.3, including the *Junktim-Klausel*, which means that the infringement must have been foreseen. If this is not the case there can be no valid expropriation, and legislation that fails to provide for compensation can be invalidated or saved by the payment of an equalisation payment.⁹¹ In the *Naßauskiesung* case, the Federal Constitutional Court ruled that in the case of a regulation that has a deprivatory effect on property, the court cannot transform it into an expropriation, as article 14.3 has very specific requirements. Expropriation can only take place if it is authorised and affected explicitly by legislation that foresees and authorises it and provides for compensation.⁹² The *Junktim-Klausel* therefore serves the very important function of determining when an infringement is a deprivation or an expropriation that requires compensation.

4.2.4.5 Compensation

Article 14.3 advances the social objective of the property clause in requiring that compensation must reflect an equitable balance between the public inter-

⁸⁸ BVerfGE 58, 300 [1981] (*Naßauskiesung*).

⁸⁹ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 149.

⁹⁰ H Mostert "Does German Law Still Matter?" (2002) 3 *German Law Journal* available at <http://www.germanlawjournal.com/article.php?id=183> [as on 29 October 2008] par 16.

⁹¹ H Mostert "Does German Law Still Matter?" (2002) 3 *German Law Journal* available at <http://www.germanlawjournal.com/article.php?id=183> [as on 29 October 2008] par 16.

⁹² AJ van der Walt *Constitutional Property Law* (2005) 241.

est and the interests of those affected. This means that full market value need not always be paid. Compensation should be determined with the proportionality principle in mind. Each case has to be judged on its own facts and in its own context. In most cases the balance is struck by the payment of full market value, but in some cases, like the *Deichordnung* case,⁹³ compensation less than market value can also strike the balance. Compensation and the calculation of compensation will be dealt with in the next paragraphs.

4.2.5 Why is compensation paid?

The Weimar Constitution in article 153 changed the notion of full compensation, to adequate compensation. Full compensation was not required, as long as the compensation paid was equitable. The current article 14.3 states that compensation should be determined by a statute and that such compensation must reflect a just balance between the interest of the person affected and the public interest.⁹⁴ Before 1968 there was no difference for the Federal High Court between the Weimar's "adequate compensation" and the article 14.3 compensation. After the *Deichordnung* case⁹⁵ the courts even stated that "adequate compensation" is the result of the balancing in article 14.3, and that is real market value or full compensation.⁹⁶ The purpose is to put the expropriatee in the same position (s)he would have been, if the expropriation had not taken place (*Äquivalenztheorie*). After the *Deichordnung* case⁹⁷ the Federal High Court did not follow the principles laid down in it, and it still adheres to the *Äquivalenztheorie*, emphasising the equalisation function of compensation.⁹⁸

When deciding on compensation, the individual in societal context becomes the focus point. Individual property rights should be seen in the context that property is needed to protect personal liberty, the fundamental guarantee. Compensation is therefore paid, not to protect property as a market com-

⁹³ BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*).

⁹⁴ D Kleyn "Constitutional Protection of Property: A Comparison between the German and the South African Approach" (1996) 11 *SAPR/PL* 402 442.

⁹⁵ BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*).

⁹⁶ BGHZ 59, 250 [1972] 258; BGHZ 11, 156 [1954] 165.

⁹⁷ BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*).

⁹⁸ W Leisner "Die Höhe der Enteignungsentschädigung" (1992) *NJW* 22 1409 1410.

modity, but property in the context of enabling the individual to lead a self-governing life.⁹⁹

4.2.6 Calculation of compensation

The courts distinguish between the constitutional principles of compensation and the calculation of compensation. The constitutional requirement for compensation in article 14.3.3 is that there must be an equitable balance between the interest affected (the interest of the owner) and the public interest.¹⁰⁰ This balancing requirement means that in certain circumstances compensation that is less than market value would be permissible.¹⁰¹ Market value and loss is thus important, but the balancing process implies that it can be adjusted if the balancing act so requires.¹⁰²

This balancing renders the determination of the compensation amount flexible, and seems to suggest that compensation less than market value should be possible.¹⁰³ The calculation of compensation is thus a finding of where the interests of the two sides are equalised, with neither the individual nor the public interest weighing more.¹⁰⁴

The legislature has a wide discretion to set the standards for compensation, and the Federal Constitutional Court has ruled¹⁰⁵ that a “rigorous market value only oriented”¹⁰⁶ approach is strange under the Constitution. The court ruled in the *Hamburgisches Deichordnungsgesetz* case that compensation does not

⁹⁹ G Alexander “Constitutionalising Property: Two Experiences, Two Dilemmas” in J McLean (ed) *Property and the Constitution* (1999) 88 99.

¹⁰⁰ BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*) 419. E Schmidt-Aßmann “Expropriation in the Federal Republic of Germany” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 88.

¹⁰¹ BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*).

¹⁰² AJ van der Walt *Constitutional Property Law* (2005) 273.

¹⁰³ D Kleyn “Constitutional Protection of Property: A Comparison between the German and the South African Approach” (1996) 11 *SAPR/PL* 402 442; AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 151. In BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*) 421 the Federal Constitutional Court confirmed this possibility.

¹⁰⁴ BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*) 420 – 421. The interest of the community is important since they ultimately have to pay the compensation (through taxes). See E Schmidt-Aßmann “Expropriation in the Federal Republic of Germany” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 88.

¹⁰⁵ BVerfGE 24, 367 (*Hamburgisches Deichordnungsgesetz*) (1968).

¹⁰⁶ “Eine starre, allein am Marktwert orientierte Entschädigung ist somit dem Grundgesetz fremd“ BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*) 421.

always mean that the expropriatee should be compensated for the “full equivalent of the value of that which is expropriated”.¹⁰⁷ The legislature can enact laws that allow for compensation that is less than market value.¹⁰⁸ The legislature must enact laws that adhere to these principles.¹⁰⁹

The Federal Planning Code¹¹⁰ sets out the specific procedures on how to calculate compensation. § 93.1¹¹¹ confirms that where expropriation takes place, compensation is due. Compensation is paid for rights and land lost at expropriation.¹¹² Compensation is determined either on the date on which the expropriation authority applies for the expropriation or on the date on which the state takes possession of the property.¹¹³ Where the initial offer was inadequate and an amount must be determined by a court, more recent price levels can be considered to adhere to the principle of fairness.¹¹⁴ Compensation is payable soon after the decision to expropriate.¹¹⁵

Market value plays a central role in the compensation of substance. The Federal Planning Code¹¹⁶ provides in § 194 that “[t]he standardised market value is [...] the price which would be achieved in an ordinary transaction at the time when the assessment is made, taking into account the existing legal circumstances and the actual characteristics, general condition and location of the property or other object of assessment, without consideration being given to any extraordinary or personal circumstances”. Expropriation is regarded as a proceeding *in rem* and therefore, when determining compensation, the focus

¹⁰⁷ “Es trifft auch nicht zu, daß den Enteigneten durch die Entschädigung stets das ‚volle Äquivalent für das Genommene gegeben werden muß“ *BVerfGE* 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*) 421.

¹⁰⁸ *BVerfGE* 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*) 421.

¹⁰⁹ E Schmidt-Aßmann “Expropriation in the Federal Republic of Germany” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 88 – 89.

¹¹⁰ *BauGB*.

¹¹¹ *BauGB*.

¹¹² § 93.2 *BauGB*.

¹¹³ § 93.4 *BauGB*. These are features that are inherent in the land at the time of the decision. Features that develops after this time or the increase of value because of the proposed project will be disregarded. See § 95.2.2 that looks like the *Pointe Gourde* principle. See also paragraph 2.4.4.5.

¹¹⁴ E Schmidt-Aßmann “Expropriation in the Federal Republic of Germany” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 90.

¹¹⁵ E Schmidt-Aßmann “Expropriation in the Federal Republic of Germany” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 90.

¹¹⁶ *BauGB*.

is on the property. Factors particular to the owner may sometimes be taken into account in supplementary “equitable compensation”.¹¹⁷

Additional monetary compensation is also payable in accordance with § 96.¹¹⁸ This includes loss suffered by the expropriatee in pursuance of his profession or livelihood,¹¹⁹ relocation costs,¹²⁰ and severance damages in the case of partial expropriation.¹²¹

The method used to calculate market value is the comparable sales method or the capitalized income method.¹²² Compensation is paid to all parties with interests in the land that are terminated upon expropriation and that suffer monetary loss because of the expropriation.¹²³ The holders of real rights are compensated for their loss, but the fact that their rights in the land are not forever, is taken into account.¹²⁴

Where the expropriatee benefits from the compensation, such a benefit will be set off against the payment (*Vorteilsausgleichung*). This may well result in the expropriatee not receiving any compensation for the expropriation, if the benefit equals out the burden.¹²⁵

The law sometimes permits an owner a “take-over” claim (*Übernahmearspruch*) where an owner whose land is burdened by a public project asks the public authority to take over his / her land. This is usually the case where the authority only intended to expropriate part of the land but then discovers that the remainder cannot be used in an economic manner after the expropriation.¹²⁶ Similarly, when an owner’s land has been designated for a future public purpose, the owner can also claim a “take-over” if it is impossible for

¹¹⁷ E Schmidt-Aßmann “Expropriation in the Federal Republic of Germany” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 91. § 181 *BauGB* protects tenants in this respect.

¹¹⁸ *BauGB*.

¹¹⁹ § 96.1.1 *BauGB*.

¹²⁰ § 96.1.2 *BauGB*.

¹²¹ § 96.1.3 *BauGB*.

¹²² E Schmidt-Aßmann “Expropriation in the Federal Republic of Germany” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 89.

¹²³ § 94 *BaugGB*.

¹²⁴ E Schmidt-Aßmann “Expropriation in the Federal Republic of Germany” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 93.

¹²⁵ E Schmidt-Aßmann “Expropriation in the Federal Republic of Germany” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 92.

¹²⁶ § 92.3 *BauGB*.

him / her to utilise the property in an economic manner until the expropriation.¹²⁷

4.2.7 Conclusion

Comparing the German example with the South African example, a few differences and similarities emerge. Firstly, the South African property clause does not have a fundamental purpose according to which it should be interpreted. Although the Constitution itself should be interpreted purposively to give effect to its transformative aspirations, as was shown in chapter 3, there is no specific framework for the property clause. That being said, the similarities of the property clauses and the specific focus on the individual rights that must be weighed up with the public interest, does imply that also in the South African context, property has a social function.

The German requirements for a valid expropriation correlate with the South African requirements, except for the *Junktim-Klausel*. The *Junktim-Klausel* is the reason why in Germany, there is a neat distinction between determining the content and limits of property (“deprivation”), and expropriation. In South Africa, and especially after the *FNB* decision, this is not the case. Expropriation is a sub-type of deprivation, and only certain deprivations are expropriations. This can lead to possible confusion, and South Africa might benefit from following the German approach in the future. This would mean that the legislature determines *when* something amounts to an expropriation, and when compensation is due, with the courts merely ruling on whether such a law is valid or not. In those instances where the deprivation then burdens an individual unduly, it might be beneficial to consider equalisation payments.

As far as the calculation of compensation is concerned, it correlates largely with the South African position. In chapter 2 it was shown that compensation in pre-constitutional South Africa meant market value. In Germany, market value also plays a central role in the calculation of compensation. In Germany, as was shown, there are Federal Constitutional Cases where the court

¹²⁷ E Schmidt-Aßmann “Expropriation in the Federal Republic of Germany” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 95.

acknowledged that market value is not always the ideal. It is therefore safe to say, that in *most* cases in Germany, market value would be paid, but that German expropriation law is flexible enough to allow in certain instances for compensation less than market value.

4.3 United States of America

4.3.1 The property clause in the United States of America Constitution

The United States of America property guarantee is found in the Fifth and the Fourteenth Amendments for the United States of America Constitution. The Fifth Amendment, also known as the “takings clause” was incorporated in the United States of America Constitution in 1791, with the Fourteenth Amendment, the “due process clause”, being added in 1868.¹²⁸

The Fifth and Fourteenth Amendments state:

(V) No person shall be [...] deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(XIV) [...] No state shall [...] deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment was initially regarded as restricting only the federal government,¹²⁹ but in *Chicago Burlington and Quincy Railroad Co v City of Chicago*¹³⁰ the Supreme Court ruled that by virtue of the Fourteenth Amendment, the Fifth Amendment also applies to the states.¹³¹ This means that since the principles embodied in the Fifth Amendment have been incorporated

¹²⁸ LR Monk *The Words We Live By* (2003) 170.

¹²⁹ LR Monk *The Words We Live By* (2003) 170; AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 399; *Barron v Baltimore* 7 Pet 243 (1833) 247.

¹³⁰ 166 US 226 (1897).

¹³¹ LR Monk *The Words We Live By* (2003) 170; JH Garvey & TA Aleinikoff *Modern Constitutional Theory* 3rd ed (1994) 362; AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 399; *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency* 535 US 302 (2002); RM Sullivan “Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 160.

into the Fourteenth Amendment an owner is entitled to compensation upon expropriation of property by the states too.¹³²

The guarantee is negatively framed, since it protects the individual from state interference by making sure that any interference is in accordance with due process, and that expropriations (or takings) are compensated. Both the exercise of eminent domain power (expropriation for a public purpose) and police power (the infringement of property in the public interest) require due process.¹³³

The government's power of eminent domain is an attribute of sovereignty. It is independent of constitutional provisions, superior to property rights,¹³⁴ and not based on common law.¹³⁵ The sovereign alone, as representative of the people, has such power.¹³⁶ It is seen as part of the government's duty to serve the common need and advance the general welfare.¹³⁷ The eminent domain power of the states, however, is special and limited by the Constitution and legislation.¹³⁸

The power of eminent domain as an attribute of sovereignty precedes the Constitution and legislative enactments.¹³⁹ Even if such a right is not conferred by the Constitution, it is still recognised, limited and regulated by the Constitution. The Constitution therefore serves as a limit to the power of eminent domain, which would otherwise be absolute.¹⁴⁰ The constitutional limits are meant to protect individual property rights by restraining the government's right to expropriate property.¹⁴¹ Since such provisions are for the protection of the individual, provisions concerning eminent domain should be liberally interpreted to fulfil that purpose.¹⁴² Legislation can be promulgated that limits

¹³² *John Corp v City of Houston* 214 F 3d 573 (2000).

¹³³ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 402.

¹³⁴ 29A CJS Eminent Domain § 2.

¹³⁵ *Maryland Plaza Redevelopment Corporation v Greenberg* 594 S W 2d 284 (1979).

¹³⁶ *Washington Metropolitan Area Transit Authority v One Parcel of Land in Montgomery County* 706 F 2d 1312 (1988).

¹³⁷ *Lake v Lake County* 233 Mont 126 759 P 2d 268 (1957).

¹³⁸ *Columbia Gas Transmission Corporation v An Exclusive Natural Gas Storage Easement* 688 F Supp 1245 (1988)

¹³⁹ *United States v 8677 Acre of Land in Richland Country* 42 F Supp 91 (1941).

¹⁴⁰ 29A CJS Eminent Domain § 3.

¹⁴¹ *City of Aurora v Commerce Group Corporation* 694 P 2d 382 (1984); AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 403.

¹⁴² *Liddick v City of Council Bluffs*, 232 Iowa 197 5 N W 2d 361 (1942).

property rights within the parameters of the Constitution. Legislation dealing with the power of eminent domain must be in conformity with the constitutional principles, since the Constitution is paramount.¹⁴³

The Supreme Court ruled in *Brooks-Scanlon Corporation v United States*¹⁴⁴ that it is the property itself and not the value of property that is protected by the Fifth Amendment. "Property" in the context of the Fifth Amendment has been given various meanings. In *Penn Central Transportation co v City of New York*¹⁴⁵ and *Loretto v Teleprompter Manhattan CATV Corp*¹⁴⁶ the court regarded it as a physical or tangible object. Economically viable rights created by positive law can also constitute property.¹⁴⁷ In *United States v General Motors Corp*¹⁴⁸ the court ruled that it is not the physical property itself, but the rights recognised by law in respect with the object, that is the property. In *Board of Regents v Roth*¹⁴⁹ the court ruled that it is not the Constitution that creates property interests, but that property interests are created by the existing rules and understandings of private law.¹⁵⁰ Some courts require that the right must be *vested* before it can be regarded as a property right. In such cases, when the legislation changes and thereby over-regulates a vested right, it can amount to an expropriation.¹⁵¹

The courts have power of review in three instances. Firstly, the court can inquire whether the power of eminent domain is for a public use. This is a mere rationality test that government easily satisfies.¹⁵² Secondly, the courts can ask whether the legislative branch has constitutionally delegated the power to

¹⁴³ 29A CJS Eminent Domain § 68.

¹⁴⁴ 44 S Ct 471 (1924).

¹⁴⁵ 438 US 104 (1978). The court did not divide the parcel of land into various segments, i.e. the airspace as a separate segment of the parcel of land.

¹⁴⁶ 458 US 419 (1982). The court stated that a unit of property can be an identifiable physical portion of something larger, i.e. the small area occupied by cable facilities.

¹⁴⁷ A Peterson "The Takings Clause: In Search of Underlying Principles Part I" (1989) 77 *Cal LR* 1299 1308.

¹⁴⁸ 323 US 373 (1945) 377 – 378.

¹⁴⁹ 408 US 564 (1972) 577.

¹⁵⁰ See *Ruckelshaus v Monsanto Co* 467 US 986 (1984) where the court viewed a manufacturer's trade secrets as property because it is so recognised by state law. Compare with *Nollan v California Coastal Commission* 483 US 825 (1987) where the court regarded what was taken as property, even if the Nollans never had the right to build in the first place.

¹⁵¹ A Peterson "The Takings Clause: In Search of Underlying Principles Part I" (1989) 77 *Cal LR* 1299 1314.

¹⁵² RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 158.

the executive branch. This is a broad power that mainly has to satisfy the public use requirement.¹⁵³ Thirdly, the court can be asked to determine whether a taking was arbitrary in connection to the choice of property, the time and the quantity of the property taken. This is not a wide power and the courts merely determine whether the taking was arbitrary or *ultra vires*.¹⁵⁴

Most eminent domain cases in the United States of America deal with the question of whether the government's actions amount to a taking that must be compensated. This is the so-called "takings issue"¹⁵⁵ and is discussed below.

4.3.2 Deprivation and expropriation

Expropriation, or a taking, refers to the state's power of eminent domain, while deprivation usually refers to the state's police or regulatory power. The source of power for each is different. Compensation is not necessary for a deprivation, while compensation is paid for expropriation.¹⁵⁶

The power of eminent domain differs from other governmental powers that can affect ownership and restrict the use of private property.¹⁵⁷ For instance, it is distinguished from a contractual purchase of property,¹⁵⁸ the taking or destruction of property in time of war,¹⁵⁹ damages in tort,¹⁶⁰ or forfeiture of property.¹⁶¹ These are all areas that are relatively easy to distinguish from the power of eminent domain. The area of uncertainty is where government regulation has the effect of taking property (inverse condemnation) that requires compensation. Police power can be distinguished in that the state interferes with private property but it is justifiable because it is done for a public purpose

¹⁵³ RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 158.

¹⁵⁴ RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 158; *Tuscarora Nation of Indians v Power Authority* 267 F 2d 885 (2d Cir 1958) 894.

¹⁵⁵ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 400.

¹⁵⁶ AJ van der Walt *Constitutional Property Law* (2005) 128.

¹⁵⁷ 29A CJS Eminent Domain § 5.

¹⁵⁸ *El du Pont de Nemours & Co v Hughes* 50 F 2d 821 (1931).

¹⁵⁹ 29A CJS Eminent Domain § 9; *Best v United States* 292 F 2d 274 (1961).

¹⁶⁰ *Miller v United States* 73 F 3d 878 (1995).

¹⁶¹ *Bowman v United States* 35 Fed Cl 397 (1996).

such as health and safety. However, a regulation that goes too far, or is not for a valid public purpose, can constitute a taking.¹⁶²

A regulatory taking occurs when regulation leads to the *de facto* taking of property. A landowner may institute inverse condemnation proceedings against the government for compensation when government regulation amounts to a taking of the landowner's property without substantially advancing a legitimate government interest, thereby denying the owner the economically viable use of his land.¹⁶³ It differs from eminent domain in that it is usually the aggrieved landowner that institutes an action against government for the payment of compensation for the alleged taking. It is called inverse condemnation because it is the landowner, and not the government, that institutes proceedings where the plaintiff owner relies solely on the Fifth Amendment.¹⁶⁴ In *San Diego Gas & Electric Co v San Diego*¹⁶⁵ the court ruled that inverse condemnation is where the landowner may recover just compensation in terms of the Fifth Amendment for a "taking" even if the government did not institute formal proceedings in terms of its eminent domain to expropriate the property. The question remains when such a regulation amounts to a taking.

In the famous case of *Pennsylvania Coal Co v Mahon*¹⁶⁶ the court per Holmes J ruled that police power and the power of eminent domain are different ends of a continuum. This implies that the state has police power to regulate property, but if an exercise of this power "goes too far" it would constitute a taking. *Mohan* was the start of a long debate to determine when a regulation would amount to a taking.¹⁶⁷ In *Penn Central Transportation co v City of New York*¹⁶⁸ Brennan J ruled that such a test is an open-ended contextual test that must be decided from case to case. The *Penn Central* test relied on the *ad hoc* factual inquiries to provide a structure that will guide the courts to identify when a

¹⁶² AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 403.

¹⁶³ *Lingle v Chevron USA Inc* 544 US 528 (2005).

¹⁶⁴ RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 170.

¹⁶⁵ 450 US 621 (1981) 638.

¹⁶⁶ 260 US 393 (1922) 415.

¹⁶⁷ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 401.

¹⁶⁸ 438 US 104 (1978) 124.

government action amounts to a taking. It is called the three-factor test.¹⁶⁹ The first factor to consider is the character of the government action, the second factor the extent to which such an action interferes with the claimant's investment backed activities and the third is the economic impact of governmental action on the claimant.¹⁷⁰

Two years later in *Agins v City of Tiburon*¹⁷¹ the court set out a two-part regulatory takings test, although it is uncertain how this test blends in or complements the *Penn Central* three-factor test. In *Agins v City of Tiburon*¹⁷² the court ruled that zoning law would be a taking if "the ordinance does not advance legitimate state interests" or it "denies an owner economically viable use of land".¹⁷³ The first part of the test was equated to a minimum rationality standard that was ignored in later cases, but brought back again in *Keystone Bituminous Coal Association v DeBenedictis*.¹⁷⁴ The "no economic viable use" test was a footnote in *Penn Central* before it became the second part in the *Agins* test, and finally was used as the only test in *DeBenedictis*.¹⁷⁵ It states that when the government interfered with property to such an extent that the owner has no economical viable use of the property afterwards, it will be regarded as a taking.

After *Mahon*, *Loretto v Teleprompter Manhattan CATV Corp*¹⁷⁶ abandoned the open-ended, contextual approach. The court developed a "per se" rule for permanent physical occupation of land, stating that it will always amount to a taking since it is a serious invasion of an owner's interest. The *Loretto per se* "permanent physical occupation" rule regards permanent physical occupation of an owner's property, authorised by government, as a taking. In *Loretto v Teleprompter Manhattan CATV Corp*¹⁷⁷ there was little economic impact on the owner, but since the court focussed on the government's action, the court

¹⁶⁹ *Penn Central Transportation Co v City of New York* 438 US 104 (1978) 124.

¹⁷⁰ For criticism of this test see A Peterson "The Takings Clause: In Search of Underlying Principles Part I" (1989) 77 *Cal LR* 1299 1315. AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 437.

¹⁷¹ 447 US 255 (1980).

¹⁷² 447 US 255 (1980) 260.

¹⁷³ *Agins v City of Tiburon* 447 US 255 (1980) 260.

¹⁷⁴ 480 US 470 (1987).

¹⁷⁵ A Peterson "The Takings Clause: In Search of Underlying Principles Part I" (1989) 77 *Cal LR* 1299 1330.

¹⁷⁶ 458 US 419 (1982).

¹⁷⁷ 458 US 419 (1982).

found that the government's physical invasion was serious and therefore warranted compensation.¹⁷⁸ In *Lingle v Chevron USA Inc*¹⁷⁹ the court confirmed that if the government requires an owner to suffer permanent physical invasion, it must provide compensation, even if the invasion was minor. In *Lucas v South Carolina Coastal Council*¹⁸⁰ the court added a second category, namely that a regulation would amount to a per se taking when the regulation prevents the plaintiff all economically beneficial use of his land. The court's justification for adding this to the list of instances where a regulation would be regarded as compensation is by distinguishing regulation that merely regulates nuisances from other instances. Since ownership was in any case subjected to the principle of nuisance law, and therefore always subjected to such regulation, that would not amount to a taking.¹⁸¹ *Hodel v Irving*¹⁸² added the third "per se" rule, by stating that regulation that destroys the core of property rights will also amount to a taking.

*First English Evangelical Lutheran Church of Glendale v County of Los Angeles*¹⁸³ re-ignited the debate surrounding the takings issue when the court ruled that a regulation that prohibited all use of property can amount to a taking that needs to be compensated.¹⁸⁴ Shortly thereafter, the court in *Nollan v California Coastal Commission*¹⁸⁵ again had to rule on whether a regulation that re-

¹⁷⁸ A Peterson "The Takings Clause: In Search of Underlying Principles Part I" (1989) 77 *Cal LR* 1299 1333. The court also stated (435) that when the invasion is temporary, then the court needs to balance the interests to determine whether it amounts to a taking. See for instance *Kaiser Aetna v United States* 444 US 164 (1979) and *PruneYard Shopping Centre v Robins* 447 US 74 (1980).

¹⁷⁹ 125 S Ct 2074 (2005).

¹⁸⁰ 505 US 1003 (1992). The courts had to rule whether an act promulgated after Lucas purchased a certain beachfront property amounted to a taking. The act precluded Lucas from developing the property the way he expected to develop it when he purchased the land, namely to build a house for himself and to keep the other piece for investment purposes. Since the land was only good as a camping ground that would be a negative value to Lucas, he argued that the property was deprived of all its economic value.

¹⁸¹ JH Garvey & LA Aleinikoff *Modern Constitutional Theory* 3rd ed (1994) 363.

¹⁸² 481 US 704 (1987).

¹⁸³ 482 US 304 (1987).

¹⁸⁴ In this case the County, after heavy floods, enacted an ordinance that prohibited development in the flood protected area. The church, as property owner, argued that this ordinance prohibited all use of the property. The court ruled that it was a taking that the government must compensate. This was overturned in the appellate court in *First English Evangelical Lutheran Church v County of Los Angeles* 482 US 304 (1989) on the basis that it was a valid safety measure enacted by the county for a reasonable period.

¹⁸⁵ 483 US 825 (1987).

stricts a landowner's use is a taking for purposes of the Fifth Amendment.¹⁸⁶ This case set a new standard of review for land use regulation in requiring that such a regulation must bear a "substantial relationship" to a legitimate state purpose in order to invoke the just compensation requirement. This also implied that the government can be held liable for the financial consequences of temporary takings.¹⁸⁷

The question of how to determine whether a regulation or other governmental actions have gone too far and constituted an expropriation (taking), does not seem to have a definite answer. Case law has laid down a few principles, although it is not clear when which principles apply. Many American scholars have tried to set up a formula for answering this question, trying to determine context-neutral rules for the courts' decisions. It would seem if the courts first try to establish whether the one of the three "per se" takings categories are present, namely physical occupation, denial of economically viable use or destruction of a core property right. If none of these categories is present, the open-ended inquiry of *Penn Central* will apply.¹⁸⁸ The three-factor test applies in such circumstances, with the courts looking at the nature of the government action, the diminution of value that results from the regulation and the extent to which regulation interferes with reasonable, investment-backed expectations.¹⁸⁹

Michelman's article¹⁹⁰ in 1987 reduced the court's doctrine to a series of categorical "either-ors". He states that "*either* (a) the regulation is categorically a taking of property because (i) it works a permanent physical occupation (however practically trivial) of private property by the government, or, perhaps,

¹⁸⁶ In this case the state granted the Nollans a permit to rebuild their home, but with the condition that they have to allow an easement on the property to the public over a portion of their beach frontage. Here the court rejected the condition since it found that there are not an essential nexus between the public purpose and the conditions of such a permit. If the state wanted to provide public access to the beach, it had to expropriate the property and pay just compensation for it. See RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 180.

¹⁸⁷ In reaction to this the government issued Executive Order 12630 in 1988, requiring federal agencies to comply with the principles established in those two decisions. See RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 180 – 182.

¹⁸⁸ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 437.

¹⁸⁹ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 437.

¹⁹⁰ F Michelman "Takings" (1988) 88 *Col LR* 1600.

specifically undermines a “distinct investment-backed expectation,” or (ii) it totally eliminates the property's economic value or “viability” to its nominal owner, or (b) the regulation is categorically not a taking.”¹⁹¹ Peterson¹⁹² summed it up in four tests that a court can choose from when determining when an interference amounts to a taking. They are the three-factor *Penn Central* test, the two-part *Agins* test, the “no economically viable use” test and the *Loretto per se* rule. For Tribe, it will not be a taking when the regulation advances a public interest, does not destroy one of the core elements of property in the bundle of property rights, leaves much of the commercial value of the property intact and includes some reciprocity of benefit.¹⁹³ These are not hard rules, but rather guidelines of why a court might find that a regulation amounted to a compensable taking.

Although it is not clear *when* government regulation or interference would be regarded as a taking, once it is ruled that government regulation amounts to a taking, there are requirements that must be complied with, namely government must follow due process, the taking must be for public use and against payment of compensation. These requirements are dealt with in more detail in the next paragraphs.

4.3.3 Expropriation requirements

4.3.3.1 Introduction

In the United States of America “takings” refers to both the state’s power of eminent domain and the practice where excessive regulatory takings are sometimes compensated, as discussed in the previous paragraph. It is therefore important to distinguish between the practice of regulatory takings, and the state’s use of eminent domain. In the latter case the state acquired something, and compensation is required, while in the former, the state does not

¹⁹¹ F Michelman “Takings” (1988) 88 *Col LR* 1600 1622.

¹⁹² A Peterson “The Takings Clause: In Search of Underlying Principles Part I” (1989) 77 *Cal LR* 1299. See also AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 428 – 440, where he discusses the same rules, in a different sequence.

¹⁹³ LH Tribe *American Constitutional Law* 2nd ed (1988) 597.

necessarily acquire something.¹⁹⁴ The requirements for expropriation are public use, due process and compensation.

4.3.3.2 Public use

In chapter 3 it was shown that the public purpose and public interest requirement in the constitutional South African expropriation law is not restricted to the narrow category of public use, and that a lenient interpretation would probably be used. This means that in some cases, specifically land reform cases, expropriation for the benefit of a private third party might be possible. In the United States of America, this is a contentious issue and the subject of much debate.

The Fifth Amendment prevents the legislature from depriving private persons of vested property rights, unless it is for public use and just compensation is paid.¹⁹⁵ Public use is a flexible requirement that changes with the expectations of citizens. It is therefore difficult to define precisely what the term entails, although it is clear that it excludes private benefit and the police power's public purpose.¹⁹⁶

Originally public use meant used by the public. Later two interpretations developed as to the meaning of the term. The first interpretation saw public use as a broad requirement that means public advantage, while the second strand

¹⁹⁴ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 423.

¹⁹⁵ *Landgraf v USI Film Products* 114 S Ct 1483 (1994).

¹⁹⁶ Public purpose is a justification for police power, and entails that police power regulation can be justified if it is for public health and safety. The constitutionality of a regulation can sometimes be attacked either by attacking the legitimacy of the police power or by claiming that the police power amounts to a taking that needs to be compensated. Both actions can be aimed at invalidating legislation, while the latter can also be a quest for compensation monies. The first will attack the purpose or the procedure, while the latter concentrates on the effect of the interference. Therefore, to save a regulation from invalidity when attacking the validity, government must show a public purpose (health and safety), while if the owner claims that the regulation goes too far and amounts to a taking, public health and safety issues cannot justify such interference. In later years socio-economic considerations are also seen as public purpose for police power purposes, especially in so-called rent-control cases. See *Pennell v City of San Jose* 485 US 1 (1988); *Yee v City of Escondido* 503 US 519 (1992); AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 412.

limited it to use by the public.¹⁹⁷ The courts follow the liberal interpretation of public use.¹⁹⁸

As stated above, the public use requirement does not restrict the government to a great extent anymore. Public use has been reduced to a mere rationality test, where the courts will only determine whether the expropriation is rationally related to a public purpose.¹⁹⁹ This is largely due to the impact of urbanisation and the decrease of land available for public use.²⁰⁰

The most contentious issue surrounding this requirement is whether expropriation that is for private benefit can be said to be for public use. *Berman v Parker*²⁰¹ was the start of a less strict public use requirement. The District of Columbia Redevelopment Act of 1945 condemned land for the redevelopment of an area. This would entail that one private party's property would be expropriated for the benefit of another private party. Nonetheless the court did not declare the act unconstitutional since it attached a liberal meaning to the concept public use. This includes the power of the legislature to determine that a community should be beautiful, healthy, spacious and clean. In addition, private agencies can be used to aide the government in achieving these values.²⁰² The court defined public use as "the product of legislative determinations addressed to the purposes of government [...] [and] subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legisla-

¹⁹⁷ RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 159.

¹⁹⁸ RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 164.

¹⁹⁹ *Hawaii Housing Authority v Midkiff* 467 US 229 (1984) 241. RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 154, 157-158.

²⁰⁰ RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 160.

²⁰¹ 348 US 26 (1954).

²⁰² *Berman v Parker* 348 US 26 (1954) 33.

ture, not the judiciary, is the main guardian of the public needs to be served by social legislation [...].”²⁰³

Thirty years later in *Hawaii Housing Authority v Midkiff*,²⁰⁴ a Hawaiian statute required lessors to sell their land to lessees at market value in order to adjust the patterns of landownership in Hawaii. Half of the land was owned by federal and state government, with the other half owned by seventy-two private owners. These landowners contended that the law violates the public use requirement in that it redistributes property from one private owner to another. The Supreme Court, relying on *Berman v Parker*, ruled that the act was valid since the state deemed the break-up of Hawaii’s feudal land system a valid public purpose. The court ruled that the eminent domain power is “rationally related” to a conceivable public purpose.²⁰⁵

From these two decisions it seems that as long as the legislature determined a public use and it is not impossible, the court will not invalidate an expropriation even if it is for a private benefit.²⁰⁶ Indeed, in *Midkiff* it seems that the courts will only rule it unconstitutional if the public purpose is impossible or the means irrational.²⁰⁷ It is therefore clear that public use must only satisfy the minimum rationality standard of judicial review.²⁰⁸

In recent years the public use requirement received more attention in a range of cases dealing with the question whether the exercise of eminent domain for private economic development of urban areas is for public use.²⁰⁹ In *Kelo*²¹⁰

²⁰³ *Berman v Parker* 348 US 26 (1954) 32. Compare this with the German approach in paragraph 4.2.4.3, where the courts will prudently scrutinise the public purpose proposed by the legislature.

²⁰⁴ 467 US 229 (1984).

²⁰⁵ *Hawaii Housing Authority v Midkiff* 467 US 229 (1984) 241.

²⁰⁶ See also *Alabama Electrical Co-op Inc v Jones* 574 So 2d (1990) 734 where the court ruled that an electrical cooperative can expropriate property for public use, but that they have to provide just compensation for the property taken. In *Gober v Stubbs* 682 So 2d 430 (1996) the court ruled that if a taking is for a public purpose, the characteristic of a public purpose cannot be taken away merely because a private person benefits.

²⁰⁷ RM Sullivan “Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 163 – 164.

²⁰⁸ RM Sullivan “Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 164.

²⁰⁹ *County of Wayne v Hatchcock* 684 N W 2d 765 (2004), where the court revised the decision of *Poletown Neighbourhood Council v City of Detroit* 304 N W 2d 455 (1981). See also *Kelo v City of New London* 843 A.2d 500 (2004) affirmed in 545 US 469 (2005); *Aaron v Target Corp* 269 F Supp 2d 1162 (2003); *Bailey v Myers* 76 P 3d 898 (2003); and *Cotton*

the court confirmed that the exercise of the eminent domain power for private economic development is not necessarily against the public-use requirement.²¹¹ In the *Kelo* case, the City of New London, Connecticut, delegated the power of eminent domain to the New London Development Corporation in order to expropriate land to revitalise the waterfront area. Ms Kelo owned a house that overlooked the waterfront area, an area that was designated for the construction of residential and commercial facilities. Ms Kelo was one of a few owners that refused to be bought out for any amount of money, and therefore sued the City of New London and the Development Corporation, refusing any money and asking “[h]ow come someone else can live here, and we can’t?”²¹² This forms the essence of the question, is such a taking for public use? The City argued that it was for public use, in that the urban rejuvenation will create jobs in the area and generate more tax revenue (partly because of the jobs, but more so because of more affluent people will move there).²¹³ The Supreme Court nevertheless ruled that takings aimed at promoting economic development is for a public use, and allowed the expropriation of the property.²¹⁴ The *Kelo* case has been the subject of criticism, mostly because the home-interest was not afforded the special protection it usually enjoys.²¹⁵ Despite the criticism, it remains possible for local and state governments to expropriate property for economic re-development of an area.

Wood Christian Centre v Cypress Redevelopment Agency 218 F Supp 2d 1203 (2002) where the state’s eminent domain power was used to promote local economic development by expropriating property in economically distressed communities.

²¹⁰ *Kelo v City of New London* 545 US 469 (2005) 2662 – 2663.

²¹¹ See GS Alexander “Eminent Domain and Secondary Rent-seeking” (2005) 1 *NYUJL & Liberty* 958 for a theoretical explanation for the court’s decisions.

²¹² K Gray “There’s No Place Like Home!” (2007) 11 *Journal of South Pacific Law* 73 76.

²¹³ K Gray “There’s No Place Like Home!” (2007) 11 *Journal of South Pacific Law* 73 76.

²¹⁴ *Kelo v City of New London, Connecticut* 545 US 469 (2005) 454.

²¹⁵ K Gray “There’s No Place Like Home!” (2007) 11 *Journal of South Pacific Law* 73 82; KM Wyman “The Measure of Just Compensation” (2007-2008) 41 *U C Davis LR* 239. See paragraph 5.2.3.5 for a discussion on the protection of home interest.

4.3.3.3 Due process

Both the Fifth and Fourteenth Amendments require that deprivation of property may not be without due process of law.²¹⁶ Due process has a substantive and a procedural side. On the substantive side it allows the courts to examine the content of the law, while on the procedural side the court is only allowed to ensure that a fair procedure was followed.²¹⁷

During the era after *Lochner v New York*²¹⁸ the due process inquiry was substantive. This meant that the purpose of legislation and the relation between the purpose and the means in obtaining the purpose were examined in the courts. This was downplayed in the decision of *West Coast Hotel Co v Parrish*²¹⁹ where *Lochner* was abandoned and the due process inquiry became an objective test, according to which the courts will not interfere where legislation regulates economic rights unless other constitutional provisions were in danger of being violated.²²⁰ It is still seen as a formal procedural guarantee, not offering much protection against legislative interference.²²¹

After *Prune Yard Shopping Centre v Robins*²²² it seems as if a substantive due process test re-emerged, but it is not clear to what extent, if at all.²²³ The only area where it seems to play a significant role is in the takings cases of new property (such as welfare payments).²²⁴

²¹⁶ RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 159.

²¹⁷ LR Monk *The Words We Live By* (2003) 171.

²¹⁸ 198 US 45 (1905).

²¹⁹ 300 US 379 (1937).

²²⁰ AJ van der Walt *Constitutional Property Clauses: A Comparative Perspective* (1999) 406.

²²¹ It is seen as amounting to complete judicial deference and possibly the reason why much emphasis is placed on the takings clause for protection of property. See also AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 406; LS Underfuffler-Freund "Takings and the Nature of Property" *Can J Law & Jur* 161 – 205 (1996) 161.

²²² 447 US 74 (1980).

²²³ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 408.

²²⁴ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 406 – 407; *Goldberg v Kelly* 397 US 254 (1970).

4.3.3.4 Compensation

With the public use and due process requirement not really providing adequate protection for the individual, the focus is placed on the just compensation requirement.²²⁵ Compensation is required for expropriation because the individual cannot be expected to bear the burden of something that is for a public purpose, while in deprivation cases the burden is usually spread among the people.²²⁶ This requirement is discussed in more detail below.

4.3.4 Why compensation should be paid

Case law²²⁷ regards the aim of just compensation to fully indemnify the owner for the property loss.²²⁸ This is interpreted to mean that the owner of the expropriated property should be in the same pecuniary position he would have been if his property had not been taken.²²⁹ In *Penn Central Transportation co v City of New York*²³⁰ the court ruled that “fairness and justice” require that economic injuries caused by public action should be compensated by the government, so that the individual alone should not bear the burden when the public benefits. In considering what is just, regards must be had to both the owner whose property is taken and the public that is paying for it.²³¹

4.3.5 Calculation of compensation

Where compensation is seen as the full and complete equivalent value for complete loss suffered due to expropriation, just compensation is merely the

²²⁵ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 408.

²²⁶ AJ van der Walt *Constitutional Property Law* (2005) 128 – 129.

²²⁷ *Primetime Hospitality Inc v City of Albuquerque* NM App 2007, 168 P 3d 1087.

²²⁸ *United States v Miller* 307 US 174 (1943); *United States v Reynolds* 397 US 14 (1953).

²²⁹ *Seaboard Air Line Ry Co v United States* 43 S Ct 354 (1923); *Lingle v Chevron USA, Inc.* 125 S Ct 2074 (2005); *Almota Farmers Elevator & Warehouse Co v United States* 93 S Ct 791 (1973); *United States v Rogers* 522 US 252 (1998); *United States v Town of Nahant* 153 F 520 (1907); *United States v Wheeler TP* 66 F 2d 977 (1933); *Kansas City Southern Ry Co v Commissioner of Internal Revenue* 52 F 2d 372 (1981).

²³⁰ 438 US 104 (1978) 124.

²³¹ *United States v Commodities Trading Corporation* 70 S Ct 547 (1950).

value of land taken or the damage caused to the land not taken.²³² The requirement of just compensation is mostly regarded as based on the principles of fairness and equity.²³³ The court stated in *United States v Fuller*²³⁴ that the requirement of just compensation not only derives its contents from the principles of fairness, but also from the technical concepts of property law.²³⁵ The concept of just compensation, as required by the Fifth Amendment, cannot be reduced to a formula or be confined to rules, but must be considered in every case.²³⁶ Nonetheless, a Model Act gives guidelines on how to calculate compensation in normal expropriations.

The National Commission on Uniform State Law adopted the Uniform Eminent Domain Code in 1974 that was changed to a Model Act in 1984. The code aimed at simplifying the condemnation procedures consistent with the just compensation requirement of the Constitution. It is seen mainly as a procedural guideline.²³⁷ For instance, it aims to conform to federal requirements that emanate from other acts, it fills the procedural *lacunae* left by other legislation, and it governs expert valuation evidence, it deals with the burden of proof issues and establishes an informal claims procedure. It also gives guidelines for how to determine just compensation.²³⁸

Article X of the code formulates principles that govern the main elements of just compensation. §1001 confirms that an owner is entitled to compensation upon expropriation. §1002(a) states the basic rule that the measurement of compensation is the market value of the property expropriated. The courts developed this in later case law²³⁹ by stating that there are no rigid rules to determine compensation or the payment thereof, but that fair market value is a just standard. The determination of whether the payment of compensation

²³² RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 166.

²³³ *United States v Commodities Trading Corporation* 70 S Ct 547.

²³⁴ 93 S Ct 801 (1973).

²³⁵ *Almota Farmers Elevator & Warehouse Co v United States* 93 S Ct 791 (1973).

²³⁶ *Georgia-Pacific Corp. v United States* 640 F 2d 328 (2000).

²³⁷ §102 of the Model Eminent Domain code.

²³⁸ RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 165.

²³⁹ *Kimball Laundry Co v United States* 338 US 1 (1949) 5-6.

is just is a judicial function.²⁴⁰ Just compensation refers to the value of the property on the date of the taking, and such value is deemed the price that it would have obtained in a negotiated sale. Interest is also payable.²⁴¹ This amount is supplemented by compensation that is governed by the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.²⁴² The act compensates consequential damages that result from the expropriation.²⁴³

In case of a partial taking §1002(b) states that just compensation is deemed to be the difference between fair market value before the taking without regard to the expropriation and fair market value of the remainder after the expropriation with regard to the expropriation.²⁴⁴

§ 1003(a) fixes the date of valuation, and §1003(b) deals with the date on which the right of compensation accrues, which varies from state to state. It is preferable for the expropriator to deposit the monies referred to in §1003(b) in order to fix the date of evaluation at the earliest possible date to avoid disputes.

§1004 deals with the term “fair market value”. §1004(a) makes it clear that fair market value is neither the value to the taker nor the loss to the owner, but rather a price that a seller and buyer would agree to if the property was sold by agreement. The court should determine the value between the ranges of valuations offered in evidence.²⁴⁵ §1004(b) deals specifically with special purpose properties (such as churches and schools), where fair market value is determined by calculating the functional replacement costs.

The rest of article X deals with evaluation issues such as the principle that the underlying scheme of the expropriation should not be taken into account when

²⁴⁰ RM Sullivan “Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 175.

²⁴¹ RM Sullivan “Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 168.

²⁴² USC 4651.

²⁴³ RM Sullivan “Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 169.

²⁴⁴ *City of Albuquerque v Westland Development Co Inc*. 909 P 2d 25 (1995).

²⁴⁵ *State Highway Department v Lawford, Alabama* 611 So 2d 285 (1992).

determining compensation;²⁴⁶ the rule that when an owner owns two parcels of land and both are expropriated the land is treated as a single parcel;²⁴⁷ the expropriation of leasehold interests;²⁴⁸ and loss of goodwill.²⁴⁹

The Supreme Court ruled that the focus when determining just compensation is the property and not the person.²⁵⁰ In this inquiry, however, the question is not what the taker gained, but rather what the owner lost.²⁵¹

Compensation is paid to the owner with respect to all rights that are dependent on the owner.²⁵² The compensation is regarded as damages paid to replace the land taken.²⁵³ Owner also includes a tenant in common, a joint tenant, and an owner of an equitable interest or title by adverse possession. If there is a servitude, then the owner of the servitude is allowed damages for the taking of that portion.²⁵⁴ Compensation money is apportioned between persons with interests in land, according to their interests.²⁵⁵

There is no time limit prescribed for the payment of compensation. The only requirement is that, at the time of expropriation, reasonable, certain and adequate provision is made for obtaining compensation.²⁵⁶ Compensation is usually paid in money, unless the parties agree on something else.²⁵⁷

Value is determined by three methods, namely the market data approach, the reproductions cost approach and the income approach. The market data approach is preferred since comparable sales are considered the most reliable evidence of value.²⁵⁸

²⁴⁶ § 1005. See also *United States v Miller* 307 US 174 (1943).

²⁴⁷ § 1007.

²⁴⁸ § 1013. This section determines that a lessee of property that is partially expropriated must continue to pay the full rent for the full term, but will be rewarded by getting the present value of the future rent as compensation for the part of the premise that is expropriated.

²⁴⁹ § 1016. This section determines that the loss of goodwill will be compensated, but that the owner has a (heavy) duty of mitigating damages.

²⁵⁰ *Monongahela Navigation Co v United States* 148 US 312 (1893) 327; *United States v 50 Acres of Land* 105 S Ct 451 (1984).

²⁵¹ *City of Monterey v Del Monte Dunes at Monterey Ltd* 526 US 687 (1999).

²⁵² 29A CJS Eminent Domain § 224.

²⁵³ *Rambo v United States* 117 F 2d 792 (1973).

²⁵⁴ 29A CJS Eminent Domain § 225.

²⁵⁵ 29A CJS Eminent Domain § 227.

²⁵⁶ 29A CJS Eminent Domain § 203.

²⁵⁷ 29A CJS Eminent Domain § 204.

²⁵⁸ RM Sullivan "Eminent Domain in the United States: An Overview of Federal Condemnation Proceedings" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 176.

4.3.6 Conclusion

The comparative value of the United States of America lay in the fact their regulatory takings practice, that explains when something amounts to a compensable taking, can help explain why and when compensation is due. The question that needs to be answered for purposes of this dissertation is whether South Africa should also follow the American route, where regulations that “go to far” are sometimes compensated, even if there was no acquisition on the part of the state, or even if there was nothing taken away from the citizen. The German example discussed in the previous section showed that in Germany, a regulation that goes too far can never be compensated. Either such a regulation will be invalidated, or equalisation monies will be paid in order to save it from invalidity if such a regulation only affects on person or a small group of people. The Australian example that follows will show that in Australia, the question of compensation only crops up once there was an acquisition.

In the United States of America, when trying to determine whether something amounts to a compensable taking one first attempts to answer that by establishing whether it amounts to a “per se” taking, and if not, move on to the *Penn Central* open-ended inquiry.

Regulatory takings must be distinguished from the government’s use of eminent domain. When the government expropriates property using eminent domain, then it must be for a public use, it must follow due process and compensation must be paid. It was shown that the public purpose use requirement is interpreted very leniently in America, with the courts often deferring this requirement to the legislature. The deference to the legislature might serve as a good example to follow, since the legislature is often better equipped than courts to make decisions that might have budgetary implications. South Africa, however, might not benefit from a lenient interpretation such as in the United States of America, where economic prosperity is often seen as a public use, at the cost of vulnerable communities (as in *Kelo*). This can be guarded against when one considers whether it is possible to compensate home interests, as will be discussed in chapter 5.

As far as compensation is concerned, in the United States of America compensation is paid to indemnify the individual, so that the individual does not carry an undue burden. This means that compensation is mostly full market value compensation. This correlates to the pre-constitutional South Africa position, although in the United States of America parties with an interest in land are also compensated. The feature that distinguishes South African expropriation law from that in the United States of America is compensation for regulatory takings where there was no acquisition of property, a route that South Africa will probably not follow. In this respect, the United States of America stands in contrast to the Australian law of acquisition, where compensation is only due when the state acquires property.

4.4 Australia

4.4.1 Introduction

As a parliamentary democracy, Australia has strong historical and constitutional ties with the United Kingdom. The Australian Commonwealth Constitution was initially written to federate the six British colonies in the late 1800s, and has not really been modified since. It is therefore mainly focussed on upholding the federal structure, and is more concerned with dividing federal and state powers than with protecting individual rights.²⁵⁹ The close ties with the United Kingdom are reflected in the Westminster system that Australia adopted – a parliamentary democracy with a constitutional monarchy.²⁶⁰ There are, however, slight differences. For instance, the federal system looks somewhat like the American model and the High Court may invalidate legislation because of its unconstitutionality.²⁶¹

²⁵⁹ AJ van der Walt *Constitutional Property Law* (2005) 249.

²⁶⁰ The monarch of the United Kingdom is also the monarch of Australia, and (s)he is represented through the governor-general that (s)he also appoints. It is theoretically possible that the Parliament of the United Kingdom can alter the Australian Constitution, even if most people believe that the ultimate legitimacy of the Constitution lies with the people (of Australia). C Evans & T Rogan "Australia" in G Robbers (ed) *Encyclopaedia of World Constitutions Volume 1* (2006) 50. For more information about the Australian constitutional system, see T Blackshield & G Williams *Australian Constitutional Law and Theory* 3rd ed (2002); P Hanks *Constitutional Law in Australia* 2nd ed (1996).

²⁶¹ C Evans & T Rogan "Australia" in G Robbers *Encyclopaedia of World Constitutions Volume 1* (2006) 47.

The Commonwealth of Australia consists of six states²⁶² and two self-governing territories.²⁶³ The states each have their own Constitution and powers under the Commonwealth Constitution,²⁶⁴ while the two territories are subject to legislation of the Commonwealth government, but are more independent than the states. The states' constitutions are all subjected to the Commonwealth Constitution.²⁶⁵ The Australian property section was based on the American Constitution's Fifth Amendment²⁶⁶ and has been compared with the American Constitution,²⁶⁷ but comparing it with the Fifth Amendment should be approached with caution. This is mostly because the Fifth Amendment aims at protecting the individual, while the Australian Constitution is more concerned with dividing federal and state powers.²⁶⁸

4.4.2 The property clause

The Commonwealth Constitution does not have a bill of rights but section 51 (xxxi) is read as a property clause. Section 51(xxxi) states that:

51. Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:-

[...]

(xxxi) The acquisition of property on just terms from any State or person for any purpose with respect of which the Parliament has the power to make laws;

²⁶² New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania. In this section, when "state" is used it refers to the federal states, and "government" refers to the federal government.

²⁶³ The Northern Territory and Australian Capital Territory.

²⁶⁴ Act 1900 (UK).

²⁶⁵ C Evans & T Rogan "Australia" in G Robbers (ed) *Encyclopaedia of World Constitutions Volume 1* (2006) 48.

²⁶⁶ T Blackshield & G Williams *Australian Constitutional Law and Theory* 2nd ed (1996) 143.

²⁶⁷ *Australian Apple and Pear Marketing Board v Tonking* (1942) 66 CLR 77 82. In *Grace Bros Pty Ltd v The Commonwealth of Australia* (1946) 72 CLR 269 290 the court looked at the American Constitution, but with regard to the differences. There are important differences, though. Where the American Constitution refers to takings in the Fifth Amendment, the Australian Constitution only refers to acquisition. The Australian clause confers power on the legislator to expropriate, while the American clause restricts such power that is regarded as inherent. The Fifth Amendment requires just compensation, while the Australian Constitution only requires just terms. While the American Constitution requires that the taking should be for public use, the Australian Constitution confers power of acquisition on the state with respect to that which the government has the power to make laws. See T Blackshield & G Williams *Australian Constitutional Law and Theory* 2nd ed (1996) 744 – 745. D Brown & A Fogg "The Law of Resumption in Australia" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 292.

²⁶⁸ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 40.

[...]

Subsection xxxi should be read in the overall context of section 51, which deals with the federal government's power to make legislation. Section 51(xxxi) refers to the federal government's power to make legislation to acquire property more than to the protection of property.²⁶⁹ Even if it is not a classic property guarantee, the Australian courts treat it as a constitutional property guarantee of sorts.²⁷⁰

While the courts regard the primary purpose of the property clause to enable the Commonwealth to (compulsorily) acquire property, the condition that it should be on just terms ensures that acquisition will not be arbitrary.²⁷¹ The clause serves a dual function, firstly enabling the government to acquire property, and secondly protecting the citizens because such acquisition must be on just terms.²⁷² The court in *Clunies-Ross v The Commonwealth of Australia and Others*²⁷³ elevated this to "a constitutional guarantee of just terms", to be interpreted like a normal constitutional property guarantee.

Another important feature of the property section is that the courts have interpreted it in such a way that it includes those cases where the government tries to acquire property in an indirect way.²⁷⁴ The famous maxim is that "you cannot do indirectly what you are forbidden to do directly".²⁷⁵ This means that federal legislation that has the effect of acquiring property should adhere to the section 51(xxxi) requirements,²⁷⁶ unless it is clear that it falls under an-

²⁶⁹ T Blackshield & G Williams *Australian Constitutional Law and Theory* 2nd ed (1996) 743.

²⁷⁰ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 39.

²⁷¹ *Grace Bros Pty Ltd v The Commonwealth of Australia* (1946) 72 CLR 269 290 – 291.

²⁷² AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 48.

²⁷³ (1984) 155 CLR 193 193.

²⁷⁴ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 352.

²⁷⁵ *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297 305; AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 45 – 46. In *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155 173 the court ruled that the extinguishment of a "chose in action" against the Commonwealth is also an acquisition of property, since it will have the same effect as an assignment of the choice in action to the Commonwealth. It is forbidden on the ground that "what the Constitution forbids directly cannot be achieved indirectly or by means of some circuitous device".

²⁷⁶ *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155 177. T Blackshield & G Williams *Australian Constitutional Law and Theory* 2nd ed (1996) 747.

other head of legislative power, or more correctly put, does not “abstract” from the section 51(xxxi) guarantee.²⁷⁷

4.4.3 Deprivation and expropriation

An inquiry into acquisition under section 51(xxxi) starts with the question whether the law or action affects the acquisition of property, and if so, whether it was for purposes of section 51(xxxi).²⁷⁸ It will not be for the purposes of section 51(xxxi) when it falls under a different head of power;²⁷⁹ when the state justifiably acquires the property in the absence of just terms,²⁸⁰ or where the acquisition was incidental to, but not for, the main purpose stated in the acquisition law.²⁸¹ In the last case, the incidental purpose should not be so inappropriate or disproportionate to the purpose that it cannot justify the acquisition.²⁸² The section 51(xxxi) requirements are applicable to all acquisition cases, even if the property is acquired by someone else than the Commonwealth.²⁸³

Section 51(xxxi) only confers the power of eminent domain on the state, and does not serve as authority for police power, since section 51(xxxi) does not provide explicitly for deprivation power. The absence of a clear distinction between deprivation and expropriation in the section led to many court cases trying to clarify these concepts,²⁸⁴ which recent case law did to some extent.²⁸⁵

²⁷⁷ Case law, for instance, has already excluded some cases. Only acquisitions by the Commonwealth are applicable: *PJ Magennis Pty Ltd v The Commonwealth of Australia* (1949) 80 CLR 382. It does not apply to acquisitions under section 122 of the Constitution: *Teori Tau v The Commonwealth of Australia and Others* (1969) 119 CLR 564 570-571.

²⁷⁸ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 43 – 44.

²⁷⁹ For example tax. See *Attorney-General (Commonwealth) v Schmidt* (1961) 105 CLR 361.

²⁸⁰ For example forfeiture. See *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 187.

²⁸¹ For example the state's police power. See AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 44 – 45.

²⁸² AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 44. *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155; *Re Director of Public Prosecutions; Ex Parte Lawler and Another* (1994) 179 CLR 270; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

²⁸³ *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155; *Re Director of Public Prosecutions; Ex Parte Lawler and Another* (1994) 179 CLR 270; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

²⁸⁴ *The Commonwealth of Australia v Tasmania* (1983) 158 CLR 1.

In short, the court stated that even if it is assumed that federal government has the power to regulate the use of property, without it necessarily amounting to an acquisition that needs to be compensated, it is acknowledged that not all regulation / deprivation of property amounts to acquisition that needs to be compensated. Therefore, not all forms of deprivation are subjected to the just terms requirement of section 51(xxxi).²⁸⁶

Section 51(xxxi) only applies to acquisition of property, and not to all deprivations, which means that the state must acquire a benefit or an advantage. This assumption rests on the idea that when the state does not “acquire” anything, it is not an acquisition.²⁸⁷ This can create problems when it comes to the state’s police power, as the state may acquire property without paying compensation when exercising its police power.²⁸⁸

The courts first examined the government’s power of acquisition in *The Commonwealth of Australia v New South Wales*.²⁸⁹ The states were of the opinion that they held the prerogative right to royal metals in land and that since the legislature did not explicitly extend the right to acquire royal metals, section 51(xxxi) cannot be said to confer on the Commonwealth the power to acquire royal metals. The court rejected this and held that the government has the power to make laws for acquiring property from any state, and that the Commonwealth’s power to make legislation with regard to property is not limited.²⁹⁰ The Commonwealth is limited by the just terms requirement and can only acquire property for the purposes in respect of which the Commonwealth has power to make laws.²⁹¹

²⁸⁵ *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155; *Re Director of Public Prosecutions; Ex Parte Lawler and Another* (1994) 179 CLR 270; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

²⁸⁶ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 46.

²⁸⁷ For a more thorough discussion see paragraph 4.4.4.

²⁸⁸ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 47.

²⁸⁹ (1923) 33 CLR 1.

²⁹⁰ *The Commonwealth of Australia v New South Wales* (1923) 33 CLR 1 20 – 21.

²⁹¹ T Allen “The Acquisition of Property on Just Terms” (2000) 22 *Syd LR* 351 352.

4.4.4 Expropriation requirements

4.4.4.1 Introduction

Australian “expropriation law” is also known as the law of resumption and is based on statutes enacted by federal and state parliaments.²⁹² The federal and state governments’ power to acquire property compulsory rests exclusively on statute. There are numerous statutes in every state regulating acquisition. Despite this, the courts seem to enforce these conditions fairly uniformly, making the principles of valuation materially the same in all the states.²⁹³ State parliaments may enact their own legislation regarding the resumption of land, and such legislation need not provide for the payment of compensation.²⁹⁴ This is, however, subject to the Constitution that serves a double function, authorising the government to legitimately acquire property, but subjecting it to the just terms requirement.²⁹⁵ Federal government enacted legislation to ensure that these principles are adhered to. The Lands Acquisition Act 1989 is a result of legislative reform in this area, and is the main federal legislation dealing with the valuation and procedural issues of resumption law.²⁹⁶ The requirements for a valid acquisition are that there must be an acquisition of property, it must be for a public purpose and the acquisition must be on just terms.

4.4.4.2 Acquisition of property

The troublesome question in Australia is when an interference with property amounts to an acquisition for purposes of section 51(xxxi). In *Minister of State for the Army v Dalziel*²⁹⁷ the High Court had to decide whether a regula-

²⁹² D Brown & A Fogg “The Law of Resumption in Australia” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 289.

²⁹³ D Brown & A Fogg “The Law of Resumption in Australia” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 290.

²⁹⁴ *The Commonwealth of Australia v New South Wales* (1915) 20 CLR 54 77.

²⁹⁵ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 48; D Brown & A Fogg “The Law of Resumption in Australia” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 291.

²⁹⁶ D Brown & A Fogg “The Law of Resumption in Australia” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 291.

²⁹⁷ (1944) 68 CLR 261.

tion that authorised the Commonwealth to take possession of any land (for an indefinite period) in the interest of “public safety, the defence of the Commonwealth, or the efficient prosecution of the war or for maintaining supplies and services essential to the life of the community” amounted to an acquisition. Dalziel was the tenant of vacant land that the Commonwealth took possession of. The court ruled that even if possession and not title was taken from the owner, it still amounted to acquisition for purposes of section 51(xxxi).²⁹⁸ The court thus followed a purposive interpretation, interpreting the just terms requirement as intending to protect the citizen.²⁹⁹ In *Bank of New South Wales v The Commonwealth of Australia (Bank Nationalisation Case)*³⁰⁰ the Bank of New South Wales argued that an act that empowered the Commonwealth Bank to acquire shares in private banks and to acquire assets or the business of the private bank against payment of compensation infringed section 51(xxxi) and was therefore invalid. The act also made provision for the government to appoint directors to the board of such a private bank as an alternative to those chosen by the shareholders. The court held that this amounted to an acquisition of property. The court stated that “section 51(xxxi) [should] not be confined pedantically to the taking of title by the Commonwealth [...] but that it extends to innominate and anomalous interests and includes the assumption and indefinite continuance of exclusive possession”.³⁰¹ Therefore, it was not an indirect taking of property. Rather, the effect of the restrictions left the banks with nothing more than an empty corporate shell.³⁰² Acquisition would thus occur when the Commonwealth acquires advantages of or economic powers from property even if it does not acquire the entire bundle of rights held by the citizen.³⁰³

The word “acquisition” implies that a mere *taking* of a right (as in the American case), without it being *acquired*, would not fall under the scope of section 51(xxxi). In 1994 five cases³⁰⁴ dealt with the question of when an acquisition

²⁹⁸ T Blackshield & G William *Australian Constitutional Law and Theory* 2nd ed (1996) 743.

²⁹⁹ T Allen “The Acquisition of Property on Just Terms” (2000) 22 *Syd LR* 351 353.

³⁰⁰ (1948) 76 CLR 1.

³⁰¹ *Bank of New South Wales v The Commonwealth of Australia* (1948) 76 CLR 1 349.

³⁰² AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 49.

³⁰³ T Allen “The Acquisition of Property on Just Terms” (2000) 22 *Syd LR* 351 355.

³⁰⁴ *Health Insurance Commission v Peverill* (1994) 179 CLR 226 ruled that a law that retrospectively reduced the amount of benefits that was payable under the *Health Insurance*

of property would fall under section 51(xxxi). In *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia*³⁰⁵ Mason CJ said that “the mere extinguishment by the Commonwealth of a right enjoyed by the owner in relation to his/her property does not amount to an acquisition of property; in the absence of an acquisition of a benefit or an interest in property, however slight or insubstantial it may be, the complete extinguishment of contractual rights does not constitute such an acquisition”.³⁰⁶ Deane and Gaudron JJ also attempted to clarify the distinction between deprivation and acquisition, ruling that “the extinguishment, modification or deprivation of rights in relation to property does not of itself constitute an acquisition of property [...] to be an ‘acquisition of property’, there must be an obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property”.³⁰⁷

The judgement in *The Commonwealth of Australia v Tasmania*³⁰⁸ raises the question of whether an acquisition of property as such is necessary before section 51(xxxi) applies. The court in this instance interpreted acquisition of property very broadly.³⁰⁹ The Commonwealth made legislation that prohibited development without the consent of the federal government. Tasmania argued that these restrictions (for example the federal governments’ power to veto development) constituted an acquisition of property. The minority ruled that the veto power was not a proprietary right, but Deane J in his separate minority judgement ruled that it should be treated as an acquisition of property. He did not limit section 51(xxxi) to the private law definition of acquisition of property, but extended it to those instances where the effect “is to confer

Act 1973 (Cth) was not an acquisition of property. In *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155 the court had to answer the question of whether a statute that levied tax on swimming pools that had the effect of depriving suppliers of swimming pools of a contractual right to refund amounts to an acquisition of property. See also *Re Director of Public Prosecutions; Ex Parte Lawler and Another* (1994) 179 CLR 270 where the Fisheries Management Act 1991 authorising the forfeiture of fishing vessels for a violation in terms of the act, even if it was not the owner violating the act, was challenged. In *Georgiadis v Australian and Overseas Telecommunications Corporations* (1994) 179 CLR 297 Georgiadis, a Telecom employee, claimed damages for a back injury under the Commonwealth Employees’ Rehabilitation and Compensation Act 1988 (Cth), thereby forfeiting his right to claim under common law. He argued that this deprivation of his right to sue under common law amounted to an acquisition for purposes of section 51(xxxi).

³⁰⁵ (1994) 179 CLR 155.

³⁰⁶ *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155 172 – 173.

³⁰⁷ *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 185.

³⁰⁸ (1983) 158 CLR 1. Also referred to as the *Tasmanian Dam* case.

³⁰⁹ T Allen “The Acquisition of Property on Just Terms” (2000) 22 *Syd LR* 351 355.

upon the Commonwealth or another an identifiable and measurable advantage or is akin to applying the property, either totally or partially, for a purpose of the Commonwealth".³¹⁰ This is the view that the courts followed in subsequent cases.³¹¹ In *Newcrest Mining (WA) Ltd v The Commonwealth of Australia*³¹² the court ruled that there was an acquisition of property when parliament enacted legislation that prohibited holders of mining leases from extracting minerals. In *The Commonwealth of Australia v WMC Resources*³¹³ the question was whether offshore oil exploration permits that were extinguished by the government amount to an acquisition. Toohey and Kirby JJ took the (minority) view that the government *did* acquire something, namely the right to issue new permits over the area of the seabed. This acquisition of a benefit was enough to be treated as a section 51(xxxi) acquisition, even if the Commonwealth did not acquire property rights. Brennan CJ and Gaudron J, on the other hand, ruled that since the Commonwealth did not acquire new property rights, it cannot be said to be acquisition for the purposes of section 51(xxxi).³¹⁴ They seemed to take the *Tasmanian Dam Case* view that there is an important distinction between acquisition and deprivation of property.³¹⁵ Allen³¹⁶ distinguishes *Newcrest Mining* from *WMC Resources* in that the Commonwealth does not have proprietary interests in the seabed, while it did have proprietary interests in the land over which the leases had been granted.

An earlier case, *Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia*,³¹⁷ supports Brennan CJ and Gaudron J's view that new property rights should be acquired before there can be an acquisition. Some sections of the Copyright Act 1968 (Cth) determined that at the sale of blank tapes a royalty had to be paid to the vendor, which in turn paid it to a society of copyright owners. The act also stipulated that when published music is recorded onto such a blank tape, there is no copyright infringement. The section 51(xxxi) question was whether giving the right to purchasers to

³¹⁰ *The Commonwealth of Australia v Tasmania* (1983) 158 CLR 1 283.

³¹¹ *Georgiadis v Australian and Overseas Telecommunications Corporations* (1994) 179 CLR 297; *Mutual Pools & Staff Pty Limited v The Commonwealth of Australia* (1994) 179 CLR 155.

³¹² (1997) 190 CLR 513.

³¹³ [1998] HCA 8.

³¹⁴ *The Commonwealth of Australia v WMC Resources* [1998] HCA 8 20.

³¹⁵ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 357.

³¹⁶ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 356.

³¹⁷ (1993) 176 CLR 480 499-500.

copy music was an acquisition of property. The court ruled that no acquisition of property for the purposes of section 51(xxxi) took place, even though the legislation deprived the music publishers from their property rights. It is unclear if, since the extinction of a financial liability is seen as an acquisition, conferring a financial liability in favour of the Commonwealth will also be seen as an acquisition.³¹⁸

Even if the reach of section 51(xxxi) may be unclear, the courts have moved from a literal interpretation of acquisition of property towards a more purposive interpretation. The fact that the courts regard the just terms requirement as protecting the citizen is indicative of this purposive interpretation.³¹⁹ If the American approach is followed, then compensation will be seen as a requirement because an individual cannot be expected to bear a burden if the public will benefit from it, and therefore compensation is paid to ensure that the burden is carried by the public as a whole. In this context property need not necessarily be restricted to traditional property. This was considered in *Australian Tape Manufacturers Association Ltd v The Commonwealth of Australia*³²⁰ where the question was whether the charging of the royalty amounted to acquisition of property. The levy in this case was a monetary liability, since the purchasers could pay the levy out of any funds affecting only their wealth, and the Commonwealth did not acquire rights in the blank tapes. This liability amounted to neither tax nor damages arising from a private law breach. The purchaser chose from which asset the liability would be discharged, something which is absent in a typical compulsory acquisition. This distinction between property and liability is not clear.³²¹ In *Australian Tape Manufacturers* the court held the royalties to be a kind of tax, and therefore not subject to the just terms requirement.

Another problematic question is whether the regulation of property amounts to an acquisition for purposes of section 51(xxxi). In *Trade Practices Commission v Tooth and Co Ltd*³²² the Trade Practices Act 1974-78 (Cth) regulated the property owner's ability to renew the leases of tenants that sold products

³¹⁸ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 357 – 358.

³¹⁹ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 358.

³²⁰ (1993) 176 CLR 480.

³²¹ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 358 – 359.

³²² (1979) 142 CLR 397.

of the property owner's competitor. The property owner averred that this was an acquisition of property in favour of the tenant and not on just terms. The court ruled that since the property owner is otherwise free to rent or to not renew leases on other grounds, this is not a serious enough interference with the property rights to render it an acquisition. Mason J³²³ added that section 51(xxxi) is not limited to acquisitions by the commonwealth, but the focus must be on the nature of the interest acquired and not on the acquirer.

*PJ Magennis Pty Ltd v The Commonwealth of Australia*³²⁴ stated that the property need not be acquired by the Commonwealth itself. It needs to be authorised by the Commonwealth, though.³²⁵ Allen³²⁶ raises the possibility that legislation may give one private person the power to acquire or to affect acquisition and transfer of property rights from one to another, although it is not clear whether section 51(xxxi) applies in such a situation. In *PJ Magennis* this was not too difficult to answer, since parliament made the legislation with the express intent to acquire the property. In *Nintendo Company Limited v Centronics Systems Pty Ltd*,³²⁷ on the other hand, legislation changed the copyright rules. The respondent claimed that the changes enabled the appellant to acquire property in its copyright but not on just terms. The court held³²⁸ that even if this can be seen as acquisition, it would not be an infringement of section 51(xxxi) because the legislation merely adjusted competing claims to resources. Dawson J³²⁹ ruled that the acquisition of property was for the purpose of the appellant and not the Commonwealth, and therefore it is the use of the application of the property that needs to be considered, and not the motive or the objective for its acquisition. It is for this reason that most third party acquisitions will probably fall outside section 51(xxxi).³³⁰

The Australian Constitution does not have the equivalent of the American Fourteenth Amendment due process clause and therefore a proportionality

³²³ *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397 426.

³²⁴ (1949) 80 CLR 382 402.

³²⁵ *PJ Magennis Pty Ltd v The Commonwealth of Australia* (1949) 80 CLR 382 423. See also *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397.

³²⁶ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 375.

³²⁷ (1994) 181 CLR 134.

³²⁸ *Nintendo Company Limited v Centronics Systems Pty Ltd* (1994) 181 CLR 134.

³²⁹ *Nintendo Company Limited v Centronics Systems Pty Ltd* (1994) 181 CLR 134 164-167.

³³⁰ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 379.

test becomes important to protect the individual from arbitrary deprivation. The test for proportionality originated in the *Tasmanian Dams* case, where proportionality was required between the purpose or the object that the legislation aimed at achieving, and the means used at achieving that aim. In *Re Director of Public Prosecutions; Ex Parte Lawler and Another*³³¹ the Fisheries Amendment Act 1991 (Cth) authorised forfeiture of fishing vessels for violation of the act. The master, and not the owner of the boat, was convicted of a violation of the act, and the boat was confiscated. It can thus be said that the owner suffered for the master's wrongdoings. The owner argued that forfeiture was not proportionate to the end sought by the act, and therefore beyond the commonwealth's legislative powers. Even though the court rejected the contention on the facts, it considered the argument and proportionality of the legislation.³³²

Allen asserts that in the cases where section 51(xxxi) does not apply, property and economic interests are only protected insofar the proportionality test is applicable.³³³ It is therefore important to know the two exceptional instances when the proportionality test applies. The first instance is where a law is enacted under a head of power for a specific purpose, and then the courts must ask whether the law goes further than necessary in achieving this purpose. The second instance is how far the law may intrude to protect fundamental rights or other limitations in favour of individuals or states.³³⁴ A decision to acquire land can further be reviewed in order to determine whether such a decision was the last resort. If there are other means of fulfilling the authority's needs, other than acquisitions, the owner may apply for reconsideration.³³⁵

In *Airservices Australia v Canadian Airlines International Ltd*³³⁶ the court applied the proportionality test. The Civil Aviation Act 1988 (Cth) stated that the Civil Aviation Authority (CAA) may charge airlines for air traffic, rescue, fire fighting and so forth. A lien was also created by the act over aircraft as security for the amounts owing to the CAA. This held owners liable even if they

³³¹ (1994) 179 CLR 270.

³³² *Re Director of Public Prosecutions; Ex Parte Lawler and Another* (1994) 179 CLR 270 286.

³³³ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 365.

³³⁴ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 365.

³³⁵ Land Acquisition Act 1989 s 31(1)(f)

³³⁶ (1999) 167 ALR 392.

were leasing or sub-leasing the aircraft. The owners of the aircraft claimed that this was an acquisition, or in the alternative, is disproportionate regulation to the aims that the act wanted to achieve. The court ruled that this was not a case of acquisition since the act was enacted under another head, namely section 51(i) (trade and commerce) or section 51(xxix) (external affairs). The court per Gleeson CJ, Kirby and McHugh JJ³³⁷ found that it was validly enacted under these heads and did not feel the need to apply the proportionality test. Allen³³⁸ is of the opinion that they did apply the test to some degree, since they weighed up the benefit the owner gets from the services of the CAA relative to the risk they are bearing. Furthermore, since the planes are the aircraft operators' biggest asset, it is desirable that the CAA establish a lien over the aircraft. They also considered the link between the lien holders and the lien grantors.³³⁹

The *Airservices* case makes it clear, however, that the Australian courts do not follow a proportionality test, and as Allen puts it, "it seems that so long as the legislation does not offend the judges' sense of what is fair or reasonable, as well as their sense of the limits on their ability and power to determine social issues, the legislation can stand".³⁴⁰ The second reason Allen cites for their reluctance to apply a proportionality test is the Australian constitutional structure.³⁴¹ The Australian Constitution is aimed at upholding the federal structure, where the balancing is between the Commonwealth and the states. The protection of human rights rests with legislative bodies,³⁴² and the courts will defer to the legislature the balancing of the various interests involved when making legislation.

The reluctance of the courts to interference with the legislative process is apparent in the recent case of *Telstra Corporation Limited v The Commonwealth*

³³⁷ *Airservices Australia v Canadian Airlines International Ltd* (1999) 167 ALR 392 415, 476.

³³⁸ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 366.

³³⁹ *Airservices Australia v Canadian Airlines International Ltd* (1999) 167 ALR 392 475.

³⁴⁰ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 367.

³⁴¹ T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 368.

³⁴² T Allen "The Acquisition of Property on Just Terms" (2000) 22 *Syd LR* 351 368. This might be an important aspect to keep in mind when comparing Australia with South Africa (and even Germany). The South African bill of rights is primarily aimed at protecting the individual against state (or other individual) interference and proportionality is often a question of whether the infringement on the individual is disproportionate towards the societal gain. If the Australians were to use such a test, it would fundamentally change the structure of their Constitution.

of Australia,³⁴³ where the question of regulatory takings was considered. Telstra asserted that the telecommunications access regime, as set out in the Trade Practices Act of 1974 (Cth), amounts to an acquisition of Telstra's property other than on just terms. The act enabled other telecommunication service providers to connect to Telstra's loops (the copper and aluminium wires running between a local exchange and the consumers' premises) in order to provide a competitive service, without having to compensate Telstra. The High Court found that the right to use the loops was granted to Telstra by legislation and therefore always subject to a statutory access regime, and granting of access rights was therefore a regulation and not an acquisition. With this ruling, it seems as if regulatory takings (in the American sense) would be impossible.

4.4.4.3 Public purpose

Public purpose refers to those purposes in respect of which the federal government has the power to make laws.³⁴⁴ The courts interpret public purpose broadly. In *PJ Magennis Pty Ltd v The Commonwealth of Australia*³⁴⁵ the court ruled that an acquisition in terms of section 51(xxxi), even if not acquired for by the federal government but by an organ of state or a third party, is a valid public purpose if it is authorised by a law of the Commonwealth for Commonwealth purposes.

In *Clunies-Ross v The Commonwealth of Australia and Others*³⁴⁶ an owner of most of the Cocos Islands sold most of the Island to the federal government by a deed, retaining the land on which his house was situated. The federal government thereafter sought to resume that piece of land. The government failed to specify the purpose for which it sought land in its notice. In court it became clear that the land was acquired for the political, social and economic advancement of the inhabitants of the island. It was thus for political purposes that the government sought to acquire the land. The court ruled that the public purpose requirement limits the power to acquire land in that only land

³⁴³ [2008] HCA 7.

³⁴⁴ Lands Acquisition Act 1989 s 6.

³⁴⁵ (1949) 80 CLR 382 402.

³⁴⁶ (1984) 155 CLR 193 193.

needed or proposed to be used for advancing such a purpose can be acquired. It must serve a public purpose and cannot be acquired simply to deprive the owner of his/her land. Compulsory acquisition for land reform purposes, the court found, is unconstitutional.³⁴⁷ For the court, the socio-political purpose for which the government want to expropriation is irrelevant, as the limits of the public purpose is indicated by law that requires that acquisition should be for a specific public purpose.³⁴⁸

4.4.5 Why is compensation paid?

The requirement in section 51(xxxi) that the Commonwealth can only acquire property on just terms refers to the interpretation presumption that the government does not intend to take away property without compensation, unless it is expressed in unequivocal terms.³⁴⁹ In *Georgiadis v Australian and Overseas Telecommunications Corporations*³⁵⁰ the court ruled that just terms means that when the government acquires property to serve the community, the owner should be fully compensated as owners cannot be expected to sacrifice their property for less than it is worth.

From the discussion on the acquisition requirement, it is clear that compensation is paid because the government acquired the property. In *Mutual Pools* it was stated that the government will not pay when there was a mere taking without an acquisition on the part of the government. Compensation is therefore paid because the government acquired a benefit, at the cost of an individual. This is the “just terms” requirement.

4.4.5.1 “Just terms” and the calculation of compensation

The Lands Acquisition Act 1989 provides for just compensation. In section 55(1) it explicitly states that the purpose of compensation is to justly compen-

³⁴⁷ D Brown & A Fogg “The Law of Resumption in Australia” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 294.

³⁴⁸ AJ van der Walt *Constitutional Property Law* (2005) 253.

³⁴⁹ *Inglewood Pulp and Paper Co Ltd v New Brunswick Electric Power Commission* [1928] AC 492 498; *CJ Burland Pty Ltd v Metropolitan Meat Industry Board* (1968) 120 CLR 400 406.

³⁵⁰ (1994) 179 CLR 297.

sate the person for the acquisition.³⁵¹ Sections 55 - 66 of the Lands Acquisition Act 1989 provide guidance as to how to achieve just compensation.³⁵² In *Grace Bros Pty Ltd v The Commonwealth of Australia*³⁵³ the court ruled that the words “just terms”, in a similar provision of the previous Acquisition Act, has the same meaning as just terms in section 51(xxxi).

Allen asserts that just terms can help determine the scope of, and the substance of acquisition in terms of section 51(xxxi). The debate seems to be whether just terms requires a balancing of public and private interests or whether just terms requires full compensation. Early commentators interpret this to mean a fair balance between the public and the private,³⁵⁴ but in the earlier cases the courts tended to tip the scale in favour of the property owner. For instance, in *Johnston Fear & Kingham & the Offset Printing Co Pty Ltd v The Commonwealth of Australia*³⁵⁵ the court ruled that the payment of market price does not satisfy the just terms condition and that the loss of profits should be added. In *The Commonwealth of Australia v Huon Transport Property Ltd*³⁵⁶ the court ruled that just terms requires the payment of interest if there is a delay between the acquisition and the payment, as such interest will serve as damages for the reason of the expropriation. Likewise, Rich J in *The Australian Apple and Pear Marketing Board v Tonking*³⁵⁷ ruled that a regulation that allows for some individuals to be overpaid and others to be underpaid is unjust, since what must be paid is the full value of the property. Starke J first began to reject this view when he gave his minority judgement in *Minister of State for the Army v Dalziel*³⁵⁸ when he ruled that just terms is a legislative judgement or discretion that cannot be unjust merely because the judges think it is. Indeed, it must be so unreasonable that a reasonable man would not be able to justify it.

³⁵¹ D Brown & A Fogg “The Law of Resumption in Australia” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 291.

³⁵² D Brown & A Fogg “The Law of Resumption in Australia” in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 292.

³⁵³ (1946) 72 CLR.

³⁵⁴ T Allen “The Acquisition of Property on Just Terms” (2000) 22 *Syd LR* 351 371.

³⁵⁵ (1943) 67 CLR 314.

³⁵⁶ (1945) 70 CLR 293 306-307.

³⁵⁷ (1941) 66 CLR 77.

³⁵⁸ (1944) 68 CLR 261.

In *Grace Brothers Pty Ltd v The Commonwealth of Australia*,³⁵⁹ Starke J now being in the majority, his minority view in *Dalziel* was incorporated into Australian law. In this *Grace Brothers* case, the Commonwealth occupied a department store during World War II. After the war it took over the department store permanently through a statutory scheme that provided for compensation. Compensation was calculated based on the value of the store on 1 January preceding the date of acquisition. The argument was that it was not on just terms, as just terms would require the value to be determined on the date that the property was taken.³⁶⁰ The court ruled that what was to be determined was not whether the acquisition itself was just, but whether the terms of the statute that authorised were just. “Just” in this case required determining whether the statute attempted to provide fair standards for compensating the individual. The legislature laid down the terms, thereby determining what would be just. As Dixon J put it in his concurring judgement, just terms do not require the Commonwealth to restore the owner to his/her pre-acquisition state. The question that needs to be asked is “whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country”.³⁶¹ In the subsequent case of *Nelungaloo Proprietary Ltd v The Commonwealth of Australia*³⁶² Dixon J elaborated that just terms is what is fair and just between the community and the owner of the acquired property. Compensation, on the other hand, has a full monetary equivalent element to it.³⁶³

During this time there was no clarity as to what compensation was required. On the one hand just terms meant full compensation, and on the other hand fair compensation was required, although fair compensation was sometimes full compensation too.³⁶⁴ Recent case law did not give much attention to this problem, except maybe for *The Commonwealth of Australia v State of West-*

³⁵⁹ (1946) 72 CLR 269.

³⁶⁰ *Grace Bros Pty Ltd v The Commonwealth of Australia* (1946) 72 CLR 269.

³⁶¹ *Grace Bros Pty Ltd v The Commonwealth of Australia* (1946) 72 CLR 269 290.

³⁶² (1947-48) 75 CLR 495.

³⁶³ *Nelungaloo Proprietary Ltd v The Commonwealth of Australia* (1947-48) 75 CLR 495.

³⁶⁴ *Bank of New South Wales v The Commonwealth of Australia* (1948) 76 CLR 1.

ern Australia.³⁶⁵ In this case a defence regulation gave the Commonwealth the right to use land belonging to Western Australia and others for defence practices. The regulation only provided for “reasonable compensation” and only for loss or damage suffered. It did not provide for other losses, and it did not expressly provide for acquisition. In *Western Australia* the High Court argued that the Commonwealth tried to acquire property other than on just terms. The majority ruled that there was no acquisition, and the inquiry stopped there. However, Kirby J commented that the just terms requirement ensures economic fairness to the states or individual against unjust interference from the Commonwealth.³⁶⁶ Allen sees this as suggesting that property owners should be fully indemnified against the losses caused by acquisition.³⁶⁷ In the end Kirby J ruled that the regulation was allowed because “reasonable compensation” can include payment of unusual expenses.³⁶⁸ This, for Allen, is an indication that the balancing test between the private interest of the property owner and the public interest will not be used. It was confirmed in *Georgiadis v Australian and Overseas Telecommunications Corporations*³⁶⁹ where the court ruled that just terms does not entail the balancing of interests, but rather means that the owners of property whose property is compulsory acquired by government to serve the community are not required to sacrifice their property for less than it is worth. Therefore, just terms means full compensation.

An acquisition scheme does not have to include compensation itself, since just terms requires that such a scheme provides for adequate procedures to determine compensation.³⁷⁰ These procedures are also subject to judicial examination, as in *The Commonwealth of Australia v Tasmania*.³⁷¹ In this case Deane J held, after ruling that there was an acquisition of property, that the acquisition laws did not meet the section 51(xxxi) requirements. The World Heritage Properties Conservation Act 1983 (Cth) provided that upon acquisition of property, claims under \$5 000 000 had to be heard in the Fed-

³⁶⁵ [1999] HCA 5.

³⁶⁶ *The Commonwealth of Australia v State of Western Australia* 196 CLR 392 461.

³⁶⁷ T Allen “The Acquisition of Property on Just Terms” (2000) 22 *Syd LR* 351 373.

³⁶⁸ *The Commonwealth of Australia v State of Western Australia* [1999] 196 CLR 392 464.

³⁶⁹ (1994) 179 CLR 297.

³⁷⁰ *Grace Bros Pty Ltd v The Commonwealth of Australia* (1946) 72 CLR 290 – 291.

³⁷¹ (1983) 158 CLR 1. Also referred to as the *Tasmanian Dam* case.

eral Court while claims over \$5 000 000 were subject to a six month waiting period to see if compensation cannot be agreed upon after the investigations of a Commission of Inquiry. Deane J stated³⁷² that section 51(xxxi) does not give a claimant an enforceable right to claim just terms for the acquisition of property, it merely enables the court to invalidate laws that do not provide for just terms. Furthermore, there is no precise definition for just terms and it is for parliament to determine what would be appropriate compensation for an acquisition, although the courts may examine it and, if found unjust, invalidate it. Parliament need not specify the amount of compensation, but must provide a procedure to be followed. If the procedure provided for determination of compensation is fair, the court will not invalidate it because it did not fulfil the requirement of just terms.

The power of resumption in Australia can be either a general power to take private property for a public purpose, or a power to take property for a specific purpose. The power to take property for a specific purpose is more common.³⁷³ A resumption statute will either contain a general power of resumption, providing a procedure to be followed, or conferring no power of resumption, but simply providing a procedure to follow when resuming property. A statute can also authorise a procedure, even if the power of resumption comes from another statute.³⁷⁴

The Lands Acquisition Act 1989 sets out the compensation principles in sections 55 – 61. The paramount principle is that the owner must be justly compensated with reference to market value, additional value to the owner, severance and enhancement, or in the absence of a market, the cost of reinstatement.³⁷⁵ Added to this, the court can also order an amount for actual financial loss³⁷⁶ and *solatium*.³⁷⁷

The owner receives compensation for the resumed land in order to put him/her in the same position as (s)he would have been if the land was not

³⁷² *The Commonwealth of Australia v Tasmania* (1983) 158 CLR 1.

³⁷³ D Brown & A Fogg "The Law of Resumption in Australia" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 293.

³⁷⁴ D Brown & A Fogg "The Law of Resumption in Australia" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 293.

³⁷⁵ S 55(2)(a)(i).

³⁷⁶ S 55(2)(c).

³⁷⁷ S 55(2)(c).

taken from him. The purpose therefore is that the owner should receive the full money equivalent of that which has been acquired from him.³⁷⁸ Australian resumption law used to equate that to just market value, but later on recognised that market value might not be sufficient to place the deprived owner in the same position (s)he would have been, and that additional compensation for disturbance or a *solatium* over and above market value should be paid.³⁷⁹

Not only the owner, but all people who have been deprived of an interest or an estate in land are entitled to compensation.³⁸⁰ The owner of each interest has a separate claim for compensation. The *Rosenbaum* principle³⁸¹ states that the court must consider each interest separately.³⁸²

Before the 1989 Act litigation was restricted to the question of compensation, and landowners did not have a statutory right to challenge the decision to acquire.³⁸³ Currently there are administrative tribunals that provide landowners and those with an interest in the land an opportunity to vary or invalidate the notice.³⁸⁴ Important grounds for review are whether the decision to acquire land was the last resort. This resembles the German requirement that acquisition should only take place as the last measure. Section 31(1)(f) of the Lands Acquisition Act 1989 permits the owner to apply for reconsideration on the ground that there are other means of fulfilling the acquiring authority's needs.

Resumption statutes prescribe the factors that must be taken into account when calculating compensation. Value of land mostly refers to market value, although in Australian resumption law special value to the owner is also some-

³⁷⁸ *Nelungaloo Pty Ltd v The Commonwealth of Australia* (1948) 75 CLR 495.

³⁷⁹ D Brown *Land Acquisition* 3rd ed (1991) 81.

³⁸⁰ The Lands Acquisition Act 1989 s 52; *Rosenbaum v Minister for Public Works* (1965) 114 CLR 424; *SJR Investments Co Pty Ltd v Housing Commission of Victoria* [1971] VR 211 214; *Lensworth Finance Ltd v Commissioner of Main Roads* (1978) 5 QLCR 261.

³⁸¹ *Rosenbaum v Minister for Public Works* (1965) 114 CLR 424.

³⁸² D Brown *Land Acquisition* 3rd ed (1991) 136.

³⁸³ An interesting remedy that was available was that a landowner, when (s)he received a federal notice of acquisition, (s)he could have an objection raised in parliament. This, however, only happened in one instant. The Lands Acquisition Act 1989 mostly abolished this remedy, but in s 46(2) retained this remedy in the case of acquisition of interests in parks. See D Brown & A Fogg "The Law of Resumption in Australia" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 295.

³⁸⁴ D Brown & A Fogg "The Law of Resumption in Australia" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 295.

times considered.³⁸⁵ Most statutes also provide for compensation of other losses that result from an acquisition. This includes disturbance and severance damages and *solatium*. Most statutes limit the amount of *solatium* that can be claimed, and it is within the court's discretion whether or not it wants to award *solatium*.³⁸⁶

In *Spencer v The Commonwealth of Australia*³⁸⁷ the court formulated the willing buyer, willing seller rule. This presumably determines the market value of the land acquired. The passage that is cited in various cases thereafter as justification for the rule states that an estimate of the price which would have been agreed upon "by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration".³⁸⁸ The *Spencer* rule is reflected in section 56 of the Lands Acquisition Act 1989.

The *Spencer* rule determines the market value of the acquired property. Market value is regarded as just compensation in most cases, but the courts have developed the *Pastoral Finance* test,³⁸⁹ allowing in some circumstances for compensation *more* than market value if the land has special value to the owner. The *Pastoral Finance* test regards the seller as prudent, and while the buyer is not ignored, (s)he plays a lesser part in the determination of market value.³⁹⁰ This test was also incorporated in the Lands Acquisition Act 1989.³⁹¹

Various other tests have developed in the courts and were incorporated in the Lands Acquisition Act 1989. The *Maori Trustee* principle³⁹² recognises that in certain circumstances there might be a plurality of buyers of the whole land, a fact that the court can take into account when determining market value.³⁹³

The *Turner* principle³⁹⁴ dictates that if the present value of land differs from

³⁸⁵ D Brown & A Fogg "The Law of Resumption in Australia" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 296 – 297.

³⁸⁶ D Brown & A Fogg "The Law of Resumption in Australia" in GM Erasmus *Compensation for Expropriation - A Comparative Study* (1990) 297 – 299.

³⁸⁷ (1907) 5 CLR 418.

³⁸⁸ *Spencer v The Commonwealth of Australia* (1907) 5 CLR 418 441.

³⁸⁹ As formulated in *Pastoral Finance Association Ltd v Minister* [1914] AC 1083.

³⁹⁰ D Brown *Land Acquisition* 3rd ed (1991) 96.

³⁹¹ S 55(2)(a)(ii).

³⁹² *Maori Trustee v Ministry of Works (NZ)* [1958] 3 All ER 336.

³⁹³ D Brown *Land Acquisition* 3rd ed (1991) 100.

³⁹⁴ *Turner v Minister of Public Instruction* (1956) 5 CLR 245.

the best economic use of the land, the owner is entitled to be compensated for the highest and best use of the land.³⁹⁵ If there is any doubt as to the amount of compensation payable, the *Executor Trustee*³⁹⁶ principle determines that the problem should be resolved in favour of a liberal interpretation (in favour of the owner). This principle can either be applied as a rule of construction (interpretation) or in cases of conflicting valuations.³⁹⁷ Where it is not possible to imagine buyers, the *Raja* principle³⁹⁸ requires that the court should first find that there are no comparable sales or willing purchasers and that the acquiring authority is the only possible purchaser. Thereafter the court must establish what price such an authority would be willing to pay should it enter into friendly negotiations.³⁹⁹ As in South Africa, the *Pointe Gourde* principle⁴⁰⁰ also applies in Australia and states that a landowner cannot be compensated for the increase of the value of land that is entirely due to the underlying scheme of the acquisition.⁴⁰¹ The *San Sebastian* principle⁴⁰² states that if restrictions are placed on the land prior to acquisition as a step to its acquisition, the effect of such restrictions on the value of the land may not be taken into account.⁴⁰³

4.4.6 Conclusion

The Australian Constitution focuses more on organising the divide between the Commonwealth and the states than on protecting individual rights, which makes it different from the South African, German and United States of America Constitutions. Compulsory acquisition, though authorised by the Constitution, is, as in the other jurisdictions, a legislative driven process.

³⁹⁵ D Brown *Land Acquisition* 3rd ed (1991) 100.

³⁹⁶ *Commissioner of Succession Duties (SA) v Executor Trustee & Agency Co of SA Ltd* (1947) 74 CLR 358.

³⁹⁷ D Brown *Land Acquisition* 3rd ed (1991) 102.

³⁹⁸ *Sri Raja Vyricherla Narayana Bhadur Garu v Revenue Divisional Officer, Vizagapatam* [1939] 2 All ER 317. Mostly replaced by s 58 of The Lands Acquisition Act 1989.

³⁹⁹ D Brown *Land Acquisition* 3rd ed (1991) 105.

⁴⁰⁰ *Pointe Gourde Quarrying & Transport Co v Sub-Intendent of Crown Lands (Trinidad)* [1947] AC 565. This principle is incorporated in The Lands Acquisition Act 1989 s 60(c).

⁴⁰¹ D Brown *Land Acquisition* 3rd ed (1991) 106.

⁴⁰² *Housing Commission (NSW) v San Sebastian Pty Ltd* (1978) 140 CLR 196.

⁴⁰³ D Brown *Land Acquisition* 3rd ed (1991) 108.

Compulsory acquisition of property can only be done in terms of section 51(xxxi) of the Constitution, even if the property is acquired by someone else than the Commonwealth. Deprivation or acquisition done in terms of any other section will not be treated as compulsory acquisition. In order for the courts to rule that there was an acquisition, the Commonwealth (or someone authorised by the Commonwealth) must at least acquire property, which includes an advantage or economic powers. When the Commonwealth only takes property, it is not an acquisition. This is remarkably different from the United States of America regulatory takings position, where the state need not acquire anything for compensation to be paid.

The public purpose requirement is broadly interpreted, and expropriation in favour of a private third party is possible. However, the *Clunies-Ross* case set the precedent that land acquired for political, social and economic advancement of marginalised groups might not be constitutional. This stands in contrast with the South African constitutional imperatives, where land may possibly be expropriated and transferred to a private third party in the context of land reform.

As in pre-constitutional South African expropriation law, there is an interpretative presumption that the state does not intend to take away property without compensation, unless it is clearly stated. In Australia, as in Germany and the United States of America, compensation is paid to spread the burden of the expropriation amongst citizens. It differs from the United States of America in that compensation is only due when the state acquires property, and not for regulatory takings. Where Germany does not pay for regulatory takings because of the clear distinction between “deprivation” and expropriation that has the *Junktim-Klausel* requirement, Australia does not pay for the regulatory takings merely because the Commonwealth does not acquire property. As in Germany, however, the Australian courts seem to go from the assumption that compensation is not about restoring the individual in the position (s)he was before the expropriation. The compensation requirement is more about providing just standards for compensating the individual in a societal context.

When acquiring property, the “just terms” requirement protects the owner in that his/her property can only be taken on just terms. Just terms normally

mean full market value compensation, and the *Georgiadis* case confirmed that an owner should not be expected to sacrifice property for less than full compensation. Like in pre-constitutional South African expropriation law, this indicates a strong focus on market value.

The question now remains whether South Africa can learn any valuable lessons from the Australian example when having to determine whether a deprivation needs to be compensated. It seems unlikely, since the Australian Constitution focuses specifically on the acquisition of property, and the question of whether or not property was *acquired* becomes central to the compensation question. The South African Constitution merely refers to “deprivation” and “expropriation”. Nonetheless, it is useful to contrast the Australian example with the United States of America example in order to provide different explanations of why compensation is paid.

4.5 Conclusion

A comparative study like this highlights the interpretive possibilities for a constitutional expropriation provision. To start with, each of the three jurisdictions defines deprivation and expropriation differently. In the United States of America an expropriation is the state’s exercise of its eminent domain power, whereas deprivation is the state exercising police power. When a person is required to give up his/her property for a public purpose and is singled out by such an action, then the state is usually exercising its eminent domain. When the state acts in the interest of society (protecting public health and safety, for instance) when restricting property, it is a deprivation. Compensation is due when the state exercises its power of eminent domain since it will be unfair to expect from the individual to carry a burden from which the whole society benefits.⁴⁰⁴ In the United States of America the theory of regulatory takings resulted in a grey area developing between expropriation and regulation, where a regulation that is implemented for the benefit of society places extraordinary burdens (such as permanent physical invasion, denial of economically viable use and destroying core property rights) on a single person. Compensation is also due in such instances even though the property was not

⁴⁰⁴ See paragraph 5.2 for more reasons why compensation is due upon expropriation.

taken for public use, although the moment *when* compensation is due, is not always clear. In Australia the question becomes more complex due to the structure of the Australian Commonwealth Constitution. An expropriation must be authorised under the correct constitutional powers (section 51(xxxi) of the Australian Commonwealth Constitution) before it can be a valid expropriation. If it is not an expropriation, it is not necessarily a deprivation.⁴⁰⁵ In Germany, expropriation must be authorised by a statute that makes provision for the payment of compensation (the *Junktim-Klausel*). If the authorising statute does not contain such a clause, it cannot be an expropriation even if the regulation unfairly burdens an individual. In such cases, the regulation will be declared unconstitutional and invalid. In the German Federal Courts a practice has developed whereby, when a regulation unduly burdens an individual, equalisation payments are sometimes paid to save a regulation that would otherwise be unconstitutional. This is, however, not compensation for expropriation, but rather an unique type of administrative or constitutional payment.

In the United States of America the state does not have to acquire property before compensation is due. A regulation that “goes too far” will be compensated, even if the state does not acquire any property. This is not true for Australia, where, as was shown above, many cases try to establish whether the state (or an authorised third)⁴⁰⁶ acquired property or a benefit in order to rule that there was an expropriation. In Germany, on the other hand, the state can determine the content and limits of property and thereby limit property rights, even quite drastically, without it amounting to an expropriation. When the state does that in terms of a law (that does not provide compensation), and the law requires the individual to make a disproportionate sacrifice, then the law may be declared unconstitutional and invalid.

That does not mean that the state *always* has to pay when it limits property. In *Pennsylvania Coal Co v Mahon*⁴⁰⁷ the United States Supreme Court ruled that property may be limited without always having to pay compensation. The

⁴⁰⁵ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 175 – 179.

⁴⁰⁶ *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297.

⁴⁰⁷ 260 US 393 (1922) 413.

German Basic Law likewise states that property is not absolute and that its contents and limits are determined by the laws. It therefore may be regulated, but such a regulation must strike a fair balance between the public and private interests involved. If it does not, the law can be declared unconstitutional and invalid. In Australia it seems likely that the state does not ever have to pay when regulating property, since the 1994 cases made it quite clear that the state must acquire property before compensation is due.

What needs to be determined, for purposes of this dissertation, is what route is best to follow in South Africa in determining when compensation is due, and therefore what must be compensated. As in all three jurisdictions, the rationale for compensation in South Africa also seems to rest on the idea that the individual should not be singled out by an expropriation. In the United States of America, however, compensation is due even when a regulation “goes too far” in interfering with the property in a physical sense, depriving all economically viable use of the property or taking away the core of property rights, even if nothing was acquired. It seems unlikely that South Africa will follow such an approach, since the notion of regulatory takings is a unique “incomprehensible muddle” and strongly connected to the liberal notion of property that is so prevalent in the United States of America (see next chapter). The Australian approach was contrasted with this, and it was shown that compensation is due when the state acquired property. This means that the focus of the expropriation inquiry is whether there was an acquisition or not. It is also unlikely that South Africa will focus on this aspect, since, as mentioned, the South African property clause does not refer to acquisition only. The answer to the question most probably lies in the German example. In Germany there is a categorical distinction between “deprivation” (the determination of content and limits) and expropriation. The *FNB* decision seems to have closed the possibility of a clear distinction between deprivation and expropriation, but seems to correlate with the German approach that when a deprivation places an undue burden on an individual, it might be arbitrary (therefore unacceptable) and declared unconstitutional and invalid. The German practice of *Ausgleich* payments might also find application in the South African context, since it could be useful to lessen the burden on a single owner (as in the *Modderklip*

case), and thereby save the otherwise constitutional law from constitutional invalidity.

All three jurisdictions require that expropriation must be for a public purpose. It was shown that in the United States of America, the public purpose requirement is applied very leniently. The courts show extreme deference to the legislature with regard to the public purpose requirement. This was evident in the *Kelo* case. The legislature furthermore seems to have a wide discretion to determine what the public purpose is. In Australia expropriation must be for a purpose in respect of which the federal government may make laws in terms of section 51 of the Constitution. As was mentioned, this has more to do with the division of federal and state powers, but it nonetheless influences the public purpose requirement. In Germany the public purpose requirement is strictly enforced, although it does allow for expropriation where private individuals benefit. Therefore, although strictly enforced, it does allow for a measure of flexibility.

The South African property clause differs from the three abovementioned jurisdictions in that section 25(4) provides that public interest also includes land reform. These interpretative possibly provides for expropriation where private parties benefit, if it is done in the land reform context. In this context the *Clunies-Ross* judgement of the Australian High Court should not influence the validity of transfers for social and economic reasons, since the South African Constitution clearly provides for it. In normal expropriations, it will be unwise to follow a very lenient interpretation, as in the United States of America, since vulnerable communities in South Africa, who often have insecure property rights as it is, need extra protection from burdensome state interference. Once again the German example proves most useful, where the public purpose requirement is strict, but flexible.

With regard to the compensation amount, the United States of America Constitution requires “just compensation”. Although it is recognised that this does not have to be market value, the overall tendency of the courts is to award market value compensation. In Germany, however, the Federal Constitutional

Court⁴⁰⁸ has stated repeatedly that compensation must strike a balance between the public interest and the affected individual and that this might not always be market value compensation. Interestingly, in the United States of America, compensation will always be seen as an adequate substitute for the property taken, while in Germany, even if compensation was offered or paid, the statute can still be declared invalid.

The South African Constitution provides for “just and equitable” compensation and, as was shown, the courts place market value central to the inquiry. This seems to be the case in the United States of America and Australia as well, where compensation is usually interpreted to mean full compensation. In Germany the contextual inquiry and the focus on the affected individual in the context of society (see the next chapter) seem to be more suitable for a move away from strict adherence to market value. Once again the German approach to the content of just compensation can be helpful in the South African context.

⁴⁰⁸ *BVerfGE* 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*).

5 Theories of Compensation for Expropriation

“Tut, tut, child! Everything's got a moral, if only you can find it.”¹

5.1 Introduction

Chapter 2 gave a technical overview of compensation practices under the Expropriation Act.² This act regulates expropriation in South Africa. It provides that property may be expropriated for a public purpose subject to the payment of compensation.³ Compensation is calculated in terms of section 12, where the focus is mostly on market value and the willing buyer willing seller principle. The payment of compensation rests on the interpretative presumption that the legislature does not intend to take away rights without compensation, presumably based on the principle that the individual should not bear the burden of the expropriation when the public benefits from it.⁴ According to the act, compensation is only due upon expropriation, and expropriation must be duly authorised by legislation. It seems as if compensation is paid for the rights that are taken away, although conflicting views exist that it is the property itself that is compensated for. The pre-constitutional expropriation law was shaped by the idea that expropriation is a neutral process, based on application of objective black letter law provisions.

Chapter 3 concentrated on the influence of the Constitution on expropriation law. Even though the Expropriation Act⁵ is still applicable, compensation is now a constitutional requirement. The Constitution requires that compensation must be just and equitable, with market value supposed to be only one of the factors the courts must take into account when determining compensation. Just compensation must strike an equitable balance between the public interest and the interests of those affected.

¹ L Carroll *Alice's Adventures in Wonderland* (2007) 131 <http://books.google.co.za/books?id=DHkIMoOUac4C> [as on 6 November 2008].

² 63 of 1975.

³ See chapter 1 n 7.

⁴ A Gildenhuys *Onteininingsreg* 2nd ed (2001) 3.

⁵ 63 of 1975.

In Chapter 4 it was shown that in the comparative jurisdictions, court cases mostly adjudicate on whether there was an expropriation or not. The courts in the United States of America have developed a vast body of case law and literature surrounding the issue of regulatory takings – the idea that some regulations go too far and amount to taking. Compensation is therefore not restricted to instances where property was taken away from an individual with the state acquiring the property. It is also paid when an individual's property suffers from a permanent physical invasion, lost all economically viable use or is deprived of a core property entitlement. This contrasts with the Australian approach, where the state needs to acquire a benefit or advantage before compensation is due. In Germany compensation is also not paid for mere regulation, due to the working of the *Junktim-Klausel*. However, once it is found that there was an expropriation and that compensation is due, the question that remains is whether compensation was calculated correctly, focussing on the proportionality principle. In most cases, this would mean market value compensation, but it is flexible enough to allow for cases where market value compensation would not be proportional.

Market value is accepted as the norm without considering *why* market value is used. It is rarely acknowledged that the choice of a valuation method is the expression of an underlying conception of property, or a subconscious advancement of certain political goals. As was shown in chapters 2 and 3 this is also the situation in South Africa with regard to market value. The preceding chapters touched on the questions *why* compensation is paid, *what* is compensated or *when* compensation is due. This chapter will look into theoretical explanations for these questions.

This chapter is an analysis of literature and cases on the compensation issue. Most of this literature is American. The body of literature on the compensation issue in America focuses on *when* compensation is due. Nevertheless, the American literature can, with careful analysis, help to answer the questions of *why* we compensate, *what* compensation is and *how* it should be calculated. Before the *how much* question will be answered, the analysis of the literature will therefore first focus on the question of *why* we pay compensation, *what* we compensate and *when* compensation is due. Thereafter, the question of

how much compensation will be answered, with specific focus on the role of market value in the calculation of compensation.

5.2 Why do we pay compensation?

5.2.1 Introduction

The Constitution states that compensation is paid to strike a “just and equitable” balance between the interest of those affected and the public. This links up with the second explanation offered in this chapter, of *why* compensation is paid. The first explanation is that compensation is paid to protect the citizen from harmful government interference, while the second explanation is that compensation is paid to distribute the burden of the government interference. The first reason implies that since compensation is required upon expropriation, government will only expropriate property once it is cost-effective (and therefore efficient) to do so.⁶ The second reason implies that in the case of expropriation, an individual is singled out to carry a burden for the public benefit. This would be an unfair burden if compensation was not paid. Compensation is therefore paid to place individuals in the same position they were before the expropriation.⁷

These explanations can, and often are, interrelated, and as Underkuffler-Freund puts it “[t]he question is not protection *or* redistribution; it is the protection *of whom*, and the distribution *of what*”.⁸ What follows is firstly a discussion on the first explanation, namely that compensation protects the citizen by preventing inefficient expropriation, followed by explanation that compensation is paid to ensure fairness.

⁶ See paragraph 5.2.2.

⁷ This is a very broad statement, and will be discussed in more detail in paragraph 5.2.3.

⁸ LS Underkuffler-Freund “Takings and the Nature of Property” (1996) 9 *Can J Law & Juris* 161 172.

5.2.2 Compensation is paid to prevent inefficient expropriation

5.2.2.1 Introduction

An owner is protected insofar as the requirement of compensation limits the state's power to expropriate without payment of compensation. The owner is protected insofar as government is expected to pay for interferences with property, making interferences with property expensive. The type of interference required before compensation is due will depend on the view of property. In a liberal notion of property, the state can be expected to pay for almost any interference with property that does not fall under its police powers, while, if property is seen as a social relation, only interferences that burdens an individual disproportionately to the gain of society will be compensable. This will be discussed in the following paragraphs. The common presumption amongst the theories that follow is that government will only embark on projects that are (economically) effective.⁹

5.2.2.2 Compensation protects private property by making socially inefficient expropriation expensive

Epstein¹⁰ asserts that the compensation requirement is there to maintain natural law, the social order and community.¹¹ Epstein's classical liberal conception¹² of private property views property as something exclusive that can only

⁹ See paragraph 5.2.2.

¹⁰ R Epstein *Takings: Private Property and the Law of Eminent Domain* (1985) 18.

¹¹ See Rose's criticism on the role of eminent domain in maintaining the natural law conceptions of property in CM Rose "Mahon Reconstructed: Why the Takings Issue is Still a Muddle" (1984) 57 S Cal LR 561 595.

¹² MJ Radin "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 Col LR 1667 1668; F Michelman "Takings, 1987" (1988) 88 Col LR 1600 1625. In this article Michelman argues that the difficulties the courts experience in takings cases is due to an effort to reconcile the liberal notion of private property with democracy. Rose makes a similar argument but bases it on history. See CM Rose "Mahon Reconstructed: Why the Takings Issue is Still a Muddle" (1984) 57 S Cal LR 561 587 – 593; 596 where she discusses classical philosophical conceptions on why property should be protected. In short, her conclusion is that the takings jurisprudence relies on two diverse concepts of property, and that "[t]his impasse is particularly unfortunate because both views of property have considerable commonsensible appeal. The argument for protecting acquisitiveness rests on the intuitive propositions that human beings act to further their own material well-being, that it is fruitless to attempt to suppress this characteristic entirely, and that the ability of individuals to act in their own best interest may have substantial social

be limited by nuisance law.¹³ Private persons are not allowed to invade or harm the property of others, but fending off those who threaten to harm your property is acceptable.¹⁴ For Epstein the meaning of property in the Fifth and Fourteenth Amendments is obvious, since he relies on what he regards the literal objective and timeless meaning of the word.¹⁵ Epstein's desire to uphold natural law is echoed in his view that (almost) every interference of the state with property amounts to a compensable taking.¹⁶ For Epstein, when government *prima facie* takes property,¹⁷ then compensation is due. Since the state is constituted by its citizens, the state should not have more power than when its citizens act together. Therefore, the state's power to interfere with property without compensation is only justified on the private law basis of self-defence (by using its police power, for instance).¹⁸ Private property is protected because the government is forced to pay for almost every interference, and this makes government interference expensive. It limits the government to choose market solutions above political solutions by requiring high or even

benefits. The civic argument rests on the equally intuitive propositions that any community – including one that protects private property – must rely on some moral qualities of public spiritedness and mutual forbearance in its individual members to bond the community together, and that a democracy may be particularly dependent on these qualities because it relies not on force, but on voluntary compliance with the norms of the community.” She attributes this to the limited political vocabulary that cannot reconcile these two positions in a principled way.

¹³ R Epstein *Takings: Private Property and the Law of Eminent Domain* (1985) 66 – 73.

¹⁴ R Epstein *Takings: Private Property and the Law of Eminent Domain* (1985) 112 -121. For a criticism of this view, see TC Grey “The Malthusian Constitution” (1986) 41 *U Miami LR* 21 – 48.

¹⁵ R Epstein *Takings: Private Property and the Law of Eminent Domain* (1985) 22 – 29.

¹⁶ For a discussion on takings and conceptual severance, see 5.4.2. Radin analyses the liberal conception of property in case law to determine whether the liberal concept of property is constitutionalised. She concludes that the courts are busy with conceptual severance, where the courts sever one stick from the bundle of property entitlements from the rest to determine if that was taken, and when taken, the courts will rule that compensation is due. See for example *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) and *Nollan v California Coastal Commission* 483 US 825 (1987) where a public access servitude was severed from the property and taken. For Radin, it is this conceptual severance that leads to Epstein's radical liberal position, and therefore, if we want to determine whether the court constitutionalised the liberal conception of property, we must determine whether they accepted conceptual severance. MJ Radin “The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings” (1988) 88 *Col LR* 1667 finds that the liberal idea of property is indeed constitutionalised because compensation is a requirement when property is taken by eminent domain. This reduces property to a liberal idea of something fungible, easily exchangeable with money and therefore just a market commodity.

¹⁷ Radin adds that Epstein would add that expected monetary gain is as compensable as physical invasion. MJ Radin “The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings” (1988) 88 *Col LR* 1667 1673.

¹⁸ R Epstein *Takings: Private Property and the Law of Eminent Domain* (1985).

excessive compensation,¹⁹ severely restricting government from regulating.²⁰ With careful acknowledgment that property is not absolute and that government has to regulate, expropriation is explained as a shift in balance of public and private rights from government to the property owner.²¹ Posner,²² although not a classic liberalist like Epstein, argues that if government could just take resources without paying compensation there would be no incentives to use its resources efficiently, as there would be in the case of a market system.

From a societal perspective there are criticisms against Epstein's approach. In the context of society, regulation and expropriation are not strange concepts. Indeed, government needs to be able to redistribute property amongst society.²³ As Underkuffler puts it, the concreteness of property lies not "in an actual or symbolic tie to corporeal or incorporeal objects, but in the mediating function that property serves between individual rights and government power".²⁴

Singer criticises the formalistic reasoning of the American courts as an attempt to answer controversial questions by way of deductive reasoning from an abstract premise (such as the meaning of property) that they claim is uncontroversial.²⁵ This denial leads to the courts separating property that has its origin in government distribution (such as welfare rights) from those rights that originated from society (such as real property). Courts thus argue that rights that come from society are private and must be protected from government interference, while those created by government can be changed by gov-

¹⁹ R Epstein "Lucas v South Carolina Coastal Council: A Tangled Web of Expectations" (1992 - 1993) 45 *Stan LR* 1369 1391; R Posner *Economic Analysis of Law* 4th ed (2003) 58 – 59. KM Wyman "The Measure of Just Compensation" (2007-2008) 41 *U C Davis LR* 239 247 notes that governments are more responsive to political costs than monetary costs, and the monetary costs do not indicate what the political costs of an expropriation are. The reason for this might be that it is because tax payers, and not government, pay the monetary cost of the expropriation.

²⁰ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 173.

²¹ C Serkin "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" (2004 - 2005) 99 *NW U LR* 677 709.

²² R Posner *Economic Analysis of Law* 4th ed (2003) 57.

²³ This links up with the second reason why compensation is paid, namely to distribute the burden, but also wealth, amongst society members. See paragraph 5.2.3.

²⁴ L Underkuffler "On Property: An Essay" (1990) 100 *Yale LJ* 127 139.

²⁵ JW Singer "Legal Realism Now" (1988) 76 *Cal LR* 465 496-503.

ernment and revoked at will, without it amounting to a taking and without compensation.²⁶

Singer and Beermann argue that the courts should rather ask whether the regulation singles out an owner, thereby requiring the owner to bear an uneven burden (therefore a fairness question).²⁷ Compensation in the natural law setting (as Epstein proposes) can therefore become a frustration to government policies²⁸ and not something that promotes democratic decision-making.²⁹ Singer and Beermann accuse the courts in this context of initiating “a renewed effort to immunize property rights from legislative revision through democratic processes, and it has done so without adequate elaboration and substantive justification and the value choices it has made”.³⁰ They attribute this to the courts, denying the social origins of property.³¹

In Nedelsky's³² view, owners have certain obligations towards others and towards their own property, but they also have obligations towards the mutual trust that the property regime fosters among society members. Property is therefore the foundation of decency, propriety and good order. Constitutional property has an added reciprocal effect. It protects individual interests or entitlements, but also redistribute them when the community so requires.³³ In this

²⁶ JW Singer “Legal Realism Now” (1988) 76 *Cal LR* 465 496-503.

²⁷ See paragraph 5.2.3 for a thorough discussion on this topic. JW Singer & JM Beermann “The Social Origins of Property” (1993) 6 *Can J Law & Juris* 217 224.

²⁸ Singer and Beermann use *Lucas v South Carolina Coastal Council* 505 US 1003 (1992) as an example; JW Singer & JM Beermann “The Social Origins of Property” (1993) 6 *Can J Law & Juris* 217 239. For a naturalist view of the case, see R Epstein “*Lucas v South Carolina Coastal Council: A Tangled Web of Expectations*” (1992 - 1993) 45 *Stan LR* 1369 53, where Epstein calls for the courts to not only restrict the “all economical viable use” test to complete takings, but to also extent it to partial takings.

²⁹ JW Singer & JM Beermann “The Social Origins of Property” (1993) 6 *Can J Law & Juris* 217 239; F Michelman “Property as a Constitutional Right” (1981) 39 *Wash & Lee LR* 1097 44.

³⁰ JW Singer & JM Beermann “The Social Origins of Property” (1993) 6 *Can J Law & Juris* 217 224.

³¹ JW Singer & JM Beermann “The Social Origins of Property” (1993) 6 *Can J Law & Juris* 217 228 sum up the characteristics of property as social rights that are diverse; limited; its definition dependent on value judgements and therefore not neutral; socially and politically construed by private action and government policies; and because they are socially and politically construed, they are dynamic. Therefore, what is protected is the social aspect of property, where individual rights are protected in a societal context.

³² J Nedelsky *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (1990) 271. GS Alexander *Commodity and Property – Competing Visions of Property in American Legal Thought 1776 – 1970* (1997).

³³ JL Sax “Takings, Private Property and Public Rights” (1971) 81 *Yale LJ* 149 150 sees protection of property as a property rule, while payment of compensation is a liability rule. Therefore, balancing the property rule with the liability rule of compensation in cases where

view, compensation is only paid when the individual is singled out by government's exercise of eminent domain.³⁴ This goes against the natural law view that is opposed to the community-based nature of decisions over how land and other property should be used.³⁵ Heller and Krier³⁶ elaborate that compensation is not only a general deterrence to government interference, but also deters the government from exploiting specific vulnerable groups or individuals.³⁷

The question is whether an owner is adequately compensated when property is expropriated, or whether government merely pays for the apparent fiscal costs of expropriation. Fiscal illusion occurs when government underestimates the costs of eminent domain. The benefit-cost ratio is therefore biased upwards, encouraging the government to embark on projects that it would not be able to do otherwise, was full compensation paid.³⁸ Therefore, when expropriation has no apparent fiscal cost, or a reduced cost, it can become a preferred means to implement policy objectives because the cost of compensation is reduced, even if the social costs of the expropriation outweigh the social benefits.³⁹ Fiscal illusion can encourage government to acquire property by eminent domain because it is or seems cheaper than to acquire property through voluntary transactions,⁴⁰ thereby not protecting the owner to the extent Epstein might have had in mind. The social approach to property merely corrects the problem of fiscal illusion, forcing the government to internalise the social cost of eminent domain actions, by only embarking on pro-

property is taken for a public use, will determine whether a compensable taking has occurred. See also JW Singer "The Ownership Society and Regulatory Takings: Castles, Investments and Just Obligations" (2006) 30 *Harv Envtl LR* 309 325 – 328.

³⁴ See paragraph 5.2.3 for a thorough discussion on this topic.

³⁵ M Fenster "The Takings Clause, Version 2005: The Legal Process of Constitutional Property Rights" (2006 – 2007) 9 *U Pa J Const L* 667 718.

³⁶ MA Heller & JE Krier "Deterrence and Distribution in the Law of Takings" (1998 – 1999) 112 *Harv LR* 997 999.

³⁷ For an in-depth discussion of this issue, see S Levmore "Just Compensation and Just Politics" (1990) 22 *Conn LR* 258; JW Singer & JM Beermann "The Social Origins of Property" (1993) 6 *Can J Law & Juris* 217 253 – 236.

³⁸ WA Fischel *Regulatory Takings: Law, Economics, and Politics* (1995) 206.

³⁹ K Guerin "Protection against Government Takings: Compensation for Regulation?" (2002) *New Zealand Treasury Working Paper 02/18* 5.

⁴⁰ The government can also be restricted by the public purpose requirement. However, in jurisdictions like the United States, where the public purpose requirement is mostly deferred to the legislature, it can be possible that fiscal illusion can be more of an encouragement for government to acquire property through eminent domain than with voluntary transactions.

jects that are socially justified.⁴¹ The government is forced to compare the cost of its action with the anticipated benefits, and would therefore only undertake actions that are socially efficient.⁴²

On the other hand, Serkin⁴³ explains that any discrepancy between the cost of government action and the amount of compensation due for expropriation creates the risk that government may embark on inefficient projects to prevent fiscal illusion, since government is forced to compensate all the harms it inflicts. Compensation is paid in this instance to protect the owner from overuse of government power, by forcing the government to plan its actions through the internalisation of costs. Serkin⁴⁴ criticises this theory as being unable to stand on its own, since all government actions benefit some and harm others. This does not mean that the winners are always required to compensate the losers and government should not always be forced to compensate harm. He therefore finds the internalisation of cost theory not “prescriptively useful”.⁴⁵

Posner,⁴⁶ writing from a law and economics perspective, asks why just compensation *should* be paid for takings. The possibility of insuring for the loss of market value makes it doubtful whether expropriation without compensation

⁴¹ J Fee “Eminent Domain and the Sanctity of Home” (2005 - 2006) 81 *Notre Dame LR* 783 804.

⁴² T Merrill “Incomplete Compensation for Takings” (2002) 11 *NYU Env'tl LR* 110 131 looks at why the courts tolerate eminent domain in various, seemingly diverse, circumstances, but defers the public use requirement to the legislature. He looks at this from an economic perspective and finds it very puzzling. For Merrill it is the difference between coerced and consensual exchange, with eminent domain entailing a coerced appropriation of private property by the state. This coerced exchange is beneficial to both parties only when compensation is sufficient to make the coerced party indifferent to the loss, while consensual exchange is almost always beneficial to both parties. Merrill mentions that G Calabresi & AD Melamed “Property Rules, Liability Rules and Inalienability: One View of the Cathedral” (1972) 85 *Harv LR* 1089 draw a similar distinction between property rules and liability rules. An owner can, through property rules, protect a right or entitlement from a taking that (s)he does not consent to, by making use of injunctive relief. An owner can, through use of a liability rule, protect a right or entitlement from a coerced taking only through an *ex post* award of damages. TW Merrill “The Economics of Public Use” (1986) 72 *Cornell LR* 61 68 finds it peculiar that eminent domain is placed parallel with private law doctrine, and therefore finds it strange that courts “effectively declared that liability rules alone shall protect all private property rights”.

⁴³ C Serkin “The Meaning of Value: Assessing Just Compensation for Regulatory Takings” (2004 - 2005) 99 *NW U LR* 677 706.

⁴⁴ C Serkin “The Meaning of Value: Assessing Just Compensation for Regulatory Takings” (2004 - 2005) 99 *NW U LR* 677 706.

⁴⁵ C Serkin “The Meaning of Value: Assessing Just Compensation for Regulatory Takings” (2004 - 2005) 99 *NW U LR* 677 707.

⁴⁶ R Posner *Economic Analysis of Law* 6th ed (2003) 57.

would demoralise an expropriated owner,⁴⁷ which would lead to less efficient uses of property in future. As long as people are aware that expropriation without full compensation or any compensation can occur, no one will be demoralised or surprised if it does, with government not having to compensate. People who bought property after such a rule is made known would not suffer because of the risk of the government taking their property, because the cost of insurance will be covered by the discounted price they pay.⁴⁸ The importance of just compensation lies in the importance of government not using compensation less than market value as an “incentive to substitute land for other inputs that were cheaper to society as a whole but more expensive to the government”.⁴⁹ This prevents, to a large extent, market distortion.⁵⁰ This market distortion is in effect what we try to avoid with the payment of compensation, for when government’s expenditures are fixed, the requirement of compensation leads to higher taxes than if there was no such requirement, and taxes in themselves are problematic due to their misallocative effects.⁵¹ Posner gives examples of the instances where compensation would not be required, for instance the loss of goodwill when expropriating a business, or zoning ordinances (for the abatement of nuisance). This is another complex argument, the details of which are not important for the purpose of this dissertation, but the conclusion provides us with a possible alternative to full market value compensation. Posner’s conclusion is that the government is not an ordinary purchaser, since it “must resort to coercion to obtain the money it uses to pay for the things it wants”.⁵² In the case of expropriation the government, in order to take property from someone who does not want to sell, has to take money from taxpayers without compensation, to pay for the expropriated property. Finally, on Posner’s analysis just compensation does not work well

⁴⁷ This is the argument made in F Michelman “Property, Utility and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harv LR* 1165. See paragraph 5.2.3.2 for the discussion on Michelman’s theory. See paragraph 5.4.2.1 for insuring against expropriation.

⁴⁸ R Posner *Economic Analysis of Law* 6th ed (2003) 57.

⁴⁹ R Posner *Economic Analysis of Law* 6th ed (2003) 57.

⁵⁰ According to R Posner *Economic Analysis of Law* 6th ed (2003) 57 some distortion still remains, since full compensation for expropriation in this case is not the same as full compensation in the economic sense, in that the subjective values are difficult to include in the calculation of compensation.

⁵¹ R Posner *Economic Analysis of Law* 6th ed (2003) 57. This is just the surface of a very complex (and interesting) argument that is beyond the scope of this dissertation.

⁵² R Posner *Economic Analysis of Law* 6th ed (2003) 59.

in practice, since the high-value parcels often get more than fair market value more often than the low-value parcels do, mainly because the government will try and avoid litigation costs.⁵³

From these criticisms it is therefore doubtful if compensation prevents harmful socially inefficient expropriation. Such a view is only tenable in a classical liberal view of property law, where government is supposedly forced to pay for every interference with property.

5.2.2.3 Compensation is paid to prevent government from arbitrary action

Another purpose of compensation is proposed by Sax.⁵⁴ He asserts that by having to pay compensation, the state is prevented from arbitrary and tyrannical action. Sax first questions the assumption that the primary function of a compensation clause ought to be to maintain the status quo (by protecting property) and that this assumption rests on history.⁵⁵ What follows is therefore first his criticism of what can be seen as “compensation for the protection of ownership or wealth” before explaining his theory.

Sax looks at the writings of the Roman-Dutch scholars and the context in which their writings appear. Grotius’ writings about eminent domain are especially important since the Fifth Amendment was based on them.⁵⁶ Sax finds that Grotius’ formulation of the rule, however, did not state *which* interests the early writers wished to protect.⁵⁷ The idea that compensation is paid to maintain existing economic values against government interference (and possible diminution) is therefore “one of the abiding myths of American constitutional

⁵³ R Posner *Economic Analysis of Law* 6th ed (2003) 59 – 60.

⁵⁴ JL Sax “Takings, Private Property and Public Rights” (1971) 81 *Yale LJ* (1971) 149.

⁵⁵ JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 53.

⁵⁶ He refers to H Grotius *De Jure Belli ac Pacis* (1625) II:VII where Grotius formulated the rule, as translated by JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 53: “[a] king may two ways deprive his subjects of their right, either by way of punishment or by virtue of the eminent power. But if he does it the last way, it must be for some public advantage, and then the subject ought to receive, if possible, a just satisfaction for the loss he suffers, out of the common stock”.

⁵⁷ JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 55 states that in fact, Grotius was an advocate of government regulation of prices which suggests that the maintenance of value was not the central idea behind compensation. Coupled with Vattel’s views, it seems that the value that it is based on is the government’s duty to regulate and adjust economic power, to make life pleasant for everyone in society.

law”.⁵⁸ Sax then draws our attention to the Christian tradition that devised the concept of just price. Here property and economic position are subordinated to the attainment of social justice.⁵⁹ The same phenomenon was evident in English legal history.⁶⁰ Sax argues that the idea that just price protects economic value does not have a foundation in history.⁶¹ The focus of the early writers was not on the losses sustained, but on the unjustness of the losses. They thus aimed at controlling arbitrary powers or the abuse of power.⁶² Sax argues that contemporaneous commentary on the topic of why compensation is paid supports the historical proposition that the takings clause was designed to prevent arbitrary deprivation, rather than preserving the economic status quo.⁶³

Sax proposes a different theory for the taking cases by stating that property is the result of a competitive process.⁶⁴ The purpose of compensation in this instance is to protect certain kinds of competition from existing values.⁶⁵ He explains how the duty to compensate can ensure good government, and focuses on identifying the governmental powers that should be subject to the compensation requirement. He explains the competition that property is subjected to when it comes to takings with reference to the government’s role when regulating or taking property: government is either a participant in the competition for property interests or a mediator of competing interests. If the government is a participant, it acts in its enterprising capacity and can therefore benefit from the competition when the individual loses, while if government is a mediator, it does not benefit from the competition. Therefore, if government acts in its enterprising capacity it can benefit from the competition

⁵⁸ JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 54.

⁵⁹ JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 55.

⁶⁰ JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 56.

⁶¹ Even though history shows that the prominent writers were not disturbed by the idea that government activity could destroy existing economic advantages, most of them mentioned specific situations in which the government was required to pay compensation. These were typically war time situations, and not losses due to sanitary and safety laws, easements of necessity, nuisance rules, the limitation of the power of disposal nor the losses sustained by price regulation laws. JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 57.

⁶² JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 57.

⁶³ JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 58.

⁶⁴ JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 61.

⁶⁵ The question of when compensation is due is therefore “to what kind of competition ought existing values be exposed; and, from what kind of competition ought existing values be protected”. JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 61.

by acquiring resources. When government is mediator, it merely governs, and does not benefit. In the first instance compensation would be required for a taking since it discourages the government from arbitrary action by taking away the profit motive. In the second instance government is merely exercising its non-compensable police power and therefore no compensation is due.⁶⁶ Since the function of compensation is to guard against “arbitrary, unfair or tyrannical government”⁶⁷ compensation is payable when government acts in its enterprising capacity, to counter the risks involved.⁶⁸ Compensation is thus paid to protect the individual from arbitrary interference of government leading to unfair competition when the government acts as an enterprise, since the government would have an unfair advantage if it did not pay compensation but took a profit.⁶⁹

Sax’s theory can neatly explain Australian law of compulsory acquisition, as discussed in the previous chapter. In Australia, compensation is only due if the expropriation was done under section 51(xxxi). If a citizen was deprived

⁶⁶ JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 62 – 63. For critique see SR Munzer *A Theory of Property* (1990) 445 – 450 where he criticises this theory on four grounds. Firstly, he finds it difficult to distinguish between the government as enterpriser and as arbiter. Secondly, he finds that this distinction can just be a matter of form. Thirdly, according to Munzer the history of the constitutional takings clause begs the question whether it should be the historical or the original meaning that should be decisive. Fourthly, he finds that there might be special risks involved if the government acts as enterpriser, but that there is no universal connection.

⁶⁷ JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 64.

⁶⁸ JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36 64 – 67 mentions three risks. The first is the risk of discrimination, since government is acquiring resources; it risks not only defining the need, but also creating it. The danger is that the government can reward the faithful and punish the opposition. Second is the risk of excessive zeal, with the government acting as a judge in its own case. The legislature can only reflect impartially on balancing two private interests when it is not party to it, but it might risk being partial when it must decide on how to implement its own projects. Third is the scope of the exposure to risk, limiting the scope of competition government is subjected to. Government is not restricted by the reciprocal relationship (and implied in that competition) of the owner whose property it wishes to affect detrimentally when acquiring resources, and therefore it needs to be limited in another way.

⁶⁹ In a later article JL Sax “Takings, Private Property and Public Rights” (1971) 81 *Yale LJ* 149 151 – 155 advances a more radical theory. This theory still views property as competition, but this time property is an interrelated network of competing uses. It is not isolated into physical definable parcels only. Sax’s focus therefore shifts from the nature of the government intervention to the nature of the use of property. When the regulation of property entails a spill-over effect (for instance, where the prohibition on the filling of wetlands has spill-over effects such as flood control on lower land), government action falls under “public rights” and therefore no compensation is required. The purpose of compensation therefore is to compensate an owner for regulation where there are no spill-over effects.

of property under another head of power (section), then it will not be a compulsory acquisition, and compensation will not be payable.⁷⁰

Michelmann views compensation as an instrument of government, a means by which political decisions of regulators can be externally controlled by judicial review.⁷¹ It therefore forces government to only make those decisions regarding takings that are productive and wealth enhancing.⁷² This is more than the mere procedural protection that Sax proposed but nonetheless necessary to keep in mind in this context. Where Sax sees the compensation requirement as steering government to be prudent when it acts in an enterprising capacity, Michelmann is more concerned about the political role of compensation and the role it plays to ensure fairness.

5.2.3 Compensation is paid to spread the cost of expropriation: the fairness argument

5.2.3.1 Introduction

The fairness requirement proposes that a single owner should not bear the cost of expropriation that benefits the public as a whole.⁷³ This can happen when an individual “has been required to give up property rights beyond his just share of the cost of government”.⁷⁴ This view rests mainly on the idea of justice as fairness of John Rawls,⁷⁵ who examines the inequalities in the treatment that individuals receive under collectively maintained arrangements.⁷⁶ If one follows Rawls,⁷⁷ compensation is a corrective measure, paid

⁷⁰ See paragraph 4.4.3.

⁷¹ F Michelmann “Property, Utility and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harv LR* 1165 1214 – 1218.

⁷² TW Merrill “The Economics of Public Use” (1986) 72 *Cornell LR* 61 82 – 87.

⁷³ The *Armstrong*-principle, stemming from *Armstrong v United States* 364 US 40 49 (1960).

⁷⁴ WB Stoebeck “A General Theory of Eminent Domain” (1972) 47 *Wash LR* 553.

⁷⁵ J Rawls “Justice as Fairness” (1958) 67 *Phil Rev* 164.

⁷⁶ For a discussion of this philosophy, see F Michelmann “Property, Utility and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harv LR* 1165 1219. The interpretation of fairness is somewhat problematic. Rose finds that the reason for this lies in the fact that property is part of a grand narrative that is not adequately questioned. This grand narrative has an influence on what we include in the demoralisation costs. In general the owner whose property is expropriated is depicted as innocent and vulnerable, and in this context property has a specific meaning that must be protected, unless the community needs are bigger. For CM Rose “*Mahon* Reconstructed: Why the Takings Issue is Still a

to equalise the impact of unequal impairment of liberties (unless some other rule is proved to work best for each person).⁷⁸ As was discussed in the previous paragraphs, criticism against the liberal view of property (and the related theory of compensation) is based on the idea that property is regulated in a societal context. This means that an individual owns property as a member of society and that not every interference with property should therefore be compensated.

It is important here to be aware of the unique approach to takings in the United States of America. In the case of so-called regulatory takings, compensation is paid to spread the unequal burden of a regulation, while in the cases where the state exercises its eminent domain, compensation is paid because the state acquired property. Reference to regulatory takings in this context is unavoidable. This is mainly because the bulk of the literature is from the United States of America, where regulatory takings are a unique problem.⁷⁹

5.2.3.2 Compensation is paid for the demoralisation cost of expropriation

According to Michelman the concept of property that is protected by the compensation requirement is a political right that enables the individual to participate in a democracy.⁸⁰ This is important for an individual to compete in a social and political life. The right that is protected is therefore the right to maintenance of the condition of fair and effective participation in politics. An individual should not be less entitled to respect from the community, but also not more entitled to particular outcomes, except for those that are applicable

Muddle" (1984) 57 *S Cal LR* 561 this means that fair distribution is therefore only possible when we rethink the grand narrative of property.

⁷⁷ J Rawls "Justice as Fairness" (1958) 67 *Phil Rev* 164.

⁷⁸ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1221.

⁷⁹ Reference to regulatory takings should not be seen as general principles of compensation, although it is useful in explaining when compensation is due. F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1169 for example sees these questions as being derived from the same broader question of "[w]hen a social decision to redirect economic resources entails painfully obvious opportunity costs, how shall these costs ultimately be distributed among all the members of society?"

⁸⁰ F Michelman "Property as a Constitutional Right" (1981) 39 *Wash & Lee LR* 1097.

to effective political participation.⁸¹ What is protected under the constitutional property clause is therefore more than ownership. In this sense, courts, when adjudicating the takings issue, should be aware of the long-term consequences of takings and political participation. If political participation is what is protected under the takings clause, then the amount of compensation as mechanism for protection would differ from property type to property type, and some property would not be up for takings at all, since it will deprive people from political participation.⁸² Therefore, compensation is due when expropriation will disable an individual from effectively participating politically in society, alongside his/her fellow citizens.

Michelman describes a taking as “constitutional law’s expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation [...] so a court assigned to differentiate among impacts which are and are not ‘takings’ is essentially engaged in deciding when government may execute public programs while leaving associated costs disproportionately concentrated upon one or a few persons”.⁸³ Therefore, to rule that something is a taking means that compensation is due, and compensation is a payment for “publicly inflicted private injury” that places “associated costs disproportionately concentrated upon one or a few persons”.⁸⁴ Costs of the redirection of resources are distributed amongst members of society through compensation.⁸⁵ In such a case, compensation is a mechanism to ensure distribution of participation in wealth among members of the society.

This links with paragraph 5.2.2 in the sense that the way in which government protects wealth has implications for the distribution of wealth. If wealth is heavily protected, as Epstein proposes, then the status quo is maintained. It is therefore necessary to have a flexible conception of property in order to fa-

⁸¹ F Michelman “Property as a Constitutional Right” (1981) 39 *Wash & Lee LR* 1097.

⁸² F Michelman “Property as a Constitutional Right” (1981) 39 *Wash & Lee LR* 1097.

⁸³ F Michelman “Property, Utility and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harv LR* 1165 1665.

⁸⁴ F Michelman “Property, Utility and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harv LR* 1165 1168.

⁸⁵ F Michelman “Property, Utility and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harv LR* 1165 1169.

cilitate redistribution,⁸⁶ as Michelman argued. According to him the purpose of just compensation rests on the ethical foundations of utility and fairness, which he equates with efficiency⁸⁷ and justice.⁸⁸

The outline of Michelman's⁸⁹ argument as to why we pay compensation can be summarised as follows. People have a certain degree of liberty to do with their belongings (wealth) as they want. There are practical boundaries to this liberty, and the practical relationship between liberty and wealth is determined by society, the community or the state. Therefore, a person's welfare is affected by being allowed to extract certain benefits from property.⁹⁰ If the uses of an owner's property were diverted by society into different uses, then this alters an owner's personal welfare situation. The assumption on which this rests is that society acts rationally and, therefore, when deciding on new resource conditions, acts for the greater welfare of society. If one member of society loses the benefit of use of property for the reallocation of resources to redistribute welfare among members of the society, this redistributive effect is partly cancelled out by converting values into dollars and paying compensation from treasury money. Therefore, compensation is paid to spread the cost of reallocation amongst society, and this is justified by the collective benefit of the change.⁹¹

5.2.3.3 Compensation is paid to enable the individual to lead a self-governing life

The German example provides an alternative look at the compensation question and the place of the individual in society.⁹² It can be recalled that article

⁸⁶ C Serkin "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" (2004 - 2005) 99 *NW U LR* 677 718.

⁸⁷ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1173 – 1183.

⁸⁸ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1219.

⁸⁹ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165.

⁹⁰ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1167.

⁹¹ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1168.

⁹² *BVerfGE* 51,1 [1979] (*Kleingartenentscheidung*) where it was ruled that private ownership is socially determined.

14 of the Basic Law guarantees both property as an institution (*Institutionsgarantie* / *Einrichtungsgarantie*) and the individual right to property (*Bestandsgarantie* / *Individualgarantie*).⁹³ Individual rights should be seen in the context that property is necessary to protect personal liberty. The institutional guarantee protects the institution of property in order to secure the individual sphere of liberty in the economic field to enable him/her to lead a self-governing life. Property may be regulated based on social and economic conditions, and expropriation is allowed under article 14.3 of the Basic Law, which unequivocally states that compensation *must* be paid. Due to the *Junktim-Klausel* the statute authorising the expropriation *must* provide for the calculation of compensation to be valid.⁹⁴ Article 14.3 should be interpreted in the framework of the fundamental guarantee of article 14, which is aimed at securing existing property in the hands of owners to enable the individual to lead a self-governing life.⁹⁵ This also implies that the closer a property right is concerned with securing personal liberty, the more restricted the government's power to interfere with such a right.⁹⁶

Property is therefore not a mere market commodity that needs to be protected, but also a civil right, with individual welfare as an important aspect of allowing self-development of citizens in a societal context. The distribution of wealth in this context is therefore not just a guarantee of distribution that it is morally optimal, but rather a guarantee that enables all individuals to develop as conscientious, self-governing members of society.⁹⁷ This means that property is protected insofar as it enables the individual to lead a self-governing life. This implies that a law that authorises expropriation *and* provides for compensation can be invalidated if it robs the owner of the ability to lead a self-governing life.⁹⁸ It is therefore not only the monetary value of

⁹³ For a discussion on German law, see paragraph 4.2.

⁹⁴ The decision of how to calculate compensation is therefore left to the legislature that can base such a decision on policy grounds.

⁹⁵ BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*).

⁹⁶ AJ van der Walt *Constitutional Property Clauses: A Comparative Perspective* (1999) 135; BVerfGE 81, 1 [1993] (*Besitzrecht des Mieters*). See also paragraph 5.2.3.5 for a discussion of Radin's view of property and personhood in the expropriation context.

⁹⁷ This links up with Michelman's idea that property as a constitutional right protects property that enables the individual to effectively participate in politics. See F Michelman "Property as a Constitutional Right" (1981) 38 *Wash & Lee LR* 1097 1112.

⁹⁸ BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*) 400.

property that is protected (and consequently compensated when property is expropriated), but extant ownership itself.⁹⁹

In this context property is socially based, where the individual is expected to participate in the benefits of the welfare state.¹⁰⁰ Private ownership is socially tied, with private property entailing social obligations, and this will always require the courts to consider the principle of proportionality when applying article 14.3.¹⁰¹

This links up with Radin's approach¹⁰² that property is bound up in personhood, and an element of personhood, and that self-constitution of a person takes place in relation to other people. This is similar to Nedelsky and Singer, mentioned earlier, that personal property exists in relation to other people, and that property should therefore be seen in a societal context. This implies that private property comes with social obligations. Therefore, when there is an infringement with property, the question of whether compensation is due should be answered by making use of a proportionality principle: the individual is only expected to carry the burden proportional to its obligations in society.

5.2.3.4 Compensation is paid to make the expropriatee indifferent to the taking

Another reason why compensation is paid is that it spreads the burden of public purpose acquisitions of private property by making the expropriatee indifferent to the expropriation, thereby not making the individual feel that (s)he is carrying an undue burden. Wyman¹⁰³ questions the presumption that compensation should be paid to make expropriatees subjectively indifferent to the expropriation. According to Wyman the purpose of compensation is to place the expropriatee back at the position (s)he was before the expropriation.¹⁰⁴

⁹⁹ G Alexander "Constitutionalising Property: Two Experiences, Two Dilemmas" in J McLean (ed) *Property and the Constitution* (1999) 88 99.

¹⁰⁰ *BVerfGE* 52, 1 [1979] (*Kleingartenentscheidung*).

¹⁰¹ See paragraph 5.5.6 for a discussion of how the proportionality principle influences the compensation.

¹⁰² See paragraph 5.2.3.5.

¹⁰³ KM Wyman "The Measure of Just Compensation" (2007-2008) 41 *U C Davis LR* 239.

¹⁰⁴ KM Wyman "The Measure of Just Compensation" (2007-2008) 41 *U C Davis LR* 239 249.

This sentiment was echoed in *Armstrong v United States*,¹⁰⁵ where Black J stated that the purpose of compensation for expropriation is to “bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole”. This correlates with the German approach.¹⁰⁶

Wyman questions the presumptions that this means that the expropriatee should be subjectively indifferent to the taking. Her analysis of the desire to make the expropriatee subjectively indifferent to the taking is that the court presumes that the most practical way to determine such an amount without running into difficulty of determining such an amount is by determining the fair market value of the property.¹⁰⁷ This is done by determining what a willing buyer would pay a willing seller for the property, and the courts regard this as an objective measure of determining how to make the expropriatee subjectively indifferent to the taking.¹⁰⁸

Wyman¹⁰⁹ questions the objectivity of market value, saying that it still rests on individual preferences.¹¹⁰ She objects to the idea that an expropriatee should be made subjectively indifferent, based on normative reasons, from an egalitarian perspective, including the idea that distributive justice does not entail *preference* satisfaction.¹¹¹ There are various problems with preference satisfaction, such as that some preferences are objectionable;¹¹² some people will have more expensive preferences than others will,¹¹³ and preferences are adaptive and therefore compensating preferences would reinforce inequalities.¹¹⁴

¹⁰⁵ 364 US 40 (1960) 49.

¹⁰⁶ BVerfGE 100, 226 [1999] (*Denkmalschutz*).

¹⁰⁷ She bases this on the case *United States v 564, 54 Acres of Land* 441 US 506 (1979).

¹⁰⁸ KM Wyman “The Measure of Just Compensation” (2007-2008) 41 *U C Davis LR* 239 253.

¹⁰⁹ KM Wyman “The Measure of Just Compensation” (2007-2008) 41 *U C Davis LR* 239 253.

¹¹⁰ See the discussion on the role of market value in the “how much” question in paragraph 5.5.3.

¹¹¹ KM Wyman “The Measure of Just Compensation” (2007-2008) 41 *U C Davis LR* 239 267.

¹¹² KM Wyman “The Measure of Just Compensation” (2007-2008) 41 *U C Davis LR* 239, 268.

¹¹³ KM Wyman “The Measure of Just Compensation” (2007-2008) 41 *U C Davis LR* 239 269.

¹¹⁴ KM Wyman “The Measure of Just Compensation” (2007-2008) 41 *U C Davis LR* 239 271. For instance, farm labourers undervalue their preferences, while the landowners will over value it. Paying compensation based on preferences will reinforce these power relations and inequality.

Wyman proposes that compensation should be paid to make the expropriatee objectively whole. The essence of this argument is that compensation should compensate goods worth having, such as “autonomy and liberty [...] and meaningful social relationships and enjoyment”.¹¹⁵ This should enable the individual to satisfy his/her own preferences, thereby enabling the expropriatee to “enjoy the same capabilities that we as a society deem valuable, before and after the taking”.¹¹⁶ This would be especially helpful in the *Kelo* cases¹¹⁷ where it is impossible to subjectively make the owner indifferent to the taking.

5.2.3.5 Protecting the home interest

Fee¹¹⁸ disagrees with Wyman insofar as compensating home interest is concerned. He starts his argument with the problem of fiscal illusion, where government calculation of the cost does not include the full costs of the governmental action to society. Government is thereby under the illusion that the project will improve the overall social welfare, while society might actually be better off without the action. Compensation is supposed to correct this fiscal illusion by internalising the costs to society. It fails to do so, however, when compensation is inaccurate. Fee refers to the example where government takes “owner occupied homes for mere market value”.¹¹⁹

For him the public use solution (where the public use requirement is used to prevent the government from expropriating) bars government from using expropriation for the benefit of private beneficiaries, which shows that it is an awkward and incomplete way to protect home interests. According to Fee the

¹¹⁵ KM Wyman “The Measure of Just Compensation” (2007-2008) 41 *U C Davis LR* 239 275. This correlates to the German approach in paragraph 5.2.3.3, and Michelman’s approach in paragraph 5.2.3.2.

¹¹⁶ KM Wyman “The Measure of Just Compensation” (2007-2008) 41 *U C Davis LR* 239 276 proposes that the amount of compensation should be determined on a case to case basis, where what individually assessed the extent to which a individual enjoyed the things that are objectively deemed valuable, before and after the taking. The expropriatee is thereby compensated with an amount that would enable him/her to enjoy those things that were valued before the taking, on the same level after the taking.

¹¹⁷ See paragraph 4.3.3.2 for a discussion of the case.

¹¹⁸ J Fee “Eminent Domain and the Sanctity of Home” (2005-2006) 81 *Notre Dame LR* 783.

¹¹⁹ J Fee “Eminent Domain and the Sanctity of Home” (2005-2006) 81 *Notre Dame LR* 783 794.

solution lies in compensating the home interest.¹²⁰ Incomplete compensation burdens citizens unequally, since taxpayers in general and not the expropriatee should bear the ultimate cost of expropriation.¹²¹ Inadequate compensation does not deter harmful government action, due to the fiscal illusion, where intrinsic values that do not surface in market appraisals are not included in compensation.¹²²

Fee's solution to this is the indemnity principle, which means that an owner must be put in the same *pecuniary* position as before the expropriation. Just compensation in the home context "should be the amount of compensation required to make the owner indifferent to the land acquisition at issue [...] accounting for the owner's reasonable subjective value".¹²³ Compensating subjective indifferences is still fair since, in most classical expropriation cases, the value to government (and therefore the public) is much higher than the value to the owner. The owner should not be compensated for more than the subjective value, since then the burden of the taking would still be spread amongst the public unequally, with the expropriatee taking a windfall at the public's expense. Fee argues that this is also true in expropriations where private beneficiaries benefit from the expropriation.¹²⁴ To avoid the difficulty with determining the subjective interest of the home, he proposes a standardised home valuation method, where home value is market value plus an added percentage.¹²⁵

¹²⁰ J Fee "Eminent Domain and the Sanctity of Home" (2005-2006) 81 *Notre Dame LR* 783 796.

¹²¹ J Fee "Eminent Domain and the Sanctity of Home" (2005-2006) 81 *Notre Dame LR* 783 803.

¹²² J Fee "Eminent Domain and the Sanctity of Home" (2005-2006) 81 *Notre Dame LR* 783 804. R Epstein *Takings: Private Property and the Law of Eminent Domain* (1985) 53 criticises the use of market value insofar as it excludes subjective damages that an owner can suffer due to the expropriation, and market value is therefore sometimes inadequate to calculate compensation. T Merrill "Incomplete Compensation for Takings" (2002) 11 *NYU Env'tl LR* 110 111 agrees that market value compensation is harsh on homeowners because they attach significant values to their homes that are not expressed in market value.

¹²³ J Fee "Eminent Domain and the Sanctity of Home" (2005-2006) 81 *Notre Dame LR* 783 807.

¹²⁴ J Fee "Eminent Domain and the Sanctity of Home" (2005-2006) 81 *Notre Dame LR* 783 808.

¹²⁵ J Fee "Eminent Domain and the Sanctity of Home" (2005-2006) 81 *Notre Dame LR* 783 813. The percentage to add is worked out on a scale according to how long the expropriatee lived in the house.

Radin, on the other hand, is in favour of compensation but against the expropriation of the home interest. She argues that compensation cannot adequately compensate the personhood element of property. Radin¹²⁶ asserts that compensation should be seen in the context of personhood. Radin's¹²⁷ theory of property and personhood states that personal property is justifiably bound up with a person and an element of personhood. We must therefore look at personhood to determine which objects are personal. Radin adds to this a normative theory of community, because "self-constitution takes place in relation to an environment...of things and of other people".¹²⁸ Things or property are therefore normatively appropriate to the construction of personhood, and people's control over these things needs greater protection than the commitment to pay market value when eminent domain is exercised.¹²⁹ The government must therefore be sensitive to whether the property taken by government deserves heightened protection, which might require compensation that is more than fair market value.

For Radin there are some instances where the government cannot exercise its eminent domain powers, since *no* amount of compensation can justify the taking of property that involves infringing on personhood.¹³⁰ Similarly, in

¹²⁶ MJ Radin "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 *Col LR* 1667. For critique of this theory, see S Schnably "Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood" (1998) 45 *Stan LR* 342.

¹²⁷ MJ Radin "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 *Col LR* 1667. See also K Gray "Human Rights and the Politics of Expropriation" (2005) 16 *Stell LR* 398, who he proposes that there are instances that warrant special protection in law, and where it is impossible to calculate the demoralisation costs.

¹²⁸ MJ Radin "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 *Col LR* 1667 1687.

¹²⁹ MJ Radin "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 *Col LR* 1667 1688.

¹³⁰ Radin applies this personhood interpretation to the three elements of property that liberals hold dear, namely possession, disposal and use. As far as possession is concerned, she concludes that *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) is wrong, since the laying of the cable did not interfere with Loretto's personhood (the building was held for investment purposes). With regard to *Poletown Neighborhood Council v City of Detroit* 410 Mich 616, 304 N W 2d 455 (1981) she found that compensation cannot always justly compensate owners for taking their right to dispose of their property freely, since some property is very important to personhood. In the use context, it will depend on how closely connected the use of the property is to personhood to determine to what extent the use can be restricted before it amounts to a taking. A developer restricted with regards of developing land should therefore be distinguished from a single owner that wants to build on his own land. The latter will have a stronger claim in cases of restriction. MJ Radin "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 *Col LR* 1667 1689 – 1691.

Germany, human dignity influences the interpretation of the property clause. In the German case *Besitzrecht des Mieters*,¹³¹ the Federal Constitutional Court stated that the property guarantee is not for the protection of property as such, but serves as a guarantee for the protection of personal liberty that, in turn, serves dignity. There is therefore a strong emphasis on the role that property plays in securing personhood, and in the proportionality test this can imply that compensation can also be *less* than market value.¹³² The nature of the property can therefore influence the compensation amount, and in some instances might require an amount more than market value to fairly compensate the loss, while in other instances it might preclude expropriation altogether.¹³³

The compensation requirement seems to bother Michelman and Radin especially in the context where the injury suffered by the owner cannot be compensated, since it has no economic value, but where the taking deprives the owner of political participation in society or of personhood interests. This is the case in *Poletown Neighborhood Council v City of Detroit*,¹³⁴ a case similar to *Kelo*. The people of Poletown, whose houses were expropriated to make way for a General Motors factory, cannot be made whole by money, since the worth of the property (and the sense of community) is more than what money can compensate. Money cannot buy a neighbourhood, and compensation cannot mediate the conflict between property/security vs police power/general welfare. According to Michelman, the courts in this case should not have allowed the expropriation, since it destroys a society from participating in the politics of the city of Detroit.

This links up with Radin's "personhood function" of property, where property is important in order to enable the individual to take control over his or her own lives.¹³⁵ In her view, personal property is held not because of its exchange value, but because it defines the sense of ourselves. Personal property should therefore receive more protection than fungible property (that is held

¹³¹ BVerfGE 81, 1 [1993] (*Besitzrecht des Mieters*).

¹³² G Alexander *The Global Debate over Constitutional Property* (2006) 115.

¹³³ See paragraph 5.5.6 for a discussion on proportionality.

¹³⁴ 410 Mich 616, 304 N W 2d 455 (1981).

¹³⁵ M Radin "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 *Col LR* 1667 1687.

for its exchange value).¹³⁶ She finds the court's adherence to the notion that private property protects individuals, as ambiguous, and pins it to the liberal conception of property. She proposes a pragmatic approach, in which each case is judged upon whether it aptly fosters individual freedom through personal property. This would in some cases mean that the power of eminent domain is limited where personal property is concerned, even if compensation is paid.¹³⁷

According to Nedelsky,¹³⁸ rights construct relationships, and property rights are about people's relation to each other, affected by things. This is also Singer's view on property.¹³⁹ Therefore, when rights are enforced it is important to think what concepts of property will foster the relationships we want. When rights are conceptualised in terms of the relationships, the liberal problem of individualism transforms into a debate of what kind of relationships are better to foster. The focus therefore moves away from the individual and protecting his or her property, to how to protect property in relation to others.¹⁴⁰ Property as constitutional right is therefore more than mere ownership, and it cannot always be compensated,¹⁴¹ especially where the home interest is involved.

5.3 What is compensated?

5.3.1 Introduction

What is compensated must be deduced from the reasons *why* we pay compensation. What follows are therefore arguments, based on the preceding paragraphs, about *what* we pay compensation for.

¹³⁶ MJ Radin "Property and Personhood" (1982) 34 *Stan LR* 957 959 – 960.

¹³⁷ M Radin "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 *Col LR* 1667 1687.

¹³⁸ J Nedelsky "Reconceiving Rights as Relationship" (1993) 1 *Review of Constitutional Studies* 1.

¹³⁹ JW Singer "The Reliance Interest in Property" (1987-1988) 40 *Stan LR* 611.

¹⁴⁰ J Nedelsky "Reconceiving Rights as Relationship" (1993) 1 *Review of Constitutional Studies* 1 13 – 14.

¹⁴¹ F Michelman "Property as a Constitutional Right" (1981) 39 *Wash & Lee LR* 1097.

5.3.2 Compensation is paid for the property taken

As was discussed in paragraph 5.2.2.2, Epstein's liberal view of property means that ownership is vehemently protected and ownership's value lies in the ability of an owner to exclude others from his/her property. Government must pay for every interference that restricts the exclusivity of ownership. From this it can be deduced that, by paying compensation, an owner is compensated for his/her loss of exclusive use of and control over the property itself. This ties in with the approach in the South African Expropriation Act,¹⁴² where compensation is only paid to owners¹⁴³ for the property taken. Pre-constitutional expropriation law in South Africa, it was shown, paid market value compensation for the rights in the property taken.¹⁴⁴ This was done in order to put the expropriatee in the same position (s)he was, before the expropriation. With the advent of constitutional democracy, it was shown that the courts, despite the new constitutional expropriation requirements, still adhere to the pre-constitutional compensation practice of placing market value central to the compensation question.¹⁴⁵ The argument was made that the Constitution demands a context-sensitive approach to the compensation question, where compensation must be "just and equitable" in a societal context. This suggests that compensation is not paid for the value of the rights in the property themselves, and that it should be interpreted in the context of rights as relationship.

This is the arguments of Singer and Beerman,¹⁴⁶ Radin¹⁴⁷ and Nedelsky¹⁴⁸ who believe that property functions in a societal context, where the purpose of compensation is to burden members of a society equally with the expropriation. Compensation would therefore be paid for the social aspect of property, and what is compensated is the amount that would equal such a burden.

¹⁴² 63 of 1975.

¹⁴³ And certain right holders, but only when additional requirements are fulfilled

¹⁴⁴ See paragraph 2.3.2.5 and 2.4.1.

¹⁴⁵ See paragraph 2.4.4.

¹⁴⁶ See paragraph 5.2.2.2.

¹⁴⁷ M Radin "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings" (1988) 88 *Col LR* 1667.

¹⁴⁸ J Nedelsky "Reconceiving Rights as Relationship" (1993) 1 *Review of Constitutional Studies* 1.

Such an amount should therefore aim at distributing the wealth and burdens of society equally amongst the citizens.

For Wyman¹⁴⁹ the burden of expropriation is fairly distributed when the individual is compensated to the point of feeling objectively indifferent to the expropriation. This would be the case where the individual receives an amount that would compensate the loss the individual suffered, but only in terms of goods that are worth having to enjoy the same capabilities that are deemed valuable by society, before and after the taking. What is therefore compensated is the loss of goods that are worth having. Fee¹⁵⁰ also agrees that an expropriatee should be rendered indifferent to the expropriation, but argues that in the case of home interest an individual must feel subjectively indifferent to the taking. What is therefore compensated is an amount that would make the individual subjectively indifferent to the expropriation. This can be done, he argues, by paying market value plus an added percentage of the market value.

5.3.3 An amount to secure democratic participation

Michelman disagrees with the idea that it is property (in the classical liberal sense of exclusively, individually owned private property) that is expropriated. Michelman investigates the nature of property as a constitutional right, before answering what compensation is paid for. For Michelman¹⁵¹ the courts give content to property, and by giving such content the judges should focus on whether the value the property embodies is important for political participation. Property in this sense is a non-specific term that the judges have to give content to, and they can do so by helping to resolve the conflict between individual protection and popular rule if they see property as something that provides the individual with the opportunity to participate in the political process.

The problem is that a constitutional system implies that individual rights can be redistributed by the popular government, but that the same Constitution provides that individuals can own property. This contradiction supports the

¹⁴⁹ See paragraph 5.2.3.4.

¹⁵⁰ See paragraph 5.2.3.5.

¹⁵¹ F Michelman "Property as a Constitutional Right" (1981) 39 *Wash & Lee LR* 1097 1112.

liberal democratic notion of popular rule vs individual worth. Instead of being a dead end, Michelman suggests that this tension must generate new resolutions by emphasising the due process procedural requirement, or just compensation for takings. What is therefore compensated is the amount of money it requires to enable individual participation in the social and political arena and the loss of political participation. The compensation amount must therefore pay the costs of redirecting the resources to enable political participation.¹⁵²

This ties in with the German idea that constitutional property should be protected insofar as it enables the individual to lead a self-governing life within the social context.¹⁵³ It should therefore be asked what amount of compensation would enable an individual to lead a self-governing life within a larger social context? This needs not always be market value, and in some cases, even if compensation is paid, a court can still declare an expropriation unconstitutional when it robs the individual of the ability to lead a self-governing life, an ability that cannot be compensated by any amount of money.¹⁵⁴

5.4 When do we pay compensation?

5.4.1 Introduction

The *when* question ties in with the *what* question, insofar as the degree of protection, and connected to that the concept of property that is protected, is often the baseline of the question in the United States of America on *when* a regulation amounts to a compensable taking. In answering the *when* question the United States of America example can help to clarify the answer. This is mainly because of the regulatory takings jurisprudence (and the accompanied academic literature on the subject) that developed over the past century. As mentioned before, although it cannot explain the general rules of compensation, it is unavoidable that the issue of regulatory takings will appear in a dissertation on compensation. The United States of America example is fur-

¹⁵² F Michelman "Property as a Constitutional Right" (1981) 39 *Wash & Lee LR* 1097 1112.

¹⁵³ See paragraphs 5.2.3.3 and 4.2.2.

¹⁵⁴ *BVerfGE* 24, 376 [1968] (*Hamburgisches Deichordnungsgesetz*).

thermore instructive in a comparative context, especially when it is measured against the German and the Australian examples as was done in chapter 4.

What follows is a look at when compensation is due, first with reference to conceptual severance, where after some conclusions will be deduced based on the *why* and the *what* question.

5.4.2 Compensation is due when an incident of ownership is taken

5.4.2.1 Regulatory takings

The United States of America courts follow a black and white rule regarding compensation for takings: if there was a taking, it must be compensated. If not, no compensation is due. This is an all or nothing approach, and it seems that once there was an expropriation, the compensation question is automatically answered by expecting full compensation at market value. The compensation requirement serves as a strong protection for property, leading to the United States of America courts concentrating on the question of when a regulation goes too far and constitutes a taking that requires compensation.¹⁵⁵

The courts in the United States of America advocates to the idea that an individual should not be expected to carry the burden where the state exercise its power in the public interest.¹⁵⁶ The takings debate therefore surrounds the question of *when* such an individual would be carrying an unfair burden. This paragraph focussed on the idea that compensation is due when an incident of ownership is taken, while the next paragraph will focus on the expropriatee and the demoralisation costs of expropriation.

Regulatory takings are about a free interpretation of the word “taking” in the Fifth Amendment, and it is about paying compensation for such a taking, even if no property was acquired. In chapter 4 it was shown that at a taking the state uses its eminent domain powers to acquire property. In the takings con-

¹⁵⁵ See chapter 2 for a thorough discussion on the methods. See JW Singer & JM Beermann “The Social Origins of Property” (1993) 6 *Can J Law & Juris* 217 221; F Michelman “Property, Utility and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harv LR* 1165 1183 – 1193; JL Sax “Takings and the Police Power” (1964) 74 *Yale LJ* 36; JL Sax “Takings, Private Property and Public Rights” (1971) 81 *Yale LJ* 149 for criticism of these factors.

¹⁵⁶ *Keystone Bituminous Coal Association v DeBenedictis* 480 US 470 (1987).

text, certain regulations will amount to a taking even if the state does not acquire property. The first is where the state does not acquire property, but destroys the property, or the use of the property.¹⁵⁷ In such a case, compensation will be paid for the property loss, or the owner losing certain entitlements. The second is where the state does not acquire or destroy property, but acquires a benefit, possibly creating a monopoly. This, for Sax, would be compensable, because the state cannot act in an enterprising capacity at the detriment of a citizen.¹⁵⁸ The third is where the state does not acquire or destroy property or a benefit, but goes too far and therefore places an unfair burden on the individual.¹⁵⁹ Compensation would in this case be due to spread the burden of the infringement amongst society.

In order to determine whether a taking occurred, the United States of America courts start by looking at whether there was a “per se” taking of property, and if it finds no answer, move on to the ad hoc *Penn Central* test.¹⁶⁰ It would be a “per se” taking if the government regulation resulted in a permanent physical invasion to the property;¹⁶¹ it destroys or denies all economic viable uses of the property;¹⁶² or it destroys the core of a holder’s property rights.¹⁶³ If the “per se” test is not applicable, the court will move on to the ad hoc test, as formulated in *Penn Central Transportation Co v City of New York*,¹⁶⁴ where the courts focus on the nature or the government action, the diminution of value due to the regulation and the extent to which the regulation interferes with reasonable investment-backed expectations to determine whether there was a taking.

This leaves the protection of property rights and compensation in the hands of the courts, and in the United States of America they have adopted a formalistic approach to identify which property rights are at the core of the tak-

¹⁵⁷ *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

¹⁵⁸ This is the kind of action that JL Sax “Takings, Private Property and Public Rights” (1971) 81 *Yale LJ* 149 advocates should be compensated.

¹⁵⁹ *Nollan v California Coastal Commission* 483 US 825 (1987); *Dolan v City of Tigard* 512 US 374 (1994).

¹⁶⁰ They were discussed in more detail in paragraph 4.3.2.

¹⁶¹ *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982). The Supreme Court ruled that a permanent physical invasion amounts to a taking, regardless of the public interest it wish to serve (425) or the physical size of the invasion (426).

¹⁶² *Lucas v South Carolina Coastal Council* 505 US 1003 (1992).

¹⁶³ *Hodel v Irving* 481 US 704 (1987).

¹⁶⁴ 438 US 104 (1978).

ings question. The courts thus became activists that protect property interests by intervening in regulatory programmes established by the legislature. Although the courts deny playing an active role in protecting property interests, Radin argues that their activism is evident from their resort to, what she calls, “conceptual severance”.¹⁶⁵ Radin states that conceptual severance

“consists of delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken. Thus, this strategy hypothetically or conceptually severs from the whole bundle of rights just those strands that are interfered with by the regulation, and then hypothetically or conceptually construes those strands in the aggregate as a separate whole thing.”¹⁶⁶

Conceptual severance entails the construction of ownership as a bundle of sticks with each stick representing an incident of ownership. This places the focus on property and not on the definition of a taking or the expropriatee. The courts can find that the taking of one stick was a deprivation of a distinct interest (instead of a restriction on a whole property interest) and that compensation is due for that stick.¹⁶⁷ This is the classic liberal view of property that Radin criticises.¹⁶⁸ Compensation is therefore paid when the state took an incident of ownership, although it acquired no property.¹⁶⁹

As mentioned, regulatory takings are unique to the United States of America, in the sense that the Constitution merely authorises takings, and the courts interpreting that to include certain instances where the state does not acquire anything. In Australia no compensation is due if the government did not acquire property or a benefit, and in Germany the law that authorises the expropriation must make provision for compensation, otherwise it is invalid. Inter-

¹⁶⁵ See n 16. This is a term coined by MJ Radin “The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings” (1988) 88 *Col LR* 1667 1676.

¹⁶⁶ MJ Radin “The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings” (1988) 88 *Col LR* 1667 1676.

¹⁶⁷ JW Singer & JM Beermann “The Social Origins of Property” (1993) 6 *Can J Law & Juris* 217 222. See the United State Supreme Court’s reference to the bundle of sticks analogy in *Loretto v Teleprompter Manhattan CATV Corp* 458 US 419 (1982) 435 and *Kaiser Aetna v Unites States* 444 US 164 (1970) 176.

¹⁶⁸ See for instance MJ Radin “The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings” (1988) 88 *Col LR* 1667, who criticises this view and proposes an alternative solution based on the concept of personhood.

¹⁶⁹ In Germany this problem is mostly avoided by the clear distinction between deprivation and expropriation. The courts first look at whether it is an expropriation, and if that is found to be the case, only then look into the question of compensation.

estingly, the Swiss property clause requires compensation when a regulatory limitation has an expropriatory effect because it places such a heavy burden on the property owner.¹⁷⁰ This is referred to as “material expropriation” and is akin to the regulatory takings idea in the United States of America,¹⁷¹ although in Switzerland it is expressly provided for in the property clause.

This also ties in with Epstein’s view of property and takings, who argues that the government must pay for every interference with property because it takes away an incident of ownership from the bundle of exclusivity of ownership. Singer and Beerman¹⁷² respond that government is allowed to regulate individual property in the social context, and that compensation should only be paid when an individual owner is singled out by the government action.¹⁷³

An alternative approach to the takings issue is proposed by Sax.¹⁷⁴ He divides government action between government as enterprise, and government as mediator. When government act as enterprise, it competes with other users for resources, and must pay compensation for a taking. Government as mediator settles conflicts between private users that claim a resource, and therefore need not pay compensation. Compensation would therefore be due when government acts as enterpriser, requiring resources.¹⁷⁵ This focuses on the government’s action, and not on the expropriatee. This correlates with the Australian approach, where compensation is only due when the property was compulsory acquired under section 51(xxxi) of the Australian Commonwealth Constitution, and not when government acts in any other capacity.

In German law, compensation is also not paid for a regulation that “goes too far”, but due to different reasons. Compensation is only due when the author-

¹⁷⁰ AJ van der Walt “The Property Clause in the New Federal Constitution of the Swiss Confederation 1999” (2004) 15 *Stell LR* 326 327.

¹⁷¹ AJ van der Walt “The Property Clause in the New Federal Constitution of the Swiss Confederation 1999” (2004) 15 *Stell LR* 326 328.

¹⁷² Singer & JM Beermann “The Social Origins of Property” (1993) 6 *Can J Law & Juris* 217 224.

¹⁷³ This will also be Nedelsky’s argument. See J Nedelsky *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (1990).

¹⁷⁴ JL Sax “Takings, Private Property and Police Power” (1964) 74 *Yale LJ* 36.

¹⁷⁵ JL Sax “Takings, Private Property and Public Rights” (1971) 81 *Yale LJ* 149 later built on this argument by shifting the focus from the nature of the government action to the nature of the use of property. This argument essentially rests on the idea that government action is a matter of public rights, where no compensation is required. Compensation is only required when government regulates a use of property that does not have a spill-over effect. This rests on the idea of interconnectedness of property. See n 69 for an explanation of this view.

ising statute makes provision for it. This is due to the *Junktim-Klausel*.¹⁷⁶ A regulation that places an unfair burden on the individual without paying compensation can only be attacked for constitutional invalidity but it cannot be used to found a compensation claim similar to that in the United States of America. An owner who was unfairly burdened by a regulation cannot claim compensation for expropriation in terms of article 14.3 of the Basic Law.

To determine whether regulation of property is fair, the German courts have developed the doctrine of *Sonderopfer* (individual sacrifice), according to which a regulation that singles out a property owner unfairly to bear a disproportionate burden of regulation that benefits the broader public is invalid. It will “go too far” if it disturbs the equitable balance between the interest of the individual and the social interest. If the individual is singled out to carry the burden, and the burden cannot be said to be one that a reasonable owner is expected to bear in the bigger society, then the regulation will be invalidated for being unconstitutional. A regulation that “goes too far” in the German perspective therefore cannot be saved by compensation for expropriation in terms of article 14.3.¹⁷⁷

An interesting practice in German law regarding the payment of compensation in this context is the so-called *Ausgleichsanspruch* (equalisation payment). This fills the gap between securing property by requiring compensation for expropriation and uncompensated regulation, but does not amount to compensation for a regulatory taking, as in the United States of America. In cases of regulatory excess that result in an unusual sacrifice (*Sonderopfer*), a special kind of compensation could be paid to alleviate the burden of uncompensated state interference with property potentially solving the problem of disproportional distribution of the burden imposed by otherwise legitimate government regulation. Equalisation aims at reducing the unfair burden of regulation on an individual owner without having to declare the regulation unconstitutional.¹⁷⁸ This is a unique solution to the problem of disproportionate regula-

¹⁷⁶ See paragraph 4.2.4.4.

¹⁷⁷ See the previous chapter, paragraph 4.2 for a more in-depth discussion of the compensation practices in Germany. Also compare this with the American approach in paragraphs 4.3.

¹⁷⁸ See paragraph 4.2.4.5. It should be remembered that this is special compensation that the Federal High Courts came up with in order to reduce the impact of regulatory access, and is

tion in the German context, where compensation for expropriation can only be paid if the authorising statute explicitly authorises expropriation and provides for compensation (*Junktim-Klausel*).

Another interesting explanation of when compensation should be due in the absence of explicit provision is proposed by Blume and Rubinfeld.¹⁷⁹ Blume and Rubinfeld provide a perspective on compensation for political risk.¹⁸⁰ In their opinion insurance against the political risk of expropriation comes in the form of compensation. The premiums to this insurance are higher taxes. There are owners who would decide that the cost of insurance is higher than the benefit of reduced risk, who would therefore not obtain insurance if it was available privately, and who might feel treated unfairly if the state forces them to pay insurance that they do not want. For Blume and Rubinfeld, it does not make sense to provide insurance to such owners.¹⁸¹ The inquiry then shifts to who will get insurance, and who will be entitled to compensation as insurance.

For this they devised a two-part test to indicate which owners would insure against the political risk of uncompensated expropriation. There are generally owners who face a higher risk, and those who are opposed to risk.¹⁸² Compensation is therefore restricted to owners who are well-off or to cases where the loss percentage-wise represents a bigger dimension of the owner's total wealth. In the case of expropriation it might be necessary to distinguish between the expropriation of commercial property and expropriation of a family home.¹⁸³ Full compensation is fair when a family home is expropriated, since the family home is the most important investment with a limited capacity to reduce risk and needs compensation as insurance, while commercial property

not compensation for expropriation, or damages in delict. For an example of cases where such a payment was made, see *BGHZ* 64, 220 [1975]; *BGHZ* 83, 61 [1982]. See also *BVerfGE* 58, 300 [1981] (*Naßauskiesung*) where the court rejected the view that this is compensation for expropriation.

¹⁷⁹ L Blume & DL Rubinfeld "Compensation for Takings: An Economic Analysis" (1984) 72 *Cal LR* 569.

¹⁸⁰ L Blume & DL Rubinfeld "Compensation for Takings: An Economic Analysis" (1984) 72 *Cal LR* 569 601.

¹⁸¹ L Blume & DL Rubinfeld "Compensation for Takings: An Economic Analysis" (1984) 72 *Cal LR* 569 601.

¹⁸² L Blume & DL Rubinfeld "Compensation for Takings: An Economic Analysis" (1984) 72 *Cal LR* 569 601.

¹⁸³ L Blume & DL Rubinfeld "Compensation for Takings: An Economic Analysis" (1984) 72 *Cal LR* 569 601. See the discussion on compensating a home at 5.2.3.5, where the difficulty of compensating home-interest is discussed.

owners can diversify their holdings, reducing their risk, and therefore should not by default receive full market value. Compensation is therefore paid when the losses are big (and therefore uninsured) or where the expropriatee (usually small time homeowners) could not insure against the losses.

Although, as mentioned in the previous chapter, the position concerning regulatory takings in South Africa is not clear. It seems unlikely that South Africa will follow the American example, although the Supreme Court of Appeal mentioned that it might be possible when a regulatory deprivation transfers rights to the state, albeit indirectly.¹⁸⁴ On the *FNB* test, a regulation that “goes too far” will probably not pass the arbitrariness test and therefore be declared unconstitutional. This is probably the desired route. A regulation that has a disproportionate burdensome effect on the individual should be attacked for constitutional validity, either in order to bring the regulation in line with the constitution or to declare it invalid, but not to found a claim for compensation. In those situations when it is not possible to save the regulation in such a manner, the courts should consider something akin to the equalisation payments in Germany to ensure a measure of flexibility. This might be especially useful where potential land reform legislation places an undue burden on a particular individual.¹⁸⁵ The land reform aspiration of such potential legislation should not be frustrated by the inflexibility to save a regulation that has an expropriatory effect on the individual.

The focus in this section was the loss that the expropriatee suffers in such instances. In the United States of America various tests developed in the courts to determine when an individual would be carrying an unfair burden. This was contrasted with German law that does not allow for regulatory takings, but alleviates the burden by making equalisation payments. The opinions of Sax and Blume and Rubinfeld were also mentioned as interesting alternatives to the compensation problem. The next paragraph will shift the focus to another interesting solution of when compensation should be paid, by focussing on the demoralising effect that regulations can have on the expropriatee.

¹⁸⁴ *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA) par 6. For a comment on the case see AJ van der Walt “Moving Towards Recognition of Constructive Expropriation?” (2002) *THRHR* 459.

¹⁸⁵ This is an example AJ van der Walt *Constitutional Property Law* (2005) 236 uses.

5.4.2.2 Compensation is due when the demoralisation cost is high

Michelman focuses on the expropriatee. The outline of Michelman's argument as to when compensation is due can be summed up as follows: a rational government will only expropriate when the cost of expropriation is less than the benefits of expropriating. As a utilitarian he focuses on the output of satisfaction. Settled expectations about the distribution of wealth (ie property) serve as an incentive for people to labour and invest and therefore help in the production of wealth. If property is taken purely for redistribution the action could be demoralising because it reduces wealth, but the demoralisation cost can be reduced by paying compensation. Compensation is therefore paid to counter the demoralisation cost of redistribution, but compensation is only needed in instances where the demoralisation cost of denying compensation is more than the settlement costs of compensating.¹⁸⁶

To elaborate on the above, we need to understand the meaning of the terminology Michelman employs. Efficiency gains are the excess of benefits that will result from the taking, measured against the losses inflicted by it. Benefits are measured by calculating the amount of money that prospective gainers would be willing to pay to secure the expropriation, and the losses are the amount that prospective losers will insist on to agree to the expropriation. "Demoralisation costs" are

"the total of (1) the dollar value necessary to offset disutilities which accrue to the loser and their sympathisers specifically from the realisation that no compensation is offered, and (2) the present capitalised dollar value of lost future production (reflecting either impaired incentives or social unrest) caused by demoralisation of uncompensated losers, their sympathisers, and other observers disturbed by the thought that they themselves may be subjected to similar treatment on some other occasion".¹⁸⁷

Demoralisation cost is the cost that arises when investors redirect their investments from jurisdictions where there is a greater risk of uncompensated expropriation of their assets. "Settlement costs" are time, effort and resources

¹⁸⁶ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1214. See TW Merrill "The Economics of Public Use" (1986) 72 *Cornell LR* 61 73 for criticism of this cost / benefit analysis.

¹⁸⁷ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1214.

that are required to reach compensation settlements to avoid demoralisation costs, expressed in money.¹⁸⁸

Michelman rejects the measurement of compensation based on efficiency gains only, as efficiency gains do not take into account the demoralisation costs caused by capricious redistribution, nor the settlement costs needed to avoid such demoralisation costs.¹⁸⁹ Efficiency gains would not, in his view, influence the calculation of compensation. Compensation is paid when settlement costs are lower than demoralisation costs and efficiency gains, but if settlement costs exceed efficiency gains but are less than demoralisation costs, then no compensation is due. Compensation is only paid when demoralisations costs are higher than settlement costs.¹⁹⁰

Since there would be no perception of unfairness in this economic analysis in instances where no compensation is due, Michelman¹⁹¹ claims that this is an ethical claim for compensation. Compensation would not be due where the settlement costs will be higher than the demoralisation costs, as for example in cases where the settlement cost of a regulation that affects a cross-section of the public is more than the demoralisation cost. In those instances affected people might not be demoralised since the burden is not singling them out. They might not feel treated unfairly, especially if they consider that the settling cost might be paid out of their taxes. Their conception of fairness is therefore informed by the long-term distribution of gains and losses.¹⁹² Since fairness in this context requires a long-term vision of society and is not focussed on the short-term satisfaction of the owner, this will require the courts to have a holistic long-term vision of compensation.

¹⁸⁸ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1214.

¹⁸⁹ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1215.

¹⁹⁰ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1215.

¹⁹¹ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1221.

¹⁹² F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1223.

5.5 How much compensation should be paid?

5.5.1 Introduction

Having looked at *why* we pay compensation, *what* is compensated and *when* it is due, this section will look at *how much* compensation should be paid, and how it should be calculated.

It was shown in chapter 2 that market value played a central role in the calculation of compensation prior to the South African Final Constitution, and it was shown in chapter 3 that market value still plays a central role in the calculation of compensation under the Constitution despite the fact that it is only one of five factors listed in section 25(3). Chapter 4 showed that in the United States of America value is assumed to be market value and that the Australian courts have ruled that just terms does not necessary mean market value. In German law, market value is mostly used, but the courts emphasise spreading the burden proportionally rather than market value as such. This section investigates market value as the only method of calculating compensation, as well as the assumption that it is neutral or scientific. The importance of the *how much* question lies in the assumptions that underlie the choice of *how* to calculate compensation, and in the paragraphs that follow those methods will be discussed critically.

Courts seem to unconditionally accept market value as an indication of value. Market value is based on the willing buyer willing seller principle, and this is determined by a chosen calculation method, such as comparable sales, return on investment and so forth.¹⁹³ These are generally accepted methods of valuation, but even if the calculation is left to experienced valuers they often have different results. This is an indication that market value and the mechanisms used to determine market value are not as objective as the courts accept it to be. Moreover, the most important and often the most difficult decision to make, such as which damages to include, is left to the courts that are not experienced in valuation and rely on what is placed in front of them. It is

¹⁹³ See chapter 2 for the methods used in South Africa.

therefore necessary to question the assumptions that the methods are based on.

5.5.2 Time and manner of payment of compensation

Alongside the requirement that compensation should be paid, many constitutions also have requirements with regard to how compensation should be paid. Compensation must be prompt¹⁹⁴ or paid within a reasonable time¹⁹⁵ and the expropriatee should have the possibility of rejecting it.¹⁹⁶ The South African Constitution requires that “the time and manner of payment must be just and equitable” without specifying time limits.¹⁹⁷ The time and manner of payment also factors that can influence the fairness of compensation.¹⁹⁸ Compensation need not be paid in cash,¹⁹⁹ and can be paid in future, as long as it is just and equitable.²⁰⁰ Expropriations are administrative actions and therefore subject to administrative review. This means that the procedure of payment must also be fair.²⁰¹ Procedural requirements can influence the substantive fairness question, and these rules are not objective rules that can be applied mechanically.

As to the substantive question, the calculation of compensation, the methods employed in calculating compensation and the unquestioned acceptance of

¹⁹⁴ See T Allen *The Right to Property in Commonwealth Constitutions* (2000) 250 for examples.

¹⁹⁵ See T Allen *The Right to Property in Commonwealth Constitutions* (2000) 250 for examples.

¹⁹⁶ See T Allen *The Right to Property in Commonwealth Constitutions* (2000) 250 for examples.

¹⁹⁷ S 25 (3). See paragraph 3.5.4

¹⁹⁸ For instance, in *Antoine v United States* 710 F 2d 477 (8th Cir 1983) a member of the Rosebud Sioux Indian tribe claimed that the government expropriated 320 acres from his grandfather in 1884. The court ruled that it was a taking, but rejected the idea that compensation should be calculated on the basis of the replacement value of the property. The court instead calculated the fair market value of the property at the time the taking occurred, back in 1884. The total amount, taking into account interest, came to a meagre \$7262. For a similar case in South Africa see *Hermanus v Department of Land Affairs: In Re Erven 3535 and 3536, Goodwood* 2001 (1) SA 1030 (LCC), where the court reduced the compensation amount by making use of the *solatium* requirement.

¹⁹⁹ See *RC Cooper v Union of India* [1970] 3 SCR 530 609 where compensation was paid in government bonds.

²⁰⁰ A Gildenhuys *Ontheieningsreg* 2nd ed (2001) 99.

²⁰¹ *Lebowa Mineral Trust Beneficiaries Forum v President of Republic of South Africa* 2002 (1) BCLR 23 (T) 30 E- F. See also the discussion of Sax's theory at 5.2.2.3.

market value as value can have a big influence on fairness. This will be discussed in the following paragraphs.

5.5.3 The role of market value in the calculation of compensation

Since owners can seldom resist expropriation, most cases focus on the compensation element. Most constitutional property clauses state that the owner must be compensated for expropriated property. The compensation requirement is formulated in numerous ways.²⁰² Compensation is required to be “just and equitable”,²⁰³ “adequate”,²⁰⁴ “just and prerequisite”,²⁰⁵ “just indemnity”,²⁰⁶ “fair and preliminary indemnity”,²⁰⁷ “fair compensation”,²⁰⁸ “full compensation”,²⁰⁹ “just and previously determined”,²¹⁰ and “just terms”.²¹¹ Some Constitutions, like the South African Constitution,²¹² have added detailed provisions to ensure that compensation is not automatically equated with market value.²¹³ These clauses have been interpreted in the context that the aim of compensation is to ensure that the owner is treated fairly,²¹⁴ and they do not aim to protect the public funds from which compensation is paid. There is therefore a strong focus on the individual that led to courts to assume that compensation should not be less than the market value of the taken property.²¹⁵

²⁰² For a comprehensive discussion on different constitutional property clauses, as well as a translated property clauses, see AJ van der Walt *Constitutional Property Clauses: A Comparative Perspective* (1999).

²⁰³ S 25(3) of the Constitution of the Republic of South Africa, 1996; Art 20 of Constitution of the Democratic People’s Republic of Algeria, 1989.

²⁰⁴ Art 27(1)(c)(i) of the Constitution of the Commonwealth of the Bahamas, 1973; s 8(1)(b)(i) of the Constitution of the Republic of Botswana, 1966.

²⁰⁵ Art 22 of the Constitution of the Republic of Benin, 1990.

²⁰⁶ Art 15 of the Constitution of Burkina Faso, 1991.

²⁰⁷ Art 27 of the Constitution of the Republic of Burundi, 1992.

²⁰⁸ Art 66 of the Constitution of the Republic of Cape Verde, 1992; Preamble of the Constitution of the Federal Islamic Republic of Comoros, 1992; Art 14.3 of the German Basic Law.

²⁰⁹ Art 73(1) of the Constitution of the Kingdom of Denmark Act 1953; art 75(1)(c) of the Constitution of Kenya Act, 1969.

²¹⁰ Art 17 of the French Constitution (Declaration of the Rights of Man and Citizen 1789).

²¹¹ S 51(xxxi) of the Commonwealth of Australia Constitution Act 1990.

²¹² See chapter 3.

²¹³ See paragraph 5.5.3 for the role of market value in the calculation of compensation, as well as the problem in India.

²¹⁴ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 223.

²¹⁵ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 223.

It should be noted from the outset that neither the United States of America Constitution (on which most of the literature is based), nor the South African Constitution (the subject of this dissertation) demands full market value: both demand just and equitable compensation.²¹⁶ Market value is therefore just *one* interpretation of the just compensation principle.²¹⁷

In the United States of America context, Dunham²¹⁸ devoted some time to the question of compensation in his 1962 article on the *Griggs v Allegheny County* case. Dunham seems to explain the procedural laws regarding compensation under the heading “just compensation”. Dunham comments that it is the courts that often find market value as a fact. He then sets out to show how the courts in the United States of America stay as close as possible to market value as a guide, re-adjusting the definition by adding or subtracting the factors to be considered when determining just compensation.²¹⁹ This creates the impression that he is of the opinion that the question of calculation of compensation is subsumed in the black letter law, which in turn rests on a specific idea of property and when a taking should be compensated.

In his discussion on market value, Dunham rejects “value to owner” and “value to taker” as calculation methods, stating that government should pay market value and not compensate for the subjective value the property has for the owner. Market value is the “value determined by general demand rather than a value computed on the basis of the unique and perhaps eccentric per-

²¹⁶ Historically just compensation was seen as something that is judicially determined and that cannot be constitutionally controlled by either the legislature or the executive. A Dunham “*Griggs v Allegheny County* in Perspective: Thirty Years of Supreme Court Expropriation Law” (1962) 63 *Sup Ct Rev* 63 95 examines three cases where World War II regulations dealt with the issue of just compensation. These cases did not make it clear whether the issue of just compensation is a legislative judgement. Dunham restricts the question of legislative control over just compensation in the constitutional context to the minimum amount payable, since the legislature seems to have the power to order that more than just compensation be paid.

²¹⁷ C Serkin “The Meaning of Value: Assessing Just Compensation for Regulatory Takings” (2004 - 2005) 99 *NW U LR* (2004 – 2005) 677.

²¹⁸ A Dunham “*Griggs v Allegheny County* in Perspective: Thirty Years of Supreme Court Expropriation Law” (1962) 63 *Sup Ct Rev* 63.

²¹⁹ A Dunham “*Griggs v Allegheny County* in Perspective: Thirty Years of Supreme Court Expropriation Law” (1962) 63 *Sup Ct Rev* 63 90 – 91 referring to *Massachusetts v Mellon* 262 US 447 (1923). See also *Alabama Power Co v Ickes* 302 US 464 (1938) where it was ruled that taxpayers in federal cases have no standing to claim that too much money was paid.

sonal standards of the owner”.²²⁰ Market value is affected by many considerations. In eminent domain proceedings parties often try to separate particular factors (eg goodwill or business value) from market value to separately value these factors. However, these factors are already included in the concept of market value, and not supposed to be valued separately. This leads to the market value either being enhanced or reduced. Dunham thinks that extra compensation should not be awarded in such circumstances; since the willing seller would presumably include these factors in the selling price.²²¹ Focusing on specific factors is therefore not fair and a method that is perceived as an objective market valuation is influenced by the choice of factors that the valuator chooses to emphasise.

The market value concept has other fundamental problems. There are no willing sellers in the case of expropriation,²²² making the market that determines the value an artificial market.²²³ As Merrill puts it:

“[T]he concept of fair market value is essentially a fiction in the context of takings of property. Fair market value would perhaps be more easily ascertainable if takings took place in thick markets in which there were many buyers and sellers.”

Regardless of the problems with market value, the courts still apply it in difficult situations, as in the case of *Kimball Laundry Co v United States*²²⁴ where market value was adopted because, even if the owner has a special attachment to the land, market value is seen as a fair way to measure the public obligation to compensate, since market value is an external validity. Therefore, even if idiosyncratic values are lost, it is still fair because that is the burden of common ownership one has to carry.²²⁵ However Durham asserts that if market value implies the value of what the biggest percentage of people would attach to the property when selling it, market value becomes meaningless,

²²⁰ A Dunham “*Griggs v Allegheny County* in Perspective: Thirty Years of Supreme Court Expropriation Law” (1962) 63 *Sup Ct Rev* 63 95.

²²¹ A Dunham “*Griggs v Allegheny County* in Perspective: Thirty Years of Supreme Court Expropriation Law” (1962) 63 *Sup Ct Rev* 63 95 – 96.

²²² A Dunham “*Griggs v Allegheny County* in Perspective: Thirty Years of Supreme Court Expropriation Law” (1962) 63 *Sup Ct Rev* 63 96.

²²³ See criticism in paragraph 2.4.4.2.

²²⁴ 338 US 1 (1949).

²²⁵ A Dunham “*Griggs v Allegheny County* in Perspective: Thirty Years of Supreme Court Expropriation Law” (1962) 63 *Sup Ct Rev* 63 97 states that what the court implies with “idiosyncratic attachment” is that some owners will not sell their property at market value.

because most people do not want to sell (which is why they must be expropriated).²²⁶ Therefore, what compensation then protects is not clear, since market value is not precise.

Allen²²⁷ pins the assumption of market value in the Commonwealth countries to the English view of the nineteenth century that compensation should serve as indemnity to the owner for the loss of the property. It is necessary to consider the influence of different views of fairness on the compensation standard.²²⁸ Allen²²⁹ asserts that most Commonwealth courts assume that if a Constitution guarantees compensation, it means full compensation. He uses India as an example of where the courts just assumed that some of the general principles of compensation law as contained in the statutes on expropriation of land are entrenched in the Constitution.²³⁰

The Indian example is intricate, but the conflict between the courts and the legislature does highlight the difference in opinion on how to calculate compensation, and what the content of market value is. The Indian Constitution in article 31(2) provided that no law can authorise an expropriation “unless the law provides for the compensation for the property taken possession of or acquired and either fixes the amount of compensation, or specifies the principles on which the compensation is to be determined and given”. The Constituent Assembly hoped that this would prevent the courts from inquiring into the adequacy of compensation, therefore enabling the legislature to acquire property below market value. The court in *State of West Bengal v Bela Banerjee*,²³¹ however, interpreted the article to give a narrow discretion to the legislature to determine compensation, requiring full indemnification of the expropriated owner. According to Allen this is an indication that the courts believed that property owners have an ethical claim to full compensation.²³² An amend-

²²⁶ A Dunham “*Griggs v Allegheny County in Perspective: Thirty Years of Supreme Court Expropriation Law*” (1962) 63 *Sup Ct Rev* 63 98.

²²⁷ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 223.

²²⁸ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 223.

²²⁹ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 224.

²³⁰ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 224 – 229.

²³¹ AIR 1954 SC 170 172

²³² T Allen *The Right to Property in Commonwealth Constitutions* (2000) 225.

ment to the Constitution followed to respond to *Banerjee*,²³³ and the court reacted with *Valravelu v Special Deputy Collector West Madras*,²³⁴ by saying that the legislature has no power to acquire property unless it provided for a just equivalent or a way to ascertain the just equivalent of that which the owner had been deprived of.²³⁵ Conflict between the Congress Party and the Supreme Court ensued, with the court eventually ruling that legislation could not be challenged for not providing just compensation, but that such a challenge was possible if compensation was not adequate and if the legislation did not lay down the principles to determine compensation.²³⁶ The courts would only intervene if compensation was illusory, allowing the legislature to depart from full compensation.²³⁷ However, after the split of the Congress Party, the court reverted to its just equivalent measure as under *Banerjee*,²³⁸ again refusing to defer to the legislature. Thereafter various amendments followed, as well as arguments on whether property rights form the basis of the unamendable core of the Constitution.²³⁹ Allen regards the Indian cases as a warning for other Commonwealth countries that are entering an era of economic reform about the power play that can ensue between government and the courts.²⁴⁰ The Indian experience also shows that fair compensation can have different meanings in different arenas.

Allen comments that only the legislatures and governments seem to notice the Indian problem, with most courts sticking to the principle that compensation means full compensation.²⁴¹ He rightly notes that full compensation also leaves the legislature room for a broad discretion by having to choose be-

²³³ Adding to article 31(2) that “no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate”.

²³⁴ AIR 1965 SC 1017.

²³⁵ *Valravelu v Special Deputy Collector West Madras* AIR 1965 SC 1017 1024.

²³⁶ *State of Gujarat v Shantilal Mangaldas* AIR 1696 SC 634 650; T Allen *The Right to Property in Commonwealth Constitutions* (2000) 227.

²³⁷ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 227 – 228, discussing *State of Gujarat v Shantilal Mangaldas* AIR 1696 SC 634 650 where the court held a statute, which had the effect of awarding compensation of the value of the property thirty years ago, as valid.

²³⁸ In *RC Cooper v Union of India* [1970] 3 SCR 530; T Allen *The Right to Property in Commonwealth Constitutions* (2000) 229.

²³⁹ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 229.

²⁴⁰ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 229. He mentions Zambia, the Caribbean, Guyana.

²⁴¹ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 230.

tween objective and subjective methods of valuation.²⁴² Most legislative provisions moved away from subjective to objective valuation, and courts seem to regard objective valuation as the constitutional minimum.²⁴³

Allen concludes that, even if courts rule that compensation is full compensation, they still have a discretion in choosing the assumptions on which a valuation is based. There are standard assumptions with regard to the location and timing of a hypothetical sale as far as market value is concerned. Valuers often have to choose between valuing property in itself or as part of a larger parcel, and whether they should take restrictions placed on it by law into account. The constitutional issue, therefore, lies in “the degree to which these choices are constrained by the requirement for full compensation”.²⁴⁴ India is a good example where the courts guard jealously the discretion in prescribing the assumptions that are necessary for determining market value.²⁴⁵ In addition, it seems like the courts are inconsistent in applying the general principles of judicial review of administrative action, by choosing to defer the issue of public purpose to the legislature, but not deferring the meaning of property or the compensation issue.²⁴⁶

Valuation methods were also questioned in the Zimbabwean case of *May v Reserve Bank of Zimbabwe*,²⁴⁷ where the statute required adequate compensation for shares in foreign companies held by a Zimbabwean, with adequate compensation equated with market value. The issue in *May* was *which* market to consider – Zimbabwe (where a considerable premium was included in the price of the shares) or Johannesburg. The minority argued that the Zimbabwean market is the relevant market since it is the only market that is open to Zimbabweans, while the majority ruled that since the Zimbabwean market ceased to exist through the statute, the Johannesburg market is the only pos-

²⁴² Where objective value is determined by looking at the market value of the property, and subjective value by taking into account the value to the owner. See chapter 2.

²⁴³ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 231 mentions the Botswana exception in the so-called *Bonnington Farm* case where the court ruled that “adequate compensation” should restore the owner to the same position he would have been in, had the land not been taken. With this the court included the cost of relocation and finding similar property, relying on the old statutory principle of full indemnification of loss.

²⁴⁴ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 231. See chapter 2.

²⁴⁵ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 231.

²⁴⁶ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 232.

²⁴⁷ 1986 (3) SA 107 (SCA).

sible market to consider. Allen sees merit in both arguments, but criticises them for wrongly assuming that statutory and constitutional interpretation are the same.²⁴⁸ This, according to Allen, is a further indication that the courts tend to focus on the loss suffered by a property owner, reflecting the prevalence of the liberal theories of property and the Constitution, where full compensation is the best means of protecting property from the state.²⁴⁹ Allen proposes that even with a strong focus on the loss of the individual, the court can still choose the method it wants to consider in characterising loss.²⁵⁰ Loss is therefore only measured in market value, and more specifically what the owner lost in market terms.

Departing from the market-value-as-value view, Michelman's view on why we pay compensation as described above can be seen as a general rule of measuring loss in cases where compensation is payable.²⁵¹ This rule neither equates compensation with market value, nor does it indemnify the owner against all his losses. All that is required is an amount that will *eliminate the demoralisation costs*, which may well be less than market value. There are even instances where wealth can be maximised without the payment of compensation, such as where the cost of demoralisation is less the settlement costs.²⁵² Demoralisation costs will be measured by looking at the responses that are imputed to an ordinary mindful and sensitive member of society.²⁵³ Michelman, however, regards the question of redistribution is a political one and he objects to the heavy reliance placed on the judiciary in the calculation of compensation. Firstly, fairness in the political decision-making process is a difficult standard for the courts to grasp. Secondly, the yes-or-no method of constitutional adjudication often makes it impossible to calculate fair compen-

²⁴⁸ According to T Allen *The Right to Property in Commonwealth Constitutions* (2000) 233 *May* is a case about statutory law, since the applicant only attacked the government's interpretation of the statute. To make it a constitutional issue, they need to attack the validity of the statute.

²⁴⁹ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 233.

²⁵⁰ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 235.

²⁵¹ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 235.

²⁵² F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165. See the discussion above on the issue.

²⁵³ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1218. See 5.2.3.2 for an explanation of demoralisation cost.

sation.²⁵⁴ The content of fairness, and therefore the calculation of compensation, is a difficult question for the courts to assess. When the legislature makes the decision on what is fair compensation, it is assumed that it does so based on objective information about the system of compensation (and therefore redistribution), while the judge can only make a decision based on a subjective formulation of fairness to the affected individual in court.²⁵⁵ Singer and Beermann²⁵⁶ also propose that policymaking should be left to the legislatures, and judges should refuse even to find regulations to amount to takings of property that require just compensation.²⁵⁷ These views suggest that the content of fair compensation might be better left to the legislature to determine, and that market value is not the only way to calculate compensation.

5.5.4 Compensating the political risk of expropriation

Michelman analyses the loss and political risk of expropriation and its influence on compensation. Risks such as natural disaster or theft influence the value of property, with high-risk properties trading at a discount to low-risk properties. This begs the question whether the political risk of expropriation without compensation should be taken into account when calculating compensation. Michelman argues that such a discount should not be compensated, since the discount equalises the loss that arises from the expropriation.²⁵⁸ This discount, moreover, is usually used by buyers to diversify their property holdings, and therefore the impact of the loss of a single asset is reduced. Alternatively, people insure their property against such risks.²⁵⁹ According to Michelman an owner in such an instance should not be compen-

²⁵⁴ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1246 – 1247.

²⁵⁵ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1248 – 1249.

²⁵⁶ JW Singer & JM Beermann "The Social Origins of Property" (1993) 6 *Can J Law & Juris* 217 222.

²⁵⁷ This can be done if one follows the German approach based on the *Junktim-Klausel* requirement, which states that expropriation is only authorised when the authorising statute makes provision for compensation. This leaves the decision of when something amounts to an expropriation to the legislature that can decide that question based on policy. See paragraph 4.2.4.4.

²⁵⁸ F Michelman "Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law" (1967) 80 *Harv LR* 1165 1238.

²⁵⁹ See the discussion on insuring against a risk, see 5.4.2.1.

sated because they suffered no risk but rather “got exactly what he meant to buy”.²⁶⁰

On the issue of political discount, Fischel²⁶¹ takes the opposite view from Michelman. Allen analyses Fischel’s assertion that an owner should be paid the full value of the property without the discount for political risk. This might seem unfair, since the owner got more than he paid for and more than he will get from any other buyer. However, undiscounted compensation will ensure that owners as a general class are treated fairly, because it is not the buyer of property at a discount that suffers if discounted compensation is paid, but rather the previous seller that had to sell the property at a discounted price (to reflect the risk).²⁶² Since the owner has no constitutional right to compensation for the initial discounting (because the threat of expropriation is not expropriation in itself), the owner will not suffer if there was a promise of full compensation. Therefore, full compensation would protect ownership as a class in general.²⁶³ Although Allen is of the view that Fischel raises valid points, he doubts that the courts, which focus on short-term loss, will incorporate such a holistic view.²⁶⁴

5.5.5 The influence of the choice of valuation mechanism

When courts assess market value, they have a choice of valuation mechanisms to choose from in order to determine what a willing buyer would pay a willing seller. What follows is a short discussion of some mechanisms in an

²⁶⁰ F Michelman “Property, Utility and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law” (1967) 80 *Harv LR* 1165 1238. This theory, for T Allen *The Right to Property in Commonwealth Constitutions* (2000) 237, describes the *May* case accurately, and the premium the people paid was not compensated since ultimately the people gambled and lost.

²⁶¹ WA Fischel *Regulatory Takings: Law, Economics and Politics* (1995).

²⁶² German law allow the contents of property rights to change through legislation without the payment of compensation, but as soon as the contents change the *institution* of property without a valid reason, it will be invalid. See paragraph 4.2.

²⁶³ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 238. See the discussion of WA Fischel *Regulatory Takings: Law, Economics and Politics* (1995) in T Allen *The Right to Property in Commonwealth Constitutions* (2000) 238.

²⁶⁴ T Allen *The Right to Property in Commonwealth Constitutions* (2000) 238.

attempt to illustrate how the choice between them can influence the seemingly objective compensation amount.²⁶⁵

First there is the harm / benefit valuation mechanism. Here the courts choose to focus either on the expropriatee's harms or on the government's benefit. When focusing on harm, the court assesses compensation by looking at the expropriatee.²⁶⁶ This can lead to compensation that is higher than market value if the owner has a special use of the property that would not be reflected in the market value, for instance where the owner's other property is next to the property that is taken. Courts, in such cases, revert their focus to what the government has gained.²⁶⁷ On the other hand, the focus on gain can also lead to compensation that is more than market value. This would be where the government regulates for environmental gains (which in itself might be difficult to calculate). In such cases, the courts tend to focus on the owner's loss.²⁶⁸ It is important to note that the courts have a choice where to focus, and this choice can influence their determination of the fair market value.

The courts often determine compensation by looking at the highest / best use of the property, thereby allocating the risk. In the United States of America, highest / best use is black letter law, since it is argued that this would be the value that is attached to the property in the market, based on the willing buyer willing seller principle.²⁶⁹ The development costs of reaching the highest and best use of the property is subtracted from that.²⁷⁰ This allocates the financial risk of developing the property from its current condition to its highest and best use.²⁷¹ The risks of the development (permit denial, environmental regula-

²⁶⁵ For a full discussion of the mechanisms used in South Africa, see chapter 0.

²⁶⁶ This seems to be the case in *Du Toit v Minister of Transport* 2003 (1) SA 586 (C); *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA); *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC), where the courts focused on the purpose of the expropriation, as listed in s 25(3) of the Constitution, and confused that with s 25(2) public purpose.

²⁶⁷ See C Serkin "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" (2004 - 2005) 99 *NW U LR* 677 687 for a list of United States cases.

²⁶⁸ See C Serkin "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" (2004 - 2005) 99 *NW U LR* 677 688 for a list of United States cases.

²⁶⁹ C Serkin "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" (2004 - 2005) 99 *NW U LR* 677 690.

²⁷⁰ This will all be hypothetical, because, since the government is expropriating the property, the property cannot be put to its highest and best use. What the government therefore acquire is the right to develop the property. C Serkin "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" (2004 - 2005) 99 *NW U LR* 677 691.

²⁷¹ C Serkin "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" (2004 - 2005) 99 *NW U LR* 677 690.

tions etc) and the question of who is to bear these risks, are reflected in the property's market value and thus influence the calculation of compensation.²⁷² In such instances the property owner would receive *more* than market value, since in a normal market value setting a buyer would pay the full value of the developed property, minus the development costs, discounted to a value that reflects the development risks and the profit motive. Because there are many factors that the court chooses from when determining the value in this case, it cannot be said to be objective,²⁷³ since the courts make the choice without explaining the reasons for it. Market value is therefore not so objective.

It is evident that the choice of valuation mechanism can influence the value of property, and courts have often been willing to depart from the market value standard by employing and accepting different mechanisms. In some cases it *is* possible to accurately ascertain the market value of a certain property, but what this section showed is that assumptions about the objectivity of the mechanisms chosen to ascertain market value, are choices that the courts make with their doctrinal baggage, and therefore not as objective as the courts would like to believe.

5.5.6 The influence of proportionality on compensation

The value of personal property can play a role in the calculation of compensation when a proportionality test is employed to calculate fair compensation. Allen looks at the influence of the European Convention on Human Rights²⁷⁴ on the influence of compensation. Article 1 requires a fair balance between public and private interests, with compensation being an important element to determine fair balance.²⁷⁵ Compensation should, however, not be seen in isolation, as there are other elements that can be important. For instance, the nature of public interest may justify that compensation is paid below market

²⁷² C Serkin "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" (2004 - 2005) 99 *NW U LR* 677 691.

²⁷³ C Serkin "The Meaning of Value: Assessing Just Compensation for Regulatory Takings" (2004 - 2005) 99 *NW U LR* 677 692.

²⁷⁴ Article 1 of the First Protocol.

²⁷⁵ An interesting case to illustrate the influence of proportionality on the calculation of compensation is *Lithgow v United Kingdom* 8 EHRR 329 par 121. The European Court of Human Rights ruled that market value is not the decisive factor in calculating compensation, but rather that the amount should be "reasonably related to its value".

value, and sometimes the presence or absence of procedural rights might influence the balance. The Convention's fair balance requirement sheds interesting light on the role of compensation, especially in the South African context, where compensation must reflect "an equitable balance between the public interest and the interests of those affected".²⁷⁶

In German law, proportionality also plays a big role in the calculation of compensation. According to article 14.3, the amount of compensation payable is an amount to maintain an equitable balance between the public interest and the interests of the affected owners. In the *Deichordnung* case²⁷⁷ the Federal Constitutional Court ruled that the expropriating legislation must provide a framework for the calculation of compensation on the facts of each case. Market value and financial loss, although relevant, are the only factors and must be weighed against the public interest involved in expropriation. This means that market value is the norm in most cases, but that compensation can be less than market value.²⁷⁸

Alexander²⁷⁹ proposes that, based on the German model, compensation should be proportional to the individual's loss. Loss is not measure in terms of wealth, but in terms of a fundamental purpose of the property guarantee (individual self-realisation in the German context) and the public interest. Therefore, where the public interest is very important, and the individual loss less substantive because the affected interest does not make the owner's opportunity to self-development vulnerable (and thereby hindering the individual from effectively participate in a political or social community), compensation can be less than market value. Proportionality can therefore play a role in determining fair compensation in as far as it can "tip the scale" or "equalise" it in cases where the expropriation might not require *full market value* compensation, but fairness requires that compensation be paid.

As noted earlier, the South African Constitution steers away from the assumption that compensation is full compensation and therefore may not be less than market value. Section 25(3) requires just and equitable compensation

²⁷⁶ S 25(3) of the Constitution.

²⁷⁷ BVerfGE 24, 367 [1968] (*Hamburgisches Deichordnungsgesetz*) 419 – 422.

²⁷⁸ AJ van der Walt *Constitutional Property Clauses: A Comparative Analysis* (1999) 142, 151.

²⁷⁹ G Alexander *The Global Debate over Constitutional Property* (2006) 240.

that reflects an equitable balance between the public interest and the interest of those affected. It therefore requires a weighing up of interests, where compensation should be proportional to the interest affected. Section 25(3)(c) makes provision for market value, but reduces it to just one of the factors that should be taken in account. This should ensure that the balancing should not result in “just and equitable” being equated to market value. It should therefore be possible, in cases where property is taken to rectify social injustices, for property to be expropriated at less than market value.

5.6 Conclusion

From the aforementioned it is clear that compensation for expropriation is a multi-layered issue. To start with, one has to take a few steps back to inquire *why* we need to compensate and *when* compensation is due, which inevitably leads to the question of *what* constitutes the property (that was expropriated and needs to be compensated).

If what is protected by the compensation requirement is private ownership from governmental power, which is what Epstein proposes and what most courts seem to follow, then government must pay full compensation for every interference. This means that every time the government regulates property, and thereby removes a “stick” from the “bundle of entitlements”, it will have to compensate the holder of those rights in full. This would make any sort of regulation that can possibly restrict property rights expensive or impossible. In the context of economic reform this can prevent the government from implementing policies for reform, for fear of having to compensate for every infringement of private property.

A more nuanced approach is to shift the focus from the individual to society to determine the fairness question, focussing on cases where an individual cannot be expected to bear the burden of expropriation alone. According to this approach, property will be protected because it enables the individual to participate in society (the Michelman approach) or to lead a self-governing life in the social context (the German approach). Since property was used as an instrument to marginalise people under apartheid, it is fundamental that they

are not kept marginalised by the denial of political participation because they do not have access to property, or because their access to property is weak. If what is compensated is only ownership or strong rights in property, people with insecure rights and weak interests in property will not receive compensation for expropriation. Their property interests are then not protected and, on the German approach, they might be robbed of the ability to lead a self-governing life. Therefore, in the South African context the courts will need to be aware of what of property it is that need to be protected under the Constitution, and that not only ownership is protected by the compensation requirement

The idea that compensation is required to ensure fairness is mainly based on Michelman who regards the takings question as a redistribution issue. This is especially important in the South African context, where the Constitution not only mandates the redistribution of property, but indeed orders it. Here the courts cannot afford a formalistic or liberal approach such as the one that Epstein advances, since this will only reinforce the distorted allocation of property.

As far as Sax's approach is concerned, property is protected from arbitrary interference by the government. In South Africa the government is prohibited from interfering arbitrarily with property, and the legislation that emanated from section 25 of the Constitution sets out the goals and the methods to ensure non-arbitrary deprivation of property. The distinction between government as arbiter and enterprise can prove helpful in determining whether something is a compensable expropriation or not. The murky issue is in what capacity government would be said to operate in the cases of land reform, especially where land is taken from a private individual and given to another private individual. To some extent government then acts as an arbiter, but there is a constitutional promise of just compensation for expropriated property that also needs to be kept. It is part of the inherent tension of the property clause, where ownership is protected and land reform ordered. Due to the transformative nature of the Constitution, it is necessary to move away from the pre-

1994 strong protection of ownership, as under the Expropriation Act.²⁸⁰ This can be done by protecting property in a societal context, which would facilitate the transformative aspirations of the Constitution. My suggestion would be that this problem could be solved by the proportionality principle, or by looking at the requirement of compensation in the context of fairness.

The biggest obstacle to transformation lies in the strict adherence to the market value principle. The problem with a strict market value approach is that it rests on an artificial market, where the sellers are not willing to sell, and the government is an unusual buyer, and the reason for the acquisition is often for public benefit. These are all factors that get lost if one strictly adheres to market value. This might be because full indemnity is seen as fair, and the only way that one can possibly fully indemnify an owner is by paying full market value. The role of compensation (the why question) therefore becomes important when it comes to using market value as the indication of value.

The methods used to calculate market value are all products of specific choices that a court makes. The multitude of variations involved means that market value and the calculation thereof is anything but scientific. The question of what to include in market value is a judicial choice, based on certain assumptions about property. It should also be questioned whether courts indeed should make such choices not having access to budgetary or policy information. It might be useful to defer to the legislature in such instances, since the legislature is better equipped to make policy decisions about the allocation or redistribution of resources. Here the German example is useful, in that the Constitution requires (the *Junktim-Klausel*) that the authorising statute must determine the way to calculate compensation (therefore leaving it up to the legislature), but giving the courts the power of review to determine whether such a determination is proportional or not. The fact that the German courts keep the question of whether there was an expropriation and the question of compensation apart also helps to avoid the complexities of when a regulation “becomes” a taking that needs to be compensated.

²⁸⁰ 63 of 1975.

The question of *when* a regulation amounts to a compensable taking also influences the compensation question. The United States of America example illustrate that compensating for a regulation where the state does not acquire property can make regulation expensive. This indicates a strong protection of property rights that mostly indicates that when property is taken by way of eminent domain, full market value will be due. This is not a desirable approach for South Africa. In this case Michelman's theory that compensation is due when the demoralisation cost is high, provides a more balanced approach where the interest of the affected owner and that of the public are taken into account.

The Indian example serves as a warning about how the issue of compensation can be utilised as a political tool and the dangers inherent to judicial activism in the political arena. It can be argued that in times of economic reform, a greater degree of deference to legislative policies is required to encourage transformation. Michelman would encourage this, since in his view redistribution is a political issue that the courts are not equipped to deal with.

The methods of calculation proposed by Blume and Rubinfeld will force the courts to look at the specific property and the context in which it was required. Property cannot be removed from its context to determine market value compensation abstractly.²⁸¹ In the South African context this theory might be of interest in the context of land reform, where the state expropriates both large commercial farms and small farms. Small farmers might not be able to insure against expropriation to the extent that big commercial farmers can, and might be entitled to compensation that is closer to market value. It might therefore be necessary to consider whether the nature of the property taken should influence the amount of compensation.

The nature of the property can also lead to the conclusion that there are some incidents of property that cannot adequately be compensated. This is the case of the home interest. If property enables political participation or personhood, then it is important to look at the property and the owner in context of compensation to determine *whether* compensation can justify the expropri-

²⁸¹ L Blume & DL Rubinfeld "Compensation for Takings: An Economic Analysis" (1984) 72 *Cal LR* 569.

ation in some instances, or whether expropriation should sometimes not be at all allowed because it takes away important elements of personhood.

If expropriation can be justified, proportionality should play a bigger role in the calculation of compensation. The role of proportionality in the calculation of compensation is mostly ignored, and in my view is the best tool to calculate fair compensation. Proportionality should not be restricted to the question of whether an expropriation should be allowed, but should also play a role in the amount of compensation that will be paid. Section 25 of the Constitution allows such proportionality, where compensation must be just and equitable taking into account various factors. In some instances the individual will not be carrying such a big burden when (s)he is expropriated, proportional to the gains of the wider public (this will be the case in land reform). The individual, however, should also not be required to carry a burden alone that the wider public benefit from (such as in the *Du Toit* cases).²⁸² Here, Sax's distinction between government as mediator and an enterprise comes in useful. In general, when government acts as an enterprise and burdens a single person or group of people, then it should pay compensation (as in *Du Toit*). Where the state's role in mediating competing interests is at stake, it should as a rule not pay compensation. The German example of equalisation payments can also be employed where otherwise lawful regulations would, in the absence of compensation, expect a single owner or group of owners to bear an unfair or disproportionate burden. In the South African context, the *Modderklip* case²⁸³ can be seen as a step in this direction, where the court ordered the state to compensate the landowner for losses he suffered because of unlawful land invasion that the state failed to prevent.²⁸⁴ This was not compensation for expropriation, but the individual could not be expected to bear the burden of regulatory transformation alone either.

In the South African context, the Michelman view of why compensation is paid is therefore perhaps the most useful. Compensation should be paid when

²⁸² See paragraph 3.6.3.2.

²⁸³ *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici Curiae)* 2005 (5) SA 3 (CC).

²⁸⁴ For a discussion on the *Modderklip* case, see AJ van der Walt "The State's Duty to Protect Property Owners vs the State's Duty to Provide Housing: Thoughts on the *Modderklip* Case" (2005) 21 SAJHR 144.

people are demoralised, and what is then compensated is an amount that would enable the individual to participate effectively in politics, which would in turn enable the individual to influence the decision-making process. Sax's distinction about when compensation is due is useful in situations when it is unclear whether compensation should be paid for a deprivation. Once it is found that it is an expropriation and compensation is due, Allen's analysis of the proportionality principle can be useful to determine "just and equitable" compensation, that is not necessarily focussed on full indemnity (and therefore market value). This should make it possible for government to regulate property for land reform purposes and, when necessary, expropriate, since full indemnity at market value is not the inflexible default position. Compensation at full market value is not necessarily "just and equitable" when approached from a proportionality perspective. The possibility of less-than-market-value compensation in warranted cases will make land reform more affordable, thereby not frustrating the transformative goals of the Constitution.

It was shown that, due to the *FNB* decision, it seems as if the grey area of whether an infringement is a deprivation or an expropriation would not surface in South Africa. It is therefore not necessary to propose a theory of how to determine *when* something amounts to a compensable expropriation. What needs to be stated is what underlying theory provides the most satisfactory explanation of *why* compensation is paid. In this regard, Michelman provides an ethical foundation for the payment of compensation that also explains *what* is compensated. Once compensation is due, Allen's analysis into the role that compensation plays with reference to proportionality is useful to determine the fairness of compensation, and should be followed.

6 Conclusion

6.1 Introduction

This dissertation set out to investigate whether the compensation for the expropriation requirement can be applied in a way that allows for a transformative interpretation without unfairly threatening existing property rights. It has been shown that the advent of constitutional democracy has not had a far-reaching impact on compensation for expropriation so far, due to the existing legal culture of expropriation. An attempt has also been made to provide guidelines for a transformative interpretation of the compensation requirement in the post-apartheid context. This chapter aims to summarise the most important findings and recommendations made in the previous chapters, in order to provide a transformative interpretation of the compensation requirement.

6.2 *The pre-constitutional legal culture of compensation for expropriation*

The dissertation commenced with a historical study of the Expropriation Act¹ in order to show what constituted the pre-constitutional legal culture of expropriation. Roman-Dutch law² did not have a general law regarding expropriation, although land could be acquired for public buildings against the payment of compensation or the acquisition of rights to the building being built on the expropriated land. The public purpose (*justa causa*) and the compensation (*pretium*) requirements seem to have their roots in Roman-Dutch law, with Grotius³ the first to refer to the state's power of eminent domain.

South African law on expropriation was more strongly influenced by English law than by Roman-Dutch law.⁴ Roman-Dutch law influenced the English law insofar as the individual owner enjoys prominence. English law reinforced this prominence, with the individual owner occupying a prominent place in English expropriation legislation. The owner has traditionally been fully indemnified

¹ 63 of 1975.

² Paragraph 2.2.2.

³ *De Jure Belli ac Pacis* 1.1.10.

⁴ Paragraph 2.2.3.

upon expropriation. Early English law equated expropriation to a forced sale, with the statutes serving as an agreement between the expropriator as purchaser and the expropriatee as vendor. This meant that the owner (as vendor) had to be fully indemnified at market value. Later legislation provided that compensation should be paid for the value of the property, meaning the value that it has for the owner. The concept of “market value” was introduced in 1919.⁵ The individual owner was furthermore protected by virtue of a presumption of statutory interpretation that the legislature does not intend to take property without compensation, unless expressly stated in legislation. English expropriation law is therefore part of a strongly legislation base tradition placing emphasis on the interests of the owner and fully indemnifying him or her with compensation at market value.

In the South African context the tension between the strong English law heritage and the influence of Roman-Dutch law on private property law in general, showed when courts had to assess the validity of an infringement of a private-law right that originated in Roman-Dutch law, by a public-law administrative act, authorised by legislation based on English law. Roman-Dutch law on expropriation was based on natural law and this ensured that the public purpose requirement played a central role in protecting the individual from arbitrary deprivation. English law, on the other hand, is based on legislation, and this emphasises the administrative law character of expropriation. The individual is protected insofar as the legislation provides for full indemnity at market value and fair procedures, and insofar presumptions of statutory interpretation work in his/her favour.

South African expropriation law has been influenced by English law to the extent that South African expropriation legislation is modelled on English legislation. The courts deemed Roman-Dutch law irrelevant for the construction of modern-day legislation, thereby limiting its influence.⁶ English legislation thus formed the basis of South African expropriation legislation and of the Expropriation Act⁷ too.

⁵ See paragraph 2.2.7.

⁶ Paragraph 2.2.5.

⁷ 63 of 1975.

The Expropriation Act⁸ governs all expropriations, even those authorised by legislation other than the act.⁹ The act sets out the requirements for a valid expropriation, namely that it must be authorised, it must be procedurally fair, it must be for a public purpose and compensation must be paid.¹⁰ The authority to expropriate emanates exclusively from the statute(s) authorising the state to expropriate property within the parameters of its legislated powers.¹¹ Expropriation, as an administrative act, is required to take place in accordance with procedural requirements laid down by legislation.¹² In pre-constitutional expropriation law the procedural fairness requirement did not sufficiently protect the expropriatee in the sense that, once the decision to expropriate had been taken, the expropriatee had little recourse to administrative justice. The procedural remedies at the disposal of an expropriatee furthermore mostly pertained to the expropriation notice. This notice was served on the owner and all the holders of registered rights to land, and the owner was responsible to inform the expropriating authority of any other rights in land that may qualify for compensation. Even though the procedural requirement did not provide strong protection for the owner, the focus was still on the owner. The public purpose requirement served only as a condition for validity.¹³ The public purpose requirement was construed extensively, and was not restricted to public use or public benefit only. The bulk of the pre-constitutional case law dealt with the compensation requirement.¹⁴ Compensation was (and still is) held to be due whenever the state expropriates property or rights in property in terms of legislation. The presumption of statutory interpretation that the legislator does not intend to take away rights without compensation provided the legal basis for the payment of compensation. Compensation was thought to be payable because individuals cannot be required to sacrifice their property for the benefit of the broader public.

Compensation before the Constitution was held to be payable for expropriation only and not for mere deprivation. The idea of material expropriation or

⁸ 63 of 1975.

⁹ Paragraph 2.3.

¹⁰ Paragraph 2.3.2.

¹¹ Paragraph 2.3.2.2.

¹² Paragraph 2.3.2.3.

¹³ Paragraph 2.3.2.4.

¹⁴ Paragraphs 2.3.2.5 and 2.4.

regulatory takings was unknown in pre-constitutional expropriation law. The bulk of case law suggests that it is the rights in the property taken that are compensated although, paradoxically, Gildenhuis seems to suggest that it is the loss of the property itself that is compensated. Compensation is awarded in terms of section 12 of the Expropriation Act.¹⁵

A discussion of section 12 of the Expropriation Act¹⁶ highlighted the strong emphasis on market value.¹⁷ Market value is calculated by looking at what a willing seller would pay a willing buyer for the expropriated property. However, market value is not without its problems, mostly stemming from the fact that a free market transaction is assumed to have taken place in a forced acquisition setting. Courts acknowledged that this fiction required them to imagine that a forced sale was a free market transaction. In doing so, a court has to function as a super valuator, something which judges have not been trained for. This makes the courts' work "curiouser and curiouser" indeed.¹⁸ This hypothesised market value transaction was therefore sometimes also questioned in pre-constitutional expropriation law, but not to such an extent that the courts ceased to insist on determining appropriate compensation for expropriation with reference to market value, and asking what a willing buyer will pay a willing seller in the event of a free market transaction.¹⁹

The legal culture of pre-constitutional compensation meant that the owner of property expropriated was indemnified by the payment of full market value compensation for the rights in property that had been taken by the state.²⁰ There was an unfailing belief that an owner *should* be compensated fully when the state expropriates his or her property. This full indemnity payable to the owner stood in stark contrast to the virtually *no* indemnity payable to holders of other rights in land. All this shows that the legal culture was dominated by the quest for market value, with its strong focus on the owner, and

¹⁵ 63 of 1975. This was discussed in paragraph 2.4.

¹⁶ 63 of 1975.

¹⁷ Paragraph 2.4.4.2.

¹⁸ *Southern Transvaal Buildings (Pty) Ltd v Johannesburg City Council* 1979 (1) SA 949 (W) 955 – 956.

¹⁹ Paragraph 2.4.4.3.

²⁰ Paragraph 2.4.1.

believed to be an “objective” and “scientific” determinant of the amount of compensation payable to an expropriated owner.

Various valuation techniques were used to determine market value.²¹ These techniques were presented as complex calculations seemingly influenced only by external, objective market factors. This objective and scientific method of calculating compensation supposedly meant that upon expropriation an owner would know how to calculate compensation objectively, and would thereby enjoy the security associated with legal certainty.²² The techniques were accepted more or less uncritically as the manner in which market value had to be calculated and market value, in its turn, was accepted as the only way to ascertain compensation for expropriation. Such were the intellectual habits of pre-constitutional (expropriation) lawyers that provided the coding for the pre-constitutional legal culture of expropriation.

By focussing on ownership, traditional rules and institutions were enforced.²³ In apartheid South Africa this had particular significance, because government systematically promulgated legislation prohibiting non-whites from owning land. This entrenched an ownership paradigm, making sure that white owners’ property holdings were strongly protected. Other less formal rights in property were uncertain, with no guarantee of compensation upon expropriation.²⁴ Since ownership was mostly restricted to white people and it was only ownership that was protected by the guarantee of compensation for expropriation, the only people who really enjoyed the protection afforded by the Expropriation Act²⁵ were the white minority. This was part of a grander scheme of inequitable access to land during apartheid. Equitable access to land is one aspect that stood to receive attention under a new Constitution as part of healing the divisions of the past.

²¹ Paragraph 2.4.4.8.

²² Paragraph 2.4.4.8.

²³ See the short discussion on this in paragraph 1.2.

²⁴ See AJ Van der Walt “Property Rights and Hierarchies of Power: A Critical Evaluation of Land-Reform Policy in South Africa” (1999) 64 *Koers* 259.

²⁵ 63 of 1975.

6.3 *The impact of constitutional democracy on the legal culture of compensation for expropriation*

The Constitution with its property clause are products of intense negotiation.²⁶ It is important to be aware of the fact that the Constitution embodies compromises between the conservative erstwhile apartheid government and the socialist African National Congress, seeking to reconcile opposing ideals. The apartheid government, aware of the fact that, in the long run, apartheid was untenable, negotiated with the African National Congress to secure their existing rights in land and to ensure that white people would not be deprived of such rights in land without market value compensation. The African National Congress agreed to protect existing rights in land, but only if provision for land reform (and the redistribution of land) was included in such a clause. At the behest of the National Party market value was included in a list of factors to be taken into account when determining just and equitable compensation. The African National Congress was adamant that a constitutional property right should not impede the transformation process. The result of all of this is a property clause harbouring an inherent tension of protecting existing property rights while, at the same time, providing for the redistribution of property and wealth within constitutional parameters. This includes expropriating land for land reform purposes, provided that compensation is paid.²⁷ This dissertation sought to establish how such a tension could be used creatively and productively to ensure that existing landowners' property rights are not unfairly infringed, but at the same time that the protection of these rights will not hinder transformation. In Chapter 3 shows how this has not been done so far, and why.

The transformative Constitution has brought with it a new interpretive framework, demanding construction of the property clause in a manner promoting the values of an open and democratic society.²⁸ The Constitution requires compensation to be "just and equitable". What then *is* "just and equitable" compensation, and how does it differ from pre-constitutional compensation?²⁹

²⁶ Paragraph 3.2.

²⁷ Paragraph 3.2.

²⁸ Paragraph 3.3.2.

²⁹ Paragraph 3.3.

In chapter 3, employing the idea of transformative constitutionalism as a point of departure, the impact of the Constitution on the act was assessed and it was shown how the pre-constitutional legal culture of expropriation, as explained in chapter 2, has made it difficult for the courts to move away from the idea that market value should be central to the determination of compensation for expropriation.

A possible explanation for the paucity of transformative interpretations is that under constitutional democracy all apartheid legislation has not been eradicated. The Expropriation Act³⁰ is an example of pre-constitutional legislation still applicable under the Constitution.

The advent of constitutional democracy meant that the Constitution became the supreme law of the land, and that all other law (including legislation and common law) are subject to the norms and principles of the Constitution. This does not mean that the bill of rights ignores existing rights and freedoms as they have always existed under the common law, customary law and legislation; it simply means that the Constitution recognises them *only* insofar as they are consistent with the rights entrenched in the bill of rights.³¹ This also applies to rights for which the Expropriation Act³² provides. What it means in practice is that authorisation for expropriation is sought in the Constitution, while the expropriation process is still administered in terms of the act. This in itself is not the problem. The problem rather is that the legal culture of expropriation evident in conventional interpretations of the Expropriation Act³³ has remained very much unchanged, as was shown in chapter 3.

Chapter 3 explained how the constitutional property clause is interpreted in light of the Constitutional Court's *FNB* decision.³⁴ Property rights may be limited by the state, sometimes without having to pay compensation. This will be in the case of deprivation, where the state normally exercises its police or regulatory powers.³⁵ The section 25(1) requirement is that such deprivation may not be arbitrary. *FNB* defined expropriation as a sub-type of deprivation,

³⁰ 63 of 1975.

³¹ Paragraph 3.3.

³² 63 of 1975.

³³ 63 of 1975.

³⁴ Paragraph 3.4.

³⁵ Paragraph 3.4.3.

which means that all expropriations must pass the section 25(1) deprivation-test before the inquiry can proceed to section 25(2) and the compensation inquiry. It was shown in paragraph 3.4.3 that this test is problematic, since a deprivation that is arbitrary may well be a valid expropriation because compensation could have the effect of balancing the interests of the individual with those of the public. The arbitrariness test could therefore obscure the role of compensation.

The section 25(2) requirements obtain in addition to the section 25(1) deprivation requirements.³⁶ The constitutional requirements for a valid expropriation correspond with the pre-constitutional requirements. Expropriation must be authorised by law of general application, which indicates that certain persons may not be singled out by such a law.³⁷ The expropriation must be for a public purpose or in the public interest.³⁸ The Constitution amplified the public purpose requirement with the addition of the public interest requirement, to ensure that land reform can be included in the scope of expropriation. It should be possible to expropriate land and transfer it to a third party if (s)he is a beneficiary of land reform. The procedural fairness requirement affords the property owner more protection under the Constitution, because of its interaction with the just administrative action requirements in section 33.³⁹ The inquiry then moved to the compensation requirement.⁴⁰

The Constitution requires compensation to be “just and equitable” with reference to the factors listed in section 25(3). The Expropriation Act⁴¹ contains detailed provisions of what should be compensated, and how such compensation must be calculated. The act is still valid insofar as it is not inconsistent with the Constitution. As in pre-constitutional expropriation, the aim of compensation is to spread the burden of the expropriation amongst the public, and not to allow that an individual carry the burden of such an expropriation all by him- or herself. The Constitution, however, added the balancing test in the aim to do spread the burden, where the infringement on individual property

³⁶ Paragraph 3.5.

³⁷ Paragraph 3.5.2 .

³⁸ Paragraph 3.5.3.

³⁹ Paragraph 3.5.4.

⁴⁰ Paragraphs 3.5.5 and 3.6.

⁴¹ 63 of 1975.

rights must be weighed against the interest of the public. This is not always done simply by paying market value compensation. The centrality that market value enjoyed in pre-constitutional compensation inquiries could thus well be revised in the light of constitutional imperatives, with the focus on balancing the interests of the individual with those of society.

Although the courts have recognised that compensation for expropriation is a constitutional inquiry they often seem unable to determine compensation in terms of section 25(3), reverting back to the methods relied on under the Expropriation Act.⁴² Courts are reluctant to inquire what “just and equitable compensation” means and how it differs from pre-constitutional compensation. The list of factors in section 25(3) of the Constitution, with market value as only one of them challenged the courts to rethink the role of market value in compensation inquiries. In paragraph 3.6.3 it was shown that the courts have not met the challenge but have opted for the comfort zone of pre-constitutional legal culture instead by keeping market value central in compensation inquiries. This was evident from the *Former Highlands* two-step approach approved of by the Constitutional Court in the *Du Toit* case. This two-step approach requires the courts to first determine the market value of the property expropriated and thereafter adjust the compensation amount, upwards or downwards, based on the other factors listed in section 25(3). This means that the pre-constitutional method of calculating compensation is still used. The Constitution just states that compensation must be “just and equitable” and, although market value is listed as a factor to be taken into account when determining compensation, it stands alongside four other factors in a non-exhaustive list. *Starting* with a market value inquiry and thereafter adjusting the amount of compensation upwards or downwards based on the constitutional list, clearly places market value central to the inquiry. This means that the Constitution in fact adheres to the pre-constitutional method of calculation, as set out in the Expropriation Act.⁴³ One explanation for this is that the mainstream legal culture of compensation for expropriation prevents lawyers from thinking about compensation differently, although they are constitutio-

⁴² 63 of 1975. See paragraph 3.6.2

⁴³ 63 of 1975.

nally obliged to do so. It is possible that this “[u]n-self-conscious and unreflective reliance on the culturally available intellectual tools and instincts handed down from earlier times may exercise a drag on constitutional interpretation, weighing it down and limiting its ambition and achievements in democratic transformation”.⁴⁴ An interpretation that places market value central to the compensation inquiry is clearly wrong, since it makes the Constitution subject to pre-constitutional legislation.⁴⁵ By subjecting the Constitution to legislation, reaching the transformative goals of the Constitution will be unnecessary problematic.

The *Du Toit* cases were discussed to show how the court calculates compensation with reference to the list of factors in section 25(3).⁴⁶ Market value is at the centre of this inquiry and the two-stage process is used to determine compensation. The market value of the property is first calculated, using pre-constitutional methods, whereafter the amount arrived at is adjusted either upwards or downwards by applying the factors listed in section 25(3). This stands in contrast with the minority judgement, which rightfully argues that this means that the majority treats section 25 as a “second level ‘review’ test”. Instead, justice and equity should be the focus of such an inquiry, the only question being whether the compensation offered is just and equitable.

The discussion of the *Du Toit* cases raised another contentious side-issue, which is not within the central focus of this dissertation. The judgements in these cases highlight the courts’ confusion about the role of “public purpose” in section 25(3)(e) and the public purpose requirement in section 25(2). In *Du Toit* the court evidently used the public purpose requirement to reduce the amount of compensation.⁴⁷ Such an amount cannot be “just and equitable”. Every expropriation, in order to be valid, must be for a public purpose. Such a public purpose may also benefit the expropriatee, not as individual, but as member of “the public”. This does not mean that every compensation amount should in future be reduced because the expropriatee also happens to benefit from the expropriation. Public purpose as a requirement and public purpose

⁴⁴ K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 168.

⁴⁵ Paragraph 3.6.2.

⁴⁶ Paragraph 3.6.3.2.

⁴⁷ Paragraph 3.6.3.

as a factor to take into account when determining compensation should be separated. With regard to the former the question is whether an expropriation is for a valid public purpose. In the case of the latter public purpose is a factor to be taken into account when “just and equitable” compensation is determined – probably restricted to considerations of land reform.⁴⁸

Section 25(4) states that public purpose includes the nation’s commitment to land reform. This refers to public purpose both as a requirement and as a factor that can influence compensation. In paragraph 3.7 a brief overview was given of the land reform programmes, indicating where section 25(3) fits in, in order to explain the tension between protecting existing property rights and regulating property to achieve the transformative goals of the Constitution.⁴⁹ A discussion of the *Khumalo* case showed how pre-constitutional legal culture could potentially frustrate these transformative goals.⁵⁰ In the *Khumalo* case, the court preferred to apply a pre-constitutional rule of compensation (the *Pointe Gourde* principle) ignoring certain factors, even though constitutional legislation required the court to consider these factors. This resulted in the determination of an amount of compensation that was arguably more than what a “fair amount”, calculated in accordance with the provisions of the act, would have been. This clearly shows that the courts prefer to rely on the familiar concepts derived from pre-constitutional legal culture, rather than to opt for a transformative interpretation of the compensation requirement as instructed by the Constitution. The result in *Khumalo* was that the court’s preferred interpretation focussed on fully indemnifying the expropriatee with no regard to the historical or social context of the expropriation. This meant that an owner who, under the apartheid, benefited from lower land prices and the protection of property, benefited once again by receiving market value compensation for the expropriation of the property in question. This shows that owners may receive disproportionately more compensation than what constitutionally they are entitled to. Existing ownership was thus protected at the expense of land reform. If this is how compensation is going to be paid out, expropriation would become prohibitively expensive, and if the state has to

⁴⁸ Paragraph 3.5.3.

⁴⁹ Paragraph 3.7.

⁵⁰ Paragraph 3.7.2.

fork out large amounts of compensation to protect every instance of ownership, with no regard for the history or the social context of the expropriation, it will soon bankrupt the land reform budget and lead to the collapse of the land reform programme. This will make it impossible to achieve the transformative goals of the Constitution.

The following guidelines can help to avoid such a situation. The Constitution is there to, *inter alia*, equal out past inequalities. This is re-affirmed in section 25(5), where the state is ordered to take reasonable measures to ensure equitable access to land for its citizens. Application of the Constitution in compensation inquiries should be context sensitive and aim to transform the society to be one that is more equal. Expropriation laws cannot be applied with no reference to the specific historical and social context within which they operate. What is needed is not just a complete overhaul of pre-1994 expropriation practices, as this may leave a void that can lead to uncertainty and instability. What is needed instead is context sensitive development to reach the transformative goals contained in the Constitution. In the context of compensation for expropriation, it will require a transformative-friendly application of pre-1994 legislation, developing the law to bring it in line with the constitutional aspirations. It means focussing on “just and equitable” compensation, and not market value. It means questioning the way in which the Expropriation Act⁵¹ and other expropriation legislation was applied pre-constitutional, and asking whether such an interpretation is still viable. It means questioning existing laws for constitutional validity and re-interpreting them in a Constitution-friendly way if they are inconsistent. This might create a tension between constitutional protection of property and the integrity of the (apartheid inherited) private property laws, but chapter 4 showed that this is not strange in other jurisdictions.

6.4 Lessons from comparative jurisdictions

Chapter 4 provided a comparative discussion on why and when compensation is paid, as well as how it is calculated in Germany, the United States of America and Australia. The German example is interesting in that it focusses

⁵¹ 63 of 1975.

on the balance between the individual and society when paying compensation for expropriation, and clearly distinguishes deprivations from expropriations.⁵² The United States of America example is interesting insofar as the extensive literature on regulatory takings provides clues as to *why* compensation is paid, and *what* is compensated by paying compensation.⁵³ The Australian expropriation law example is of interest because it does *not* pay for regulatory takings. In Australian expropriation law, compensation is only due when there was an acquisition of property in certain circumstances.⁵⁴ This makes for valuable comparison with the example of the United States of America.

The German property clause must be interpreted with reference to the fundamental purpose of article 14, namely to secure the holder of the property an area of personal liberty in the patrimonial sphere in order to enable him/her to lead a self-governing life in the larger social and legal context.⁵⁵ What article 14 therefore protects is not so much property as individual liberty. Article 14 is characterised by a tension between the individual's property rights and the social function of property, where property rights are created and restricted within the social context. In paragraph 4.2.2 it was shown that the fundamental purpose provides valuable guidelines for the interpretation of the South African property clause, and that the tension between private property and the social function of property is well illustrated by the expropriation provisions.

Due to the social function of property, the state is allowed to determine the content and limits of property (deprivation in other jurisdictions), but only insofar as it is justified in the broader society.⁵⁶ When the state determines the content and limits of property so that the nature, character and intensity of the regulation requires an exceptional sacrifice from the owner, the regulation might be declared invalid. It cannot be validated by the payment of compensation. To illustrate this, the *Naßauskiesung* case was discussed, where the court ruled that compensation for expropriation is only due once the requirements of article 14.3 are satisfied. Regulatory laws that do not provide for compensation (the so-called *Junktim-Klausel*) can never constitute expropri-

⁵² Paragraph 4.2.

⁵³ Paragraph 4.3.

⁵⁴ Paragraph 4.4.

⁵⁵ Paragraph 4.2.2.

⁵⁶ Paragraph 4.2.3.

ation. A regulation that has an expropriatory effect must be attacked for being invalid.

In this context, the practice of the Federal Civil Courts, where some courts have ordered the state to pay equalisation payments, was discussed. These *Ausgleich* payments (equalisation payments) are paid in instances where a regulation excessively burdens the individual, in order to prevent the law from being declared invalid. Although not compensation for expropriation, these payments are paid in order to relieve the individual from having to carry the burden of an excessive regulation (that benefits the public) alone.⁵⁷ The *Denkmalschutz* case was discussed in this context to illustrate how such payments will work. The court in the *Denkmalschutz* case reiterated that these payments will not convert a regulation into an expropriation, it merely saves the regulation from invalidity.

Determining the content and limits of property should be clearly distinguished from expropriation.⁵⁸ In German law, it is only expropriation once all the article 14.3 requirements are met. A valid expropriation is authorised by a valid law⁵⁹ that determines the nature and the extent of compensation (*Junktim-Klausel*),⁶⁰ undertaken for a public purpose⁶¹ and accompanied by compensation.⁶²

The public purpose requirement operates with the proportionality principle, where the individual's infringed right is weighed up against the public purpose which the expropriation is intended to serve. When the individual's right outweighs the public purpose, the expropriation cannot be sanctioned. This means that expropriation will only be sanctioned as a last resort and if there are no other less drastic measures available to serve the public purpose. This illustrates the tension between the individual's rights and the social function of property. Although the public purpose requirement is applied seriously in German law, the courts do in some instances allow for expropriation that benefits private persons, if it serves a public purpose. Expropriated property must

⁵⁷ Paragraph 4.2.3.

⁵⁸ Paragraph 4.2.4.

⁵⁹ Paragraph 4.2.4.2.

⁶⁰ Paragraph 4.2.4.3.

⁶¹ Paragraph 4.2.4.4.

⁶² Paragraph 4.2.4.5.

be strictly used for the public purpose it was expropriated for. If the expropriated property is not used for the proposed public purpose, then it can be re-expropriated by the expropriatee.⁶³

The *Junktim-Klausel* requirement states that the authorising statute must also specify how compensation must be calculated. This clear distinction means that the courts cannot award compensation for regulatory excess, as they do in the United States of America. This leaves the question of compensation effectively in the hands of the democratically elected legislature who decides *when* compensation is due and *how much* is paid.⁶⁴ The fact that the law must provide for the compensation means that the legislature can protect the public and the fiscus by not burdening it with unforeseen expenses.

The social objective of the property clause is advanced in that compensation is required to reflect an equitable balance between the public interest and the interests of those affected. This means that compensation is determined with reference to both the individual and the society, advancing the social objective of the property clause while also ensuring that the individual is able to lead a self-governing life. As the *Deichordnung* case showed, this means that in some instances compensation can also be less than market value.⁶⁵ In German law the payment of compensation therefore has an equalisation function. The South African property clause, as was shown in chapter 3, is also characterised by the tension between protecting existing individual property holdings and the social function of transformation. Viewing property not as a market commodity, but as something that enables the individual to lead a self-governing life, can be of assistance in the South African context in order to manage the tension.

The property clause of the United States of America is characterised by its negative formulation that protects the individual from state interference.⁶⁶ It has a strong individual focus and is not characterised by a tension between the individual and the social function, as overtly as the German property clause. However, the law of eminent domain in the United States of America

⁶³ Paragraph 4.2.4.3.

⁶⁴ Paragraph 4.2.4.4.

⁶⁵ Paragraph 4.2.6.

⁶⁶ Paragraph 4.3.1.

is nevertheless interesting insofar as there is a large body of literature on the distinction between deprivation and expropriation, creating the possibility of sometimes requiring compensation for regulatory access.⁶⁷ Whereas expropriation, or taking, refers to the state's power of eminent domain, deprivation refers to the state's police or regulatory power. Compensation is payable upon expropriation and not deprivation. However, in the United States of America a practice developed whereby a regulation (deprivation) that "goes too far" is compensated. This is called regulatory takings. Compensation is paid to individuals who were unduly burdened by a regulation, even if the Government did not acquire a benefit or property in terms of its eminent domain. The various tests to determine *when* compensation is due in these cases were discussed,⁶⁸ showing that it is indeed at the best of times an incomprehensible mess. The *Penn Central* test treats the question of *when* something amounts to a regulatory taking as an open-ended, contextual test based on a three-factor test, where the character of the government action is considered alongside the extent to which such an action interferes with the claimant's investment backed activities and the economic impact of the governmental action. The *Agins* test extended this to include takings that deny the owner all economically viable use of land. The *Penn Central* test was abandoned in *Loretto*, where the court developed a "per se" rule that indicated that permanent, physical occupation of land will always amount to a taking, regardless of the size or purpose of such a physical invasion. This was expanded in the *Lucas* case, where the court ruled that a regulation that denies the plaintiff all economically beneficial use of land will amount to a taking. From these cases it is clear that the question of *when* something amounts to a compensable taking does not have a single clear answer. What is striking about these cases, however, is that the focus is on ownership, an owner's right to exclusive use of property (*Loretto*) and a aversion to government regulating an owner's use of property (*Lucas*).

The approach in the United States of America to regulatory takings is something uniquely American, which will probably not be applicable in South Africa

⁶⁷ Paragraph 4.3.2.

⁶⁸ Paragraph 4.3.2.

due to the *FNB* arbitrariness test. A deprivation that “goes too far” would probably be arbitrary and therefore unconstitutional in terms of *FNB*, because it places an undue burden on the individual. The social function of property seems to play a secondary role in the inquiry of whether something amounts to a compensable taking in the United States of America. This provides fruitful comparative material, in that South Africa should guard against the dangers of following the regulatory takings route. Not only does it lead to uncertainty due to it being unclear about exactly *when* a regulation will amount to a compensable taking, it also severely restricts the state’s power to regulate property in order to fulfil the social function of the property clause (and therefore possibly transformation). In this sense, South Africa would be better off following the German example of a clear distinction between deprivation and expropriation, where regulations that “go too far” will be declared invalid.

When the state uses its power of eminent domain to acquire property, there are certain requirements that must be met. Firstly, the expropriation must be for a public use.⁶⁹ This requirement is of interest for this dissertation insofar as it seems that in the United States of America, eminent domain power is more readily used to acquire property for the benefit of a third party, who then develops the property for what seems to be public use in the sense of economic development. The question that is raised in this context is whether the payment of compensation can justify the taking of one private party’s property for the benefit of another private party, whose use of the property also benefits the public. This problem was illustrated by the *Kelo* case, where the question was raised whether, even if compensation is paid to Ms Kelo, the state should be allowed to expropriate the property (a home) to transfer it to a private developer to develop. This question was returned to and dealt with on a more theoretical level in paragraph 5.2.3.5. Secondly, when expropriating property due process must be observed.⁷⁰ In the United States of America this is merely a formal procedural guarantee that does not really offer much protection against legislative interference. It is not surprising, then, that expropri-

⁶⁹ Paragraph 4.3.3.2.

⁷⁰ Paragraph 4.3.3.3.

atees rely on the compensation requirement to protect their property rights. Thirdly, compensation should be paid.⁷¹

In the United States of America, compensation is paid to spread the burden of the expropriation among all in society, and to fully indemnify the individual. This mostly means paying full market value compensation.⁷² By fully indemnifying the individual at full market value, ownership enjoys strong protection against government interference. Once it is found that compensation is due for a regulatory taking, or once the state exercises its eminent domain in order to acquire property, the individual's property rights are strongly protected because full market value compensation is paid.

In Australia the individual's rights are protected by payment of compensation only when the state *acquires* property or a benefit in terms of section 51(xxxi) of the Australian Commonwealth Constitution.⁷³ Section 51(xxxi) empowers the Commonwealth of Australia to make laws in order to acquire property on just terms from any state or person for any purpose with respect to which the parliament has the power to make laws. It was shown that section 51 of the Commonwealth Constitution focuses on the federal government's power to make legislation. Section 51(xxxi) is treated as a property clause of sorts nonetheless. Acquisitions of property must take place in terms of section 51(xxxi) subject to the "just terms" requirement. The acquisition of property or a benefit by the state in terms of any other section of the Constitution would not be treated as an expropriation and then the just term requirement does not apply.⁷⁴ This allows the government some leniency to restrict and regulate the use of property (including the deprivation of property, in some instances) in terms of other sections in the Constitution without having to provide for "just terms".

Expropriation of property is done in terms of legislation, and must fulfil certain requirements. In order for it to be a compensable deprivation, the state must *acquire* property in terms of section 51(xxxi), it must be for a valid public purpose and it must be on just terms (the compensation requirement). Interest-

⁷¹ Paragraph 4.3.3.4.

⁷² Paragraph 4.3.5.

⁷³ Paragraph 4.4.2.

⁷⁴ Paragraph 4.4.3.

ing about the public purpose requirement is that the court in *Clunies-Ross* ruled that where the state acquires property for land reform purposes based on political motifs, the socio-political reasons for the acquisition are irrelevant, as public purpose is indicated by law that requires a specific public purpose.⁷⁵ This is a useful explanation in the South African context too, insofar as the socio-political reasons for an expropriation are irrelevant. In South Africa land reform, as was shown in chapter 3, is constitutionally mandated and legislation driven, and not solely based upon a political decision as in the case of *Clunies-Ross*.

The acquisition of property or a benefit need not be for the state only, but can also be for a private party,⁷⁶ the central question being when an interference with property amounts to an acquisition for purposes of section 51(xxxi). The cases discussed in this section explained *when* compensation is due, with reference to the question of whether there had been an acquisition of property or a benefit, or not. This ranges from the state taking possession of land for an indefinite period in the interest of safety (*Dalziel*) to the state acquiring shares and assets in the business of a private bank (*Bank of New South Wales*) and legislation prohibiting holders of mining leases from extracting minerals (*Newcrest Mining*), all amounting to an acquisition. This does not, however, include the mere extinction by the state of a right enjoyed by the owner in relation to his or her property (*Mutual Pools*), extinction of an offshore oil exploration permit by the government (*WMC Resources*) or legislation that deprives music publishers of some of their property rights (*Australian Tape Manufacturers*). A regulation of property, such as an act that regulates an owner's ability not to renew leases of tenants who sell products to the property owner's competitor would not qualify as an acquisition in terms of section 51(xxxi). This differs remarkably from the approach in the United States of America, where compensation is sometimes paid for the effects of a regulation that "goes too far", even if the state had not acquired property or a benefit. The fact that property must be *acquired* makes it possible to steer clear of regulatory takings, but it should be remembered that acquisition is a

⁷⁵ Paragraph 4.4.4.3.

⁷⁶ Paragraph 4.4.4.2.

requirement because of the unique wording of section 51(xxxi). Therefore, although it provides a possible solution to the regulatory taking problem, it should be approached with the necessary caution.

Compensation is paid because of the statutory presumption that the government does not intend to take away property without compensation, unless so authorised in unequivocal terms.⁷⁷ Compensation is paid for the acquisition of property, where the government acquires a benefit for the public at the cost of the individual. An owner should be fully compensated for property that is acquired because (s)he cannot be expected to sacrifice it for less than what it is worth. Compensation is understood to be fair compensation, and earlier cases regarded full market value compensation to be fair. In the *Georgiadis* case, however, the court ruled that just terms entails the balancing of interests, and that does not necessarily mean full market value. Therefore, even with the strong focus on full market value to the owner, the courts sometimes recognise that “just terms” involve a balancing of interests and not necessarily full market value compensation.

Chapter 4 was concluded⁷⁸ by applying the comparative findings to the South African situation. The *FNB* decision compromised the clear distinction between deprivation and expropriation, as in Germany, first by requiring the courts to ask whether there was a deprivation, before asking whether such a deprivation amounts to an expropriation. *FNB* did not make it clear how to distinguish between a deprivation and an expropriation. This leaves the possibility for the courts to define more accurately *when* a deprivation will be an expropriation that needs to be compensated, although they are restricted by *FNB* to see it as a sub-division of deprivation. This problem could be solved by incorporating something similar to the fundamental purpose of Germany into South African expropriation law. This means that the property clause, and the expropriation requirement, would be interpreted in order to fulfil a certain (fundamental) purpose. The fundamental purpose then provides an interpretive framework for the property clause. This means that the question when a deprivation is an expropriation will revolve around the idea of what

⁷⁷ Paragraph 4.4.5.

⁷⁸ Paragraph 4.5.

it is that we protect when paying compensation for property taken. This, however, means that the courts should ask: what are we protecting when we pay compensation for expropriation? Chapter 5 proffered some suggestions about what is protected by requiring the payment of compensation.

6.5 *Why, what, when and how much compensation?*

Chapter 5 analysed literature and cases on the compensation issue, in order to answer the questions *why* we compensate, *what* compensation is paid for, *when* compensation is due and *how much* compensation is to be paid. It was shown that there are two main explanations for the payment of compensation.

The first is that compensation is paid to prevent inefficient expropriation.⁷⁹ Inefficient expropriation is prevented either by making socially inefficient expropriation expensive, as Epstein advances,⁸⁰ or by making the government pay only for takings in its enterprising capacity, as Sax proposes.⁸¹ Epstein's explanation has a strong individual focus, and regards property as exclusive, where an owner has a right to exclude all others from use and enjoyment of his/her property. Therefore, if the state interferes with property rights, it must pay. The state can only escape the duty to compensate if it could be justified on a private law basis. The protection is therefore to be traced back to the state's reluctance to take property, for fear that it will have to compensate, thereby making state interference expensive. Such an explanation favours market solutions above political solutions, restricting state regulation of property. The criticism of this approach is that the individual property right is not viewed in the context of society as a whole, with emphasis on individual property rights being an obstacle to democratic decision-making (Singer and Beerman). It also negates the obligations towards the mutual trust that the property regime fosters amongst society members, where individual interests are protected, but also redistributed when society so requires (Nedelsky). This problem is aggravated by fiscal illusion.

⁷⁹ Paragraph 5.2.2.

⁸⁰ Paragraph 5.2.2.2.

⁸¹ Paragraph 5.2.2.3.

Fiscal illusion occurs when government underestimates the costs of eminent domain, believing that an expropriation is a cost-effective way to acquire property. It can make it easier for government to decide to expropriate property, since it is under the illusion that it is cheaper to expropriate property than to acquire it through a voluntary transaction. Fiscal illusion, however, does not always include the social cost of the expropriation. When property is protected with regard to the social approach to property, the government is forced to internalise the social costs of eminent domain actions, which will force the government to only embark on projects that are socially justified (as opposed to justified in terms of the market). This will force the government to undertake only actions that are socially efficient. Government would therefore be forced to carefully plan its actions by internalising all the cost. This will ensure that government will only embark on projects that are efficient.

Sax believes that compensation is paid to prevent government from arbitrary action.⁸² Sax sees property as a result of a competitive process. The purpose of compensation is to protect certain kinds of competition from existing values. In this competition, government is either a participant in the competition for property interests, or a mediator, mediating competing interests. When competing, government acts in its enterprising capacity and can benefit from the competition. Therefore, when government acquires property in such a way, it must pay compensation. When government acts in its mediating capacity, it merely mediates two competing interests. Government does not, in such a case, acquire any benefit, and therefore need not pay compensation.

The second explanation as to why compensation is paid is that compensation spreads the cost of expropriation.⁸³ This is an argument based on fairness and distributive justice. Compensation is seen as a corrective measure, paid to equalise the impact of unequal impairment of liberties. It recognises the individual's property rights within a society, which means that compensation is not always due. When compensation is due, the interest of the individual is seen and weighed against the interests of the public. This explanation for paying compensation best explains the South African property clause that

⁸² Paragraph 5.2.2.3.

⁸³ Paragraph 5.2.3.

provides for compensation being just and equitable, with regard to the interest of both the individual and the public.

In this context Michelman explains that compensation is paid for the demoralisation cost of expropriation.⁸⁴ According to Michelman, people have a certain degree of liberty to do with their belongings as they want. This liberty, however, is subject to practical boundaries determined by society, the community or the state. A person's welfare is affected by the degree of liberty the individual enjoys to extract benefits from his/her property. If the liberty is diverted by society into different uses, then the individual's welfare situation is altered. Assuming that the state acts rationally, this diversion can be for the greater welfare of society. If one member loses the benefit of use of property for the greater welfare of society, the redistributive effect on the individual owner is cancelled out by converting the values lost into dollars, and compensating the individual. Compensation is therefore paid to spread the cost of reallocation amongst society, and this is justified by the collective benefit of the change.

The German approach is that compensation is paid to enable the individual to lead a self-governing life.⁸⁵ Property is necessary to protect personal liberty and should enable the individual to lead a self-governing life. Property in this context is not merely a market commodity, but a civil right that regards individual welfare as an important aspect of allowing self-development of citizens in a social context. Distribution of wealth in this context can be seen as a guarantee that enables all individuals to develop as conscientious, self-governing members of society. Compensation is therefore paid to enable the individual to lead a self-governing life.

A third approach is that compensation is paid to make the expropriatee indifferent to the taking.⁸⁶ This will prevent the individual from feeling that (s)he is carrying an undue burden for the benefit of the public. Wyman argues that the individual only needs to be objectively indifferent to the expropriation, as this will prevent preference satisfaction that subjective indifference entails. Making the individual objectively indifferent means that compensation should only

⁸⁴ Paragraph 5.2.3.2.

⁸⁵ Paragraph 5.2.3.3.

⁸⁶ Paragraph 5.2.3.4.

be paid for goods worth having, such as autonomy and liberty and meaningful social relationships and enjoyment, enabling the individual to satisfy his/her own preferences, which in turn enables the individual to enjoy the capabilities that society deem valuable.

In this context the question was raised to what extent compensation protects the home interest.⁸⁷ According to Fee, mere market value compensation does not adequately protect the individual homeowner from government interference, due to fiscal illusion not including *all* the costs of the expropriation in the cost-calculation. Homeowners should therefore be compensated for their home interest (that may be more than market value), because failing to do so would lead to incomplete compensation that burdens citizens unequally. Radin argues that compensation cannot always be adequate to compensate for the personhood element of property. If compensation is regarded within the context of personhood, where personal property is justifiably bound up with a person as an element of personhood, then there might be instances where compensation cannot adequately protect this, and expropriation should be avoided. Property is therefore normatively appropriate to the construction of personhood, and people's control over these things need greater protection. Michelman adds to this that some injuries suffered by the owner cannot be compensated, since they have no economic value. This is where a taking deprives an owner of political participation in society, or of personhood interests. This means that there are some instances where the government should not exercise its eminent domain powers, since no amount of compensation can justify the taking of property that involves infringing on personhood, or can adequately compensate an individual to enable him/her to participate in politics. This correlates with the fundamental purpose of the German property clause, where property is protected to enable the individual to lead a self-governing life. In the German case compensation might not be enough justification for the expropriation, and therefore the expropriation itself will be nullified, while in the other cases, compensation is not seen as a solution, and therefore expropriation should not allowed.

⁸⁷ Paragraph 5.2.3.5.

The South African Constitution, it was shown, is characterised by the tension between the individual property holders and the public. The expropriation clause requires a balancing of the rights of individual with the interest of the public. The property clause therefore has a social dimension. This makes Michelman's explanation, that compensation is paid to redistribute wealth, a plausible one. Fee's call for subjective indemnity would make compensation for expropriation too expensive, whereas Wyman's context sensitive approach to objective indemnification seem more plausible. Subjective indemnity would take into account the value that an owner attaches to his/her property, which will inevitably be more than what the benefits for the public is. Wyman's argument takes the interest of the public into account.

What is compensated can be deduced from the reasons *why* we pay compensation.⁸⁸ Different theories on *what* is compensated showed that some theorists, like Epstein, believe that compensation is paid because government restricts the exclusivity of ownership and an owner is therefore compensated for loss of exclusive use of land and control over property.⁸⁹ It was argued that this view compares to the pre-constitutional approach in South Africa, which contradicts the constitutional imperative that compensation should be just and equitable with reference to the interests of both the individual and society. Compensation is paid in such cases, as Singer and Beerman, Radin and Nedelsky argue, for the social aspect of property, where wealth and the burdens of the expropriation are spread equally amongst citizens. According to Wyman, what is compensated is *the cost of things that society deems worth having*, in order to make the expropriatee subjectively indifferent to the expropriation. According to Fee, on the other hand, compensation is an amount that the expropriatee deems would make the him/her subjectively indifferent to the expropriation.

Michelman argues that compensation is an amount that would secure democratic participation.⁹⁰ Judges should give content to the term "property" by regarding it as something that provides the individual with the opportunity to participate in political processes. Compensation is therefore an amount that en-

⁸⁸ Paragraph 5.3.

⁸⁹ Paragraph 5.3.2.

⁹⁰ Paragraph 5.3.3.

ables the individual to participate in the social and political arena, the cost of redirecting resources to enable political participation in society.

South Africa will benefit from an interpretation of section 25 that gives “property” the content Michelman proposes. If “property” is seen as enabling the individual to participate in the political process, it should ideally be possible for such an individual to bargain for a better life through politics.

The discussion on *when* compensation is due concentrated on the belief that compensation is due whenever an incident of ownership is taken.⁹¹ It focused on the practice of regulatory takings in the United States of America, discussed in chapter 4. It was argued that compensation is due when expropriation places an undue burden on the individual.⁹² Radin’s theory of conceptual severance was discussed, as a possible explanation of why regulatory takings are compensated.⁹³ According to Radin courts resort to “conceptual severance” where they sever an incident of ownership and then conceptually construes that incident in the aggregate as a separate whole thing that must be compensated. This means that the courts focus on, and therefore protect, property. This ties in with Epstein’s view of takings and the idea that government must compensate for every interference with property.

In German law, compensation is only due when the authorising statute makes provision for it, placing the decision of *when* compensation is due in the hands of the legislature. If a regulation unfairly singles out an individual, the regulation would be declared unconstitutional. It would not attract compensation. According to Blume and Rubinfeld, compensation will only be paid in those cases where owners could not insure their property against the expropriation. This in essence means that compensation is paid when the losses are big or where the expropriatee could not insure against the losses. Compensation, according to Michelman, is due whenever the demoralisation costs of the expropriation is too high.⁹⁴ According to him, a rational government will only expropriate when the cost of expropriation is less than the benefits of expropriating. People labour and invest to contribute to the production of wealth, be-

⁹¹ Paragraph 5.4.

⁹² Paragraph 5.4.2.

⁹³ Paragraph 5.4.2.1.

⁹⁴ Paragraph 5.4.2.2.

cause settled expectations about the distribution of wealth will maximise the output of satisfaction. Property that is taken purely for redistribution could be demoralising as it reduces wealth. This demoralisation can, however, be counteracted with the payment of compensation. Compensation in such a case is therefore paid to counter the demoralisation cost of redistribution, and it is only due when the demoralisation costs of denying such compensation would be more than the costs to settle such demoralisation.

In this respect South Africa can again benefit from Michelman's approach, where the focus is on the individual's demoralisation cost in relation to the settlement cost. The individual will only be compensated if the individual demoralisation cost outweighs the settlement cost.

This links with the question of, *how much* compensation should be paid. Courts seem to unconditionally accept market value as an indication of value, and this was challenged in this section.⁹⁵ The time and manner of payment of compensation was discussed to show that the time and manner of paying compensation can have an influence on the just and equitable compensation.⁹⁶ Thereafter it was argued that market value is often equated with the just and equitable requirement, but that market value is not always as easy to calculate as the courts sometimes assume.⁹⁷ According to Allen, the idea that market value is the assumed value of "just and equitable" compensation comes from the English view that compensation should indemnify the owner of the property for his/her loss. Allen also discusses the example in India, where the court's interpretation of just compensation as the market value was used to counter the government's attempts at economic reforms. It was also shown, with reference to the *May* case, how the choice of valuation methods that calculate market value compensation can influence the market value amount. Michelman rejects the market-value-as-value approach and proposes that a compensation amount should eliminate the demoralisation costs of expropriation. This makes it possible for wealth to be maximised without the payment of compensation, such as where the cost of demoralisation is less than the cost of counteracting the demoralisation.

⁹⁵ Paragraph 5.5.

⁹⁶ Paragraph 5.5.2.

⁹⁷ Paragraph 5.5.3.

This was followed by a more technical discussion on the how the choice of valuation mechanism can influence the amount of compensation.⁹⁸ It was shown that not only the valuation mechanism, but also the choice of focal point will influence the compensation amount. These mechanisms are projected as being objective and scientific, but courts seem to be ignorant of the fact that the choice of mechanism is not objective and that those choices are made based on certain assumptions about property and compensation. The valuation methods are therefore not as objective as the courts would like to believe.

Compensation can also be calculated in terms of the proportionality test,⁹⁹ weighing the interests of the individual against those of society. The amount of compensation can help to strike a balance between the injured individual and the public that benefited.

The wording of South Africa's property clause indicates a predisposition towards proportionality. It requires that, when determining compensation, one should balance the interests of the individual with those of the public. The focus should be on an amount that will prevent the individual from feeling demoralised rather than on market value. Valuation techniques are useful in determining an amount of compensation, but the choice of technique and the focal point of the inquiry cannot be unconditionally accepted. The courts should justify their choice of technique and should be aware of the risks of every technique. This will make "just and equitable" compensation possible.

6.6 *The way forward for South Africa*

From this dissertation it appeared that compensation is not a one-dimensional matter, but is multi-layered. Compensation is paid to balance the interests of the individual with those of the public in order not to let the individual unduly carry the burden of an expropriation from which the public benefits. Compensation therefore spreads the cost of the expropriation amongst the public that benefits. Before the Constitution, compensation was paid because it was presumed that the state will not take away rights without compensation, un-

⁹⁸ Paragraph 5.5.5.

⁹⁹ Paragraph 5.5.6.

less clearly stated. The Constitution requires that the interest of the individual be weighed against the interest of the public, and this means that the focus shifted to the individual holding property rights in the context of society. Compensation is due when the state expropriates property for a public purpose, and not for mere regulation of property. Before the Constitution, compensation was deemed to be market value. Under the Constitution, compensation must be “just and equitable”, an amount necessary to alleviate the burden from the individual in proportion to the gain of the public, presumably also due to the balancing required.

Courts need to be aware of *what* they are protecting when they order the payment of compensation. The German approach, based on the view that property enables the individual to lead a self-governing life and that the constitutional property clause must be construed to further this fundamental purpose of property, should be considered by the South African courts. Not only does this require placing the individual’s right to property in a societal context, but also that the court situates the compensation question in the broader historical context and applies a proportionality test to ensure fairness. This will shift the emphasis away from market value and enable a transformative approach to the interpretation of constitutional and statutory provisions on expropriation. This will also encourage the idea of Michelman that compensation is paid to ensure fairness (through redistributive justice). An individual would not be required to unfairly shoulder the burden of an expropriation, but society will likewise not be held accountable for compensation at full market value in the instances where it is not justified.

Shifting the focus from compensation at market value to just and equitable compensation means that the amount of compensation paid for expropriation must prevent the individual from being (disproportionately) demoralised. Payment of market value can mean that the costs of settling an expropriation is higher than the demoralisation costs. Market value should therefore not be at the centre of the inquiry as this can lead to unfair compensation. The pre-constitutional legal culture, still present in constitutional expropriation law, should change. This can be achieved if the courts, at every occasion when they are called upon to adjudicate expropriation matters, ask themselves

whether a pre-constitutional interpretation of the law they have to apply is still tenable in the new constitutional dispensation. Only if the courts grapple with this question can new, transformative expropriation law be developed through precedent. This may open a door to move away from the strict “market value centred” and “scientific” legal culture of expropriation, towards a transformative, constitutional and legal culture of expropriation. A new body of context and history sensitive case law, treating each case individually and situating it in its proper context, might in time ensue. This will also aid in the project of transformative constitutionalism to bring about “large-scale social change through non-violent political processes, grounded in law”.¹⁰⁰ If the courts do not start to develop such a new body of case law, we will be left with a compensation for expropriation legal culture, making the future of expropriation law “curiouser and curiouser”.

¹⁰⁰ K Klare “Legal Culture and Transformative Constitutionalism” (1998) 14 *SAJHR* 146 150.

Addendum: Extracts from Legislation

Constitution of the Republic of South Africa

8 Application

(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.

(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court-

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36 (1).

(4) A juristic person is entitled to the rights in the Bill of Rights to the extent required by the nature of the rights and the nature of that juristic person.

25 Property

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

(2) Property may be expropriated only in terms of law of general application-

(a) For a public purpose or in the public interest; and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

(4) For the purposes of this section-

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

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

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

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

33 Just administrative action

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must-

- (a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- (b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- (c) promote an efficient administration.

36 Limitation of rights

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

Expropriation Act 63 of 1975

12 Basis on which compensation is to be determined

(1) The amount of compensation to be paid in terms of this Act to an owner in respect of property expropriated in terms of this Act, or in respect of the taking, in terms of this Act, of a right to use property, shall not, subject to the provisions of subsection (2), exceed-

(a) in the case of any property other than a right, excepting a registered right to minerals, the aggregate of-

(i) the amount which the property would have realized if sold on the date of notice in the open market by a willing seller to a willing buyer; and

(ii) an amount to make good any actual financial loss caused by the expropriation; and

(b) in the case of a right, excepting a registered right to minerals, an amount to make good any actual financial loss caused by the expropriation or the taking of the right:

Provided that where the property expropriated is of such nature that there is no open market therefor, compensation therefor may be determined-

(aa) on the basis of the amount it would cost to replace the improvements on the property expropriated, having regard to the depreciation thereof for any reason, as determined on the date of notice; or

(bb) in any other suitable manner.

(2) Notwithstanding anything to the contrary contained in this Act there shall be added to the total amount payable in accordance with subsection (1), an amount equal to-

(a) ten per cent of such total amount, if it does not exceed R100 000; plus

(b) five per cent of the amount by which it exceeds R100 000, if it does not exceed R500 000; plus

(c) three per cent of the amount by which it exceeds R500 000, if it does not exceed R1 000 000; plus

(d) one per cent (but not amounting to more than R10 000) of the amount by which it exceeds R1 000 000.

(3) (a) Interest at the standard interest rate determined in terms of section 26 (1) of the Exchequer Act, 1975 (Act 66 of 1975), shall, subject to the provisions of subsection (4), be payable from the date on which the State takes possession of the property in question in terms of section 8 (3) or (5) on any outstanding portion of the amount of compensation payable in accordance with subsection (1): Provided that-

(i) in a case contemplated in section 21 (4), in respect of the period calculated from the termination of thirty days from the date on which-

(aa) the property was so taken possession of, if prior to that date compensation for the property was offered or agreed upon; or

(bb) such compensation was offered or agreed upon, if after that date it was offered or agreed upon, to the date on which the dispute was settled or the doubt was resolved or the owner and the buyer or the mortgagee or the builder notified the Minister in terms of the said section 21 (4) as to the payment of the compensation money, the outstanding portion of the amount so payable shall, for the purposes of the payment of interest, be deemed not to be an outstanding amount; and

(ii) if the owner fails to comply with the provisions of section 9 (1) within the appropriate period referred to in the said section, the amount so payable shall during the period of such failure and for the purpose of the payment of interest be deemed not to be an outstanding amount.

(b) Interest payable in terms of paragraph (a) shall be deemed to have been paid on the date on which the amount has been made available or posted to the owner concerned.

(c) Any deposit, payment or utilization of any amount in terms of section 11 (1), 20 (2) or 21 (1) or (4) shall be deemed to be a payment to the owner, and no interest shall in terms of paragraph (a) be payable on any such amount as from the date on which it has been so deposited, paid or utilized.

(4) If the owner of property which has been expropriated occupies or utilizes that property or any portion thereof, no interest shall, in respect of the period during which he so occupies or utilizes it, be paid in terms of subsection (3) on so much of the outstanding amount as, in the opinion of the Minister, relates to the property so occupied or utilized.

(5) In determining the amount of compensation to be paid in terms of this Act, the following rules shall apply, namely-

(a) no allowance shall be made for the fact that the property or the right to use property has been taken without the consent of the owner in question;

(b) the special suitability or usefulness of the property in question for the purpose for which it is required by the State, shall not be taken into account if it is unlikely that the property would have been purchased for that purpose on the open market or that the right to use the property for that purpose would have been so purchased;

(c) if the value of the property has been enhanced in consequence of the use thereof in a manner which is unlawful, such enhancement shall not be taken into account;

(d) improvements made after the date of notice on or to the property in question (except where they were necessary for the proper maintenance of existing improvements or where they were undertaken in pursuance of obligations entered into before that date) shall not be taken into account;

(e) no allowance shall be made for any unregistered right in respect of any other property or for any indirect damage or anything done with the object of obtaining compensation therefor;

(f) any enhancement or depreciation, before or after the date of notice, in the value of the property in question, which may be due to the purpose for which or in connection with which the property is being expropriated or is to be used, or which is a consequence of any work or act which the State may carry out or perform or already has carried out or performed or intends to carry out or perform in connection with such purpose, shall not be taken into account;

(g)

(h) account shall also be taken of-

(i) any benefit which will enure to the person to be compensated from any works which the State has built or constructed or has undertaken to build or construct on behalf of such person to compensate him in whole or in part for any financial loss which he will suffer in consequence of the expropriation or, as the case may be, the taking of the right in question;

(ii) any benefit which will enure to such person in consequence of the expropriation of the property or the use thereof for the purpose for which it was expropriated or, as the case may be, the right in question was taken;

(iii)

(iv) any relevant quantity of water to which the person to be compensated is entitled, or which is likely to be granted to him, in terms of the provisions of the Water Act, 1956 (Act 54 of 1956), or any other law.

Abbreviations

<i>Brook J Int'l L</i>	Brooklyn Journal of International Law
<i>Cal LR</i>	California Law Review
<i>Can J Law & Juris</i>	Canadian Journal of Law and Jurisprudence
<i>CCR</i>	Constitutional Court Review
<i>CILSA</i>	Comparative and International Law Journal of Southern Africa
<i>CJS</i>	Corpus Juris Secundum
<i>Col LR</i>	Columbian Law Review
<i>Conn LR</i>	Connecticut Law Review
<i>Cornell LR</i>	Cornell Law Review
<i>DVBI</i>	Deutsches Verwaltungsblatt
<i>GG</i>	Government Gazette
<i>GN</i>	Government Notice
<i>Harv Envtl LR</i>	Harvard Environmental Law Review
<i>Harv LR</i>	Harvard Law Review
<i>HRCLJSA</i>	Human Rights and Constitutional Law Journal South Africa
<i>LQR</i>	Law Quarterly Review
<i>NJW</i>	Neue Juristische Wochenschrift
<i>Notre Dame LR</i>	Notre Dame Law Review
<i>NW U LR</i>	Northwestern University Law Review
<i>NYU Envtl LR</i>	New York University Environmental Law Review
<i>NYUJL & Lib</i>	New York University Journal of Law & Liberty
<i>Phil Rev</i>	Philosophy Review
<i>S Cal LR</i>	Southern California Law Review
<i>SAJHR</i>	South African Journal on Human Rights
<i>SALJ</i>	South African Law Journal
<i>SAPR/PL</i>	South African Public Law
<i>Stan LR</i>	Stanford Law Review
<i>Stell LR</i>	Stellenbosch Law Review

<i>Sup Ct Rev</i>	Supreme Court Review
<i>Syd LR</i>	Sydney Law Review
<i>THRHR</i>	Tydskrif vir die Hedendaagse Rome- ins-Hollandse Reg
<i>TSAR</i>	Tydskrif vir die Suid Afrikaanse reg
<i>U C Davis LR</i>	University of California Davis Law Review
<i>U Miami LR</i>	University of Miami Law Review
<i>U Pa J Const L</i>	University of Pennsylvania Journal of Constitutional Law
<i>U Pa LR</i>	University of Pennsylvania Law Re- view
<i>Wash & Lee LR</i>	Washington and Lee Law Review
<i>Wash LR</i>	Washington Law Review
<i>Yale LJ</i>	Yale Law Journal

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