

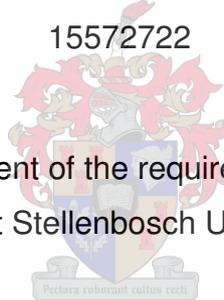
# The Meaning of 'Public Purpose' and 'Public Interest' in Section 25 of the Final Constitution

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## **Abstract**

This thesis discusses the meaning of public purpose and public interest in s 25 of the Final Constitution. The main question that is asked is: how does 'public purpose' differ from 'public interest', and what impact did the Final Constitution have on the interpretation and application of the public purpose requirement in expropriation law in South Africa? This question is investigated by looking at how the courts have dealt with the public purpose requirement, both before and during the first years of the constitutional era in South African law, and also with reference to foreign law.

The thesis shows that the position has not changed that much yet because the interpretation of this requirement has not received much attention in constitutional case law. The main focus is to show that the reason for the interpretation problems surrounding this requirement is the apparent conflict between the formulation of the public purpose requirement in the Final Constitution and in the current Expropriation Act of 1975. It is pointed out that the efforts that were made to resolve the problem failed because the Expropriation Bill 2008 was withdrawn. Consequently, it is still unclear how the public purpose requirement has been changed by s 25(2) of the Constitution, which authorises expropriation for a public purpose or in the public interest. This apparent lack of clarity is discussed and analysed with specific reference to the different types of third party transfers that are possible in expropriation law.

Comparative case law from Australia, Germany, the United Kingdom, the United States of America and the European Convention on Human Rights is considered to show how other jurisdictions deal with the public purpose requirement in their own constitutions or expropriation legislation, with particular emphasis on how they solve problems surrounding third party transfers. In the final chapter it is proposed that the Expropriation Bill should be reintroduced to bring the formulation of the public purpose requirement in the Act in line with s 25(2) and that expropriation for transfer to third parties could be in order if it serves a legitimate public purpose or the public interest (e.g. because the third party provides a public utility or for land reform), but that expropriation for economic development should be reviewed strictly to ensure that it serves a more direct and clear public interest than just stimulating the economy or creating jobs.

## Opsomming

Hierdie tesis bespreek die betekenis van openbare doel en openbare belang in a 25 van die Finale Grondwet. Die belangrikste vraag is: hoe verskil 'openbare doel' van 'openbare belang', en watter impak het die Finale Grondwet op die interpretasie en toepassing van die openbare doel-vereiste in die Suid-Afrikaanse onteieningsreg gehad? Die vraag word ondersoek met verwysing na die howe se hantering van die openbare doel-vereiste voor en gedurende die eerste jare van die nuwe grondwetlike bedeling, asook met verwysing na buitelandse reg.

Die tesis toon aan dat die posisie nog min verander het omdat die interpretasie van die vereiste in die grondwetlike regspraak nog nie veel aandag gekry het nie. Daar word aangetoon dat interpretasieprobleme rondom hierdie vereiste ontstaan as gevolg van die oënskynlike teenstrydigheid tussen die formulering van die openbare doel-vereiste in die Finale Grondwet en in die huidige Onteieningswet van 1975. Daar word geargumenteer dat pogings om die probleem op te los gefaal het omdat die Onteieningswetsontwerp 2008 teruggetrek is. Dit is daarom steeds onduidelik hoe die openbare doel-vereiste deur a 25(2) van die Grondwet, wat onteiening vir 'n openbare doel of in die openbare belang toelaat, verander is. Hierdie oënskynlike gebrek aan sekerheid word bespreek met verwysing na die verskillende gevalle waarin eiendom onteien en dan aan derde partye oorgedra word.

Regsvergelykende regspraak van Australië, Duitsland, die Verenigde Koninkryk, die Verenigde State van Amerika en die Europese Konvensie op Menseregte word oorweeg om te wys hoe ander regstelsels die openbare doel-vereiste in hulle grondwette of onteieningswetgewing interpreteer, spesifiek ten aansien van die oordrag van eiendom aan derde partye. In die laaste hoofstuk word aan die hand gedoen dat die Onteieningswetsontwerp weer ter tafel geneem moet word om die bewoording van die openbare doel-vereiste in die Onteieningswet in ooreenstemming met a 25(2) te bring. Daar word ook aan die hand gedoen dat onteiening vir oordrag aan derde partye in orde kan wees as dit 'n geldige openbare doel of die openbare belang dien (bv omdat die derde party 'n openbare diens lewer of in belang van grondhervorming), maar dat onteiening vir ekonomiese ontwikkeling streng hersien moet word om te verseker dat dit 'n meer direkte en duidelike openbare belang dien as bloot om die ekonomie te stimuleer of om werk te skep.

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# Chapter 1

## Introduction

### 1.1 Background

In 1983 the South African Parliament passed a Constitution<sup>1</sup> that created a new, tricameral Parliament, separated into White, Coloured and Indian racial chambers. Black people were excluded and treated as citizens of the homelands where they were born. They had no political rights outside these homelands. Under this Constitution, Whites benefited most from public services, followed by Coloureds and Indians, with Black people largely left out.

The 1983 Constitution did not contain a Bill of Rights or a property clause, and therefore did not provide constitutional standards or procedures for the protection or the regulation of property rights. Consequently, there was no constitutional control over the purposes for which private property could be expropriated, although it is general knowledge that the apartheid state used its power of eminent domain to further the goals of racial segregation by expropriating both Black-owned land (so-called clearing of 'Black spots') and White-owned land (so-called consolidation of the homelands) that did not fit in with its grand scheme of spatial segregation. The introduction of constitutional control over expropriation, in the 1993 and 1996 constitutions, not only introduced an element of general constitutional scrutiny into the equation but also made it possible to analyse the purpose of expropriation in the

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<sup>1</sup> The Republic of South Africa Constitution Act 110 of 1983.

specific context of social and economic transformation, particularly because of the strong emphasis on social justice and land reform in the South African constitutions of 1993 and 1996.

Prior to the Interim Constitution of 1993 and the Final Constitution of 1996, expropriation was regulated purely in terms of the Expropriation Act,<sup>2</sup> although expropriation was also provided for in other legislation. The 1975 Act, which is still in force in the post-1996 constitutional dispensation, provides the requirements for a valid expropriation. The most important requirements are that there must be a proper statutory authority for the expropriation, the expropriation must be for a public purpose, it must comply with procedural fairness requirements and compensation must be paid according to the provisions of the Act.<sup>3</sup> The most important of these requirements, for purposes of this thesis, is that the Expropriation Act requires that expropriation should be for a public purpose; the Act also includes a definition of 'public purpose.'<sup>4</sup>

In the pre-1993 era, the courts followed an *ad hoc* approach towards interpreting this term.<sup>5</sup> In terms of the pre-constitutional expropriation law, courts were reasonably strict in ensuring that expropriation of land was for a public purpose, at least in terms of how they understood the notion of public purpose. Briefly stated, the courts interpreted 'public purpose' either narrowly (as referring to state or government use)

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<sup>2</sup> 63 of 1975.

<sup>3</sup> Section 2 of Act 63 of 1975.

<sup>4</sup> Public purpose is defined in s 2 of the Act as 'any purpose connected with the administration of the provisions of any law by an organ of state'. Public interest is not a requirement in the Act, and is therefore not defined in the Act.

<sup>5</sup> Badenhorst PJ, Pienaar JM & Mostert H *Silberberg and Schoeman's The law of property* (5<sup>th</sup> ed 2006) at 567.

or widely (as referring to a more general public interest), depending on the authorising legislation and the context. In this thesis, various cases decided before 1996 will be discussed to give an overview of how the courts have dealt with the public purpose requirement in the Act during the pre-constitutional era.

Prior to the 1993 and 1996 constitutions the courts were reasonably strict in ensuring that expropriation of land was for a public purpose. For example, in the *Rondebosch*<sup>6</sup> case Innes J said that ‘public purpose may either be all purposes which pertain to and benefit the public in contradistinction to private individuals, or that may be those more restricted purposes which relate to the state, and the government of the country, that is, government purposes’. This is a clear indication that in the pre-constitutional era the courts, in deciding expropriation cases, always paid close attention when applying the public purpose requirement. For the most part, the courts approached the matter by way of a distinction between narrower state or government use of property and property that was used for the benefit of the public or a community at large. In the *Van Streepen* case the court distinguished between public purpose and public interest as follows:

‘[T]he acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. *Non constat* that it cannot be in the public interest. It would depend upon the facts and circumstances of each particular case. One can conceive of circumstances in which the loss and inconvenience suffered by A through the acquisition of portion of his land to relocate the services of B, who would have otherwise have to be paid massive compensation, could be justified on the basis of it being in the public interest.’<sup>7</sup>

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<sup>6</sup> *Rondebosch Municipal Council v Trustees of Western Province Agricultural Society* 1911 AD 271 at 283; see further *Slabbert v Minister van Lande* 1963 (3) SA (T) 612 at 330.

<sup>7</sup> *Administrator, Transvaal v Van Streepen (Kempton Park) (Pty) (Ltd)* 1990 (4) 644 (A) at 661 D-E.

The Interim Constitution<sup>8</sup> was introduced in 1993 by the first democratic government, led by the African National Congress. It came into force in April 1994 and for the first time contained a Bill of Rights and other democratic and transformative guarantees. Section 28<sup>9</sup> guaranteed rights in property as well as providing for the expropriation of property rights under certain circumstances. The Interim Constitution property clause included a public purpose requirement for expropriation of property.<sup>10</sup> It also provided for payment of just and equitable compensation. Much like the 1975 Expropriation Act, the Interim Constitution gave the state a mandate to expropriate property for a public purpose only. The few cases where the courts could have applied the public purpose requirement for expropriation of property under the 1993 Constitution will also be discussed in this thesis.

The Final Constitution was introduced in 1996 and it also contained a property clause in s 25, giving a similar mandate as s 28 of the 1993 Interim Constitution that allows the state to expropriate property. However, s 25 allows expropriation not only for a public purpose, but also in the public interest.<sup>11</sup> Public purpose is not defined in the Constitution. 'Public interest' is not defined in the Constitution either, but s 25(4)(a) states that it includes the 'nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources'. This has caused some interpretation problems in case law, since the Expropriation Act,<sup>12</sup> which is still in force, only provides for expropriation for a public purpose, and does not explicitly provide for expropriation in the public interest. The inclusion of public

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<sup>8</sup> Act 200 of 1993.

<sup>9</sup> This section contains the property clause in the Interim Constitution of the Republic of South Africa 1993.

<sup>10</sup> Section 28(1).

<sup>11</sup> Section 25(2)(a) and 25(4)(a).

<sup>12</sup> 63 of 1975.

interest in the property clause, without an amendment of the 1975 Expropriation Act, seems to lead to inconsistency between the Act and the Constitution. The proposal of a new Expropriation Bill in 2008 was intended to resolve some of the problems encountered because of this apparent inconsistency.

The Expropriation Bill<sup>13</sup> was drafted in 2008 to bring the Act in conformity with the Constitution. The Bill was criticised for, amongst other things, stating that expropriation can be in the 'public interest.'<sup>14</sup> This is different from the current Expropriation Act,<sup>15</sup> which only provides for 'public purpose'. Public interest seems to be a wider concept than public purpose.<sup>16</sup> It is this wider meaning that gives rise to the fears of the Bill's critics, some of whom have argued that the wider provision will allow the government to expropriate property arbitrarily.<sup>17</sup>

Since the Final Constitution defines neither term, and because the Constitution has not as yet had a clearly discernible impact on the interpretation of these two concepts in case law, the question that arises is: How does 'public purpose' differ from 'public interest', and what impact did the Final Constitution have on the meaning of these two concepts? For instance: In cases where the state expropriates property from a private owner and transfers it to another private person, can that be said to be in the public interest? What about instances where private persons benefit from expropriation? Is expropriation for economic development purposes also for a

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<sup>13</sup> Bill 16 of 2008. This Bill was withdrawn in August 2008.

<sup>14</sup> Sapa 'Civil rights group slam land Bill' *Business Report* [available at [www.busrep.co.za](http://www.busrep.co.za) as on 18 June 2008].

<sup>15</sup> 63 of 1975.

<sup>16</sup> Van der Walt AJ *Constitutional property law* (2005) 243.

<sup>17</sup> Hartley W 'Absa comes under fire over Expropriation Bill' *Business Day* (19 June 2008) [available at [www.businessday.co.za](http://www.businessday.co.za) as on 19 June 2008] para 7.

public purpose or in the public interest? During the drafting of the Final Constitution, one of the major concerns was that expropriation should be possible for land reform purposes, and it was said that public purpose could be interpreted too narrowly to avoid expropriation for private benefit, which might in turn prevent expropriation for land reform purposes. Public purpose in the context of land reform takes place in cases where land is expropriated for restitution and redistribution purposes. It is therefore necessary to determine whether and how the public purpose / public interest requirement allows for expropriation that benefits third parties, either by way of economic development or land reform.

Expropriating property from one private owner and transferring it to another private person is known as a third party transfer and is generally problematic in comparative constitutional property law. Expropriation of private property and subsequent transfer to another private party may be in the public interest as long as the expropriation and the transfer serve a legitimate public interest that satisfies an important public need. This is particularly true in land reform cases, but where the private person benefits from an expropriation that was undertaken purely for economic development, it is not self-evident that the public interest requirement would be satisfied. In a third category of cases, where a private party benefits from an expropriation that also serves a public purpose in that the private party is responsible to provide public utilities, the expropriation could again more easily satisfy the public interest requirement if the property is required in the delivery of the public utility.

In South African law, third party transfers are especially important in the context of land reform. In German law, where a procedurally strict but substantively lenient

level of scrutiny is applied,<sup>18</sup> comparative examples could be found that would assist in developing a theory on the interpretation of the public purpose requirement. In view of the constitutional and reform context within which s 25(2) must be interpreted, it is clear that there is a strong argument to be made that this provision should be interpreted in its constitutional and historical context and that it should therefore probably allow third party transfers that are justified by their land reform purpose, without allowing third party transfers that are not clearly justified by some important public need. This would require developing jurisprudence to indicate when such transfers are justified. There is some guidance for similar interpretations in foreign case law, and the argument will be explored further and developed in the thesis.

It is important to analyse the definitions of these two elements of the public purpose requirement in order to clarify the differences between them, as well as to make sure what the state needs to establish in order to fulfil this requirement when expropriating property. In the absence of a clear definition, analysis of the requirement and of the differences between the two elements in s 25(2) will still help the courts to decide when an expropriation is for a public purpose or in the public interest, if the different cases and categories of third party transfers can be distinguished from each other clearly enough. It is equally important for the land owner whose property has been expropriated by the state, to know exactly for which one of the two elements of the requirement, and therefore for which public purpose or interest, his / her property was expropriated.

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<sup>18</sup> See *BVerfGE* 66, 248 [1984], where expropriation of property for the purpose of enabling a private person to provide electricity (on contract) was judged to be constitutional, even though the expropriated property was used by the private company to make a profit from the provision of services according to its contract with the state. This case is discussed in chapter 3.

## **1.2. Research Question, Hypothesis and Methodology**

Analysis of the meaning of public purpose and public interest in s 25(2) is aimed at answering the following research question: how does 'public purpose' differ from 'public interest' in s 25(2), and what impact did the Final Constitution have on the interpretation and application of the public purpose requirement in expropriation law in South Africa? This thesis will highlight the impact of the Constitution on existing law and the role that the Constitution plays in the interpretation of the Bill of Rights and legislation. Specific attention will be given to the question of whether the public purpose requirement can be interpreted in such a way as to allow expropriation for the benefit of a private party, expropriation for economic development and expropriation for land reform purposes.

This thesis will investigate the question whether the change in formulation in s 25(2) and the double reference to public purpose and public interest was driven by a change in policy and, if so, what the implications of such change are. The hypothesis is that public purpose is narrower in scope than public interest and that the public interest requirement is therefore difficult to demarcate accurately. Public purpose in the wider sense relates to matters affecting the public or the whole community at large, meaning that an expropriation of a particular parcel of land should benefit the whole community and not only a certain individual or a group of individuals. Public purpose in the narrow sense means that an expropriation serves a public purpose only if the property expropriated is acquired by the state for state use. In a broader sense, it relates to use of the property that benefits a local community or the public as a whole. Public interest can also include third party transfers and expropriation for

the benefit of private persons, for example when property is expropriated for land reform or economic development. The hypothesis will be tested by looking at the historical background of these two requirements by way of analysis of South African case law, as well as a comparative study of the interpretation of similar or comparable requirements in other jurisdictions. The underlying assumption is that the interpretation of the public purpose / public interest requirement is problematic because these terms are not clearly defined in the Constitution, and that this lack of clarity may lead to uncertainty that could stand in the way of land reform. It will be suggested that there is a need for a context-sensitive interpretation and application of the public interest requirement in s 25(2) so as to enable expropriation for land reform purposes, without thereby opening the door for arbitrary expropriation.

The methodology that will be used in this thesis is to analyse the interpretation of the two elements of the public purpose requirement from a historical, constitutional and comparative perspective. Initially, the interpretation of the public purpose requirement in pre-1993 case law will be analysed. This will then be contrasted with the situation under the 1993 and 1996 constitutions. The public purpose requirement in s 28 of the Interim Constitution will be compared to the requirement in s 25 of the Final Constitution, to identify the differences and similarities between these two property clauses and to ascertain why the public interest aspect was added in the Final Constitution. The analysis and interpretation of the requirement by the courts and academic writers' opinions with regard to these two concepts are also discussed in this research.

Comparative analysis will be conducted in this research with reference to Germany, the United States of America, Australia, the European Union (the European Convention on Human Rights) and the United Kingdom. This comparative analysis is

considered necessary because there is case law in all these jurisdictions that indicates that courts resort to either stricter or more lenient review of the comparable provisions. This research will reflect the position of other countries with regard to the public purpose requirement and ensure that we do not repeat the mistakes of other countries, while we learn from their insights. The US courts, for example, have applied the public use requirement in the Fifth Amendment to the US Constitution very leniently, even in cases where private property was apparently expropriated purely for the benefit of a private person.<sup>19</sup> German case law, on the other hand, can be characterised as strict rather than lenient in that the German courts tend to scrutinise the public purpose requirement in article 14.3.1 of the Basic Law more closely.<sup>20</sup> Comparative examples from the other jurisdictions referred to above will also be discussed to see how these two requirements were applied in their case law.

Foreign case law regarding land reform will be discussed specifically to show what the arguments are for and against expropriation for land reform purposes and to indicate how the interpretation of the public purpose requirement can affect land reform. For instance, in an Australian decision, compulsory acquisition for land reform purposes was held to be unconstitutional as it was not considered to serve a public use requirement.<sup>21</sup> In the United States, on the other hand, expropriation of land for land reform purposes was justified in one of the most important expropriation

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<sup>19</sup> Case law dealing with expropriations for private benefit will be discussed in chapter 3.

<sup>20</sup> The Basic Law for the Republic of Germany 1949 provides in article 14.3.1 that 'Expropriation shall only be permissible in the public interest'.

<sup>21</sup> *Clunies-Ross v The Commonwealth of Australia and Others* (1984) 155 CLR 193. This case is mentioned briefly in chapter 2 and discussed fully in chapter 3.

decisions of the US Supreme Court.<sup>22</sup> These foreign cases are mentioned briefly in chapter 2 and discussed fully in chapter 3.

### **1.3 Overview of Chapters**

In chapter 2, the interpretation of the public purpose and public interest requirement in South African law is reviewed by first giving an overview of the interpretation of the public purpose requirement in South African law before 1993 (in terms of the Expropriation Act of 1975); then discussing the interpretation of the requirement under the Interim Constitution, between 1993 and 1996, and finally analysing the interpretation of the new public purpose / public interest requirement in the Final Constitution, after 1996. The chapter will show how the courts and academic writers understood and interpreted these requirements prior to 1993, between 1993 and 1996, and since 1996.

During the pre-constitutional era the South Africa courts followed a relatively strict interpretation of the public purpose requirement in expropriation cases, generally distinguishing between expropriation for state use and expropriation for a use that will benefit the public at large. The 1993 Interim Constitution had very little constitutional impact on the interpretation of this requirement during the short time that it was in force. The 1996 Constitution added a public interest aspect to the public purpose requirement and it is this seemingly wider public interest requirement that caused interpretation problems for South African courts in expropriation cases.

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<sup>22</sup> *Hawaii Housing Authority v Midkiff* 467 US 229 (1984). This case is mentioned briefly in chapter 2 and discussed fully in chapter 3.

Prior to 1993, expropriations were regulated in terms of the Expropriation Act.<sup>23</sup> According to the 1975 Expropriation Act, public purpose is 'any purpose connected to the administration of the provisions of any law by an organ of state.'<sup>24</sup> It will be shown in the first part of Chapter 2 that in case law, this was interpreted to mean anything that is done by an organ of state which is to the advantage of the public at large, benefitting the community as a whole and not just one particular individual or group of individuals. However, during the pre-constitutional era, the public purpose requirement was not limited to government purposes but also included other purposes that served the public at large, depending on the formulation and context of the authorising legislation.

In 1993 the Interim Constitution was introduced and it contained a property clause in s 28 that provided for the expropriation of property for a public purpose only.<sup>25</sup> The difficulties and the problems that emerged during and after the drafting of the Interim Constitution are discussed in the second part of Chapter 2. Debates amongst academic commentators regarding the property clause in the Interim Constitution and the first case that came before the Constitutional Court dealing with expropriation are analysed to ascertain how commentators and the Court applied and interpreted the property clause in s 28 of the Interim Constitution. It will be argued that the Interim Constitution had little effect on the interpretation of the public purpose requirement during the short time that it was in force.

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<sup>23</sup> 63 of 1975.

<sup>24</sup> Section 1 of Act 63 of 1975.

<sup>25</sup> Section 28 (3) of Act 200 of 1993.

Section 25(2)(a) of the Constitution provides that property may be expropriated in terms of law of general application;<sup>26</sup> for a public purpose or in the public interest;<sup>27</sup> and subject to payment of just and equitable compensation.<sup>28</sup> Section 25(4)(a) adds that, for purposes of s 25, the public interest ‘includes the nation’s commitment to land reform, and to reforms that bring about equitable access to all South Africa’s natural resources’. The interpretation difficulties caused by the addition of the public interest aspect to the public purpose requirement are discussed in the final part of Chapter 2, with reference to case law and academic commentary. It will be argued that the public purpose requirement can be interpreted either more narrowly or more leniently and that South African case law is likely to follow a lenient interpretation of the public interest requirement, making expropriation for the benefit of a private party possible in certain circumstances.

A particularly important aspect that remains unclear in South African expropriation law is whether, and when, expropriation that benefits another private party would be permissible under the public purpose / public interest requirement. It will be argued in Chapter 2 that third party transfers, generally speaking, do not necessarily render an expropriation unconstitutional merely because a third party benefits from the expropriation or because the property is transferred to another private party. The chapter includes a discussion of the differences between third party transfers in general, expropriations that benefit a private person, expropriation for economic development and expropriation for land reform and other social reform purposes. Case law and academic debates regarding third party transfers are discussed to illustrate the differences and the implications of the distinctions between these

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<sup>26</sup> Section 25(2).

<sup>27</sup> Section 25(2)(a), read with s 25(4)(a).

<sup>28</sup> Section 25(2)(b), read with s 25(3).

cases. It will be argued that the transformative purposes of the Constitution, and specifically the land reform goals set out in s 25, justify an interpretation that will allow certain (but not all) expropriations that involve transfer of the property to other private persons.

The apparent inconsistency of the Expropriation Act with the 1996 Constitution, which led to the Expropriation Bill of 2008, is also discussed in this chapter. The question is raised whether the 1975 Expropriation Act can be interpreted to be consistent with the final Constitution and whether the Expropriation Bill is necessary to render the Act consistent with the Constitution, as far as the public purpose requirement is concerned.

In the final section of this chapter, several specific problems with the public purpose requirement as they appear in South African law are discussed. The question of expropriation for the purposes of land reform, which is one of the most crucial issues in South African law, is considered in this chapter by looking at case law and academic debates regarding expropriations that benefit third parties for different reasons and under different circumstances.

Chapter 3 is a comparative chapter on how other countries deal with the public purpose / public interest requirement for expropriation. The 1996 Final Constitution allows the courts to have regard to foreign law when interpreting national legislation and the Bill of Rights.<sup>29</sup> The chapter provides an overview of case law dealing with the public purpose requirement in foreign jurisdictions, specifically German and American law, with some additional references to Australian case law, judgments of the European Court of Human Rights on the European Convention on Human Rights

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<sup>29</sup> Section 39(1)(c) of the Constitution of the Republic of South Africa 1996.

and the United Kingdom. It is imperative to look at how these countries define, apply and interpret the public purpose and public interest requirements in their respective constitutions or legislation because they have dealt with the issues for a much longer time and have already formulated certain general guidelines that might be useful in South African law as well. The US courts, for example, have applied the public use requirement in the Fifth Amendment to the US Constitution very leniently, even in cases where private property was expropriated purely for the benefit of a private person.<sup>30</sup> According to US law, the state may expropriate property for public use, but there is no precise definition of public use in the case law because it changes with the changing position of society.<sup>31</sup> Thus far, the US courts have tended to allow expropriation for economic development, provided the legislator has designated that as a legitimate public use. It will be shown in this chapter that the term 'public use' in the Fifth Amendment could also lend itself to a very narrow interpretation that would exclude all but actual state or public use of the property expropriated, but the courts have so far avoided this approach. One of the problems that will be discussed in this chapter regarding courts' deferent interpretation of the public use requirement is the justification of expropriations that benefit a third party.

German courts, on the other hand, tend to scrutinise the public purpose requirement in article 14.3.1 of the Basic Law more closely.<sup>32</sup> The German courts apply a high level of scrutiny in applying the public purpose standard. In German law, if the state expropriates property and that property is not used for what it was initially intended

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<sup>30</sup> *Kelo v City of New London* 545 US 469 (2005); see also *Poletown Neighbourhood Council v City of Detroit* 304 NW 2d 455 (Mich 1981). These cases are discussed fully in chapter 3 below.

<sup>31</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 209.

<sup>32</sup> German case law and the German property clause are discussed fully in chapter 3 below.

for, the expropriation becomes invalid and the property may have to be given back. The German courts have so far not allowed expropriation for economic development, but they have developed useful guidelines for deciding when expropriation might be for a public purpose even though it benefits another private person. The relevant case law in which these guidelines have been developed is discussed in the chapter. The South African property clause in s 25 was partly modelled on the German property clause and hence it is useful to refer to German case law for comparative analysis.

The Australian Commonwealth Constitution does not have a Bill of Rights and its differences from other jurisdictions like the United States of America, Germany and South Africa will be pointed out in this chapter. The European Convention on Human Rights will also be discussed, even though South Africa is not a member state, because the Convention case law is often referred to by South African courts. The public purpose requirement in English law is different from the other jurisdictions discussed in this chapter because, in English law, the debate about the legitimacy of the purpose of any expropriation takes place in Parliament when the law is made and not in court. The implications of this approach will be discussed through analysis of case law.

Chapter 4 contains a summary of the conclusions reached in this thesis, together with recommendations about how the public purpose / public interest requirement should be interpreted and how the state should go about in ensuring that expropriation of land is indeed for a public purpose or in the public interest.

## Chapter 2

### Public Purpose and Public Interest in South African Law

#### 2.1 Introduction

In terms of s 25(2)(a) of the 1996 Constitution<sup>33</sup> expropriation of private property is allowed, provided that the property is expropriated in terms of law of general application;<sup>34</sup> for a public purpose or in the public interest;<sup>35</sup> and subject to payment of just and equitable compensation.<sup>36</sup> This provision is complemented by s 25(4)(a), which provides that, for purposes of s 25, the public interest 'includes the nation's commitment to land reform, and to reforms that bring about equitable access to all South Africa's natural resources.' Given the fact that expropriation of land is a distinct possibility in view of the post-apartheid land reform programme, the public purpose requirement is obviously significant. Even before the 1994 political turnaround, this was a problematic requirement for expropriation. Its double-barrelled formulation in the 1996 Constitution does not necessarily solve all problems and may even create some new problems. This chapter gives an overview of the development of the public purpose / public interest requirement in South African law since before 1993. It will show how the courts and academic commentators understood and interpreted the requirements prior to 1993, between 1993 and 1996, and since 1996.

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<sup>33</sup> The Constitution of the Republic of South Africa 1996.

<sup>34</sup> Section 25(2) introduction.

<sup>35</sup> Section 25(2)(a), read with s 25(4)(a).

<sup>36</sup> Section 25(2)(b), read with s 25(3).

Before the advent of the 1993 Interim Constitution, expropriations were dealt purely with in terms of the Expropriation Act,<sup>37</sup> because there was no Bill of Rights and hence no property clause in any of the pre-1993 constitutions. Section 2(1) of the 1975 Act gives the Minister of Public Works the power to expropriate property or to acquire a right to use property temporarily for a public purpose, subject to the payment of compensation. The requirements for a valid expropriation in terms of this Act are: there must be a proper statutory authority for the expropriation, the expropriation must be for a public purpose, the expropriation must comply with procedural fairness requirements and compensation must be paid according to the provisions of the Act.<sup>38</sup>

Public purpose is defined by the 1975 Expropriation Act as 'any purpose connected to the administration of the provisions of any law by an organ of state.'<sup>39</sup> According to case law, this means that anything that is done by an organ of state which is advantageous to the public at large will be for a public purpose.<sup>40</sup> Public purpose relates to things affecting the community or the public at large.<sup>41</sup> Public purpose also means that the expropriation should benefit the community as a whole and not just one particular individual or a group of individuals. The expropriatee bears the onus of proof in cases where he believes that the expropriated property was not expropriated for a public purpose.<sup>42</sup> Although a replacement Expropriation Bill was introduced in

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<sup>37</sup> 55 of 1965, replaced by Act 63 of 1975.

<sup>38</sup> Section 2 of Act 63 of 1975.

<sup>39</sup> Section 1 of Act 63 of 1975.

<sup>40</sup> *Fourie v Minister van Lande* 1970 (4) SA 165 (O) at 176B; see the discussion of this case in the paragraphs below.

<sup>41</sup> *African Farms and Townships v Cape Town Municipality* 1961 (3) SA 392 (C); *Gildenhuys A Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 95.

<sup>42</sup> *Gildenhuys A Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 98; *White Rocks Farm (Pty) Ltd v Minister of Community Development* 1984 (3) SA 785 (N) at 793D.

2008,<sup>43</sup> the 1975 Expropriation Act<sup>44</sup> has not yet been repealed and it is still binding, although it is now subject to the Constitution.

When the Interim Constitution was introduced in 1993, the system of parliamentary sovereignty was replaced by a system of constitutional supremacy.<sup>45</sup> This not only means that expropriations in future had to be in line with the requirements and values in the Constitution, but also that the Expropriation Act and any other legislation regulating expropriation has to comply with the constitutional requirements and values. In terms of the Interim Constitution<sup>46</sup> the requirements for a valid expropriation were that an expropriation shall be permissible for a public purpose only and shall be subject to the payment of just and equitable compensation.<sup>47</sup> The public purpose requirement in s 28(3) of the Interim Constitution was understood in a broad sense to include purposes affecting the whole population and not only matters concerning the state.<sup>48</sup>

In 1996 the Constitution of the Republic of South Africa was introduced. Section 25(2) of the final Constitution states that:

‘(2) Property may be expropriated only in terms of law of general law 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.’

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<sup>43</sup> See the discussion of the Bill in 2.5 below.

<sup>44</sup> Act 63 of 1965.

<sup>45</sup> Section 4(1) of the Interim Constitution: now s 2 of the 1996 Constitution

<sup>46</sup> Act 200 of 1993.

<sup>47</sup> Section 28(3) of the 1993 Constitution.

<sup>48</sup> Chaskalson M ‘The property clause: Section 28 of the Constitution’ (1994) 10 *SAJHR* 131-139 at 136; see also Gildenhuys A *Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 95.

This means that if an expropriation is not for a valid public purpose or in the public interest, it will be invalid. The term 'public purpose' is not defined in the final Constitution of 1996, but s 25(4)(a) states that the public interest includes the nation's commitment to land reform and reforms to bring about equitable access to all South Africa's natural resources.<sup>49</sup> The definition in s 25(4)(a) of the final Constitution came as a reaction to the Interim Constitution, where the land reform issue was addressed in a separate section (ss 121-123) and not in the property clause (s 28), raising the question whether expropriation for land reform purposes would be possible. This provision was therefore inserted in the property clause in the final Constitution to indicate explicitly that expropriation for land reform purposes is possible.

Public interest is a broad concept and difficult to demarcate accurately. Chaskalson and Lewis<sup>50</sup> describe the presence of this term in s 25(2) as a warning to the judiciary to respect the choices made by the legislature or the executive as to where the public interest lies. The courts need to be careful when interpreting the public interest requirement, as it may differ from case to case. In the South African context it is particularly important to establish whether expropriation for land reform purposes would be in the public interest and therefore permissible.

In finalising the Constitution there were serious concerns about restricting the public purpose requirement to narrow state or public use. According to the narrow view, an expropriation serves a public purpose only if the property is acquired by the state for

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<sup>49</sup> The Constitution of the Republic of South Africa 1996. Stroud, on the other hand, defines public interest as 'that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected': Greenberg D *Stroud's judicial dictionary of words and phrases* (5th ed 2007) at 2090.

<sup>50</sup> Chaskalson M & Lewis C 'Property' in Chaskalson M, Kentridge J, Klaaren J et al (eds) *Constitutional law of South Africa* (1996) chapter 31 at 22.

state use or actual public use. Van der Walt argues that in terms of the narrow view, transfer of property to private individuals for land reform and other purposes (such as economic development, provision of public utilities etc) would make the expropriation unconstitutional, as this would amount to a non-public purpose.<sup>51</sup> In at least two foreign cases this narrow view has indeed been followed, where expropriation for land reform purposes was declared not to be in the public interest simply because the property was eventually transferred to private parties. In *Trinidad Island-Wide Cane Farmers' Association Inc and Attorney General v Prakash Seereeram*<sup>52</sup> the issue was the taking of money from one private party to be given to another private party, the objection being that the taking of the money did not serve a public purpose. The majority of the Trinidad & Tobago Court of Appeal held that property cannot be expropriated from one private party to be given to another private person. A similar approach was followed by the Australian High Court in *Clunies-Ross v The Commonwealth of Australia and Others*.<sup>53</sup> Clunies-Ross, who had been the owner of land on the Cocos Islands, transferred the major part of his land to the federal government, but retained the land on which his house was situated. The government brought an application to expropriate his land, stating that it was for a public purpose, namely to promote political, social and economic advancement of the people of the Cocos Islands. The court held that compulsory acquisition for land reform purposes was unconstitutional because it was not carried out for a public purpose.<sup>54</sup> Van der

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<sup>51</sup> Van der Walt AJ *Constitutional property law* (2005) at 244.

<sup>52</sup> (1975) 27 WIR 329 (CA).

<sup>53</sup> (1984) 155 CLR 193.

<sup>54</sup> Budlender G 'The constitutional protection of property rights: Overview and commentary' in Budlender G, Latsky J & Roux T (eds) *Juta's new land law* (original service 1998) chapter 1 at 53; for further discussion see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 250-251.

Walt is of the view that the two courts in these cases applied the public purpose requirement very conservatively and that most courts would nowadays favour a more lenient approach, where expropriation for the benefit of a private party may sometimes be justified as being for a public purpose.<sup>55</sup>

Comparative case law also indicates that this narrow interpretation of the public purpose requirement is by no means self-evident. In the US, expropriation for land reform purposes was justified in *Hawaii Housing Authority v Midkiff*.<sup>56</sup> In this case, the legislature had decided that concentrated land ownership was the reason for inflated land prices, which was harming the public welfare. In addressing these problems the legislature decided to compel the large land owners to break up their estates. The US Supreme Court held that the purpose of the taking in the present case was justified by the purpose of the authorising statute, namely to break down existing unhealthy land distribution patterns, and that this was a valid public purpose.<sup>57</sup> Similarly, in *James v United Kingdom*<sup>58</sup> the European Court of Human Rights accepted that expropriation for land reform purposes could serve a legitimate public purpose. The applicants, trustees of an estate, complained that the Leasehold Reform Act of 1967, which gave leaseholders of properties the right to acquire the properties, was contrary to Article 1 of the First Protocol to the European Convention.<sup>59</sup> They contended that the public interest was satisfied only if the

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<sup>55</sup> Van der Walt AJ *Constitutional property law* (2005) at 253.

<sup>56</sup> 467 US 229 (1984).

<sup>57</sup> *Hawaii Housing Authority v Midkiff* 467 US 229 (1984) at 239-244.

<sup>58</sup> (1986) 8 EHRR 123.

<sup>59</sup> Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms (1950) provides as follows: '[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by general principles of international

property was taken for a public purpose, that is, for the benefit of a community generally, and that the transfer of property from one individual to another for private benefit can never be in the public interest. The European Court of Human Rights accepted this argument, but pointed out that compulsory transfer of property from one individual to another may constitute a legitimate means of promoting the public interest, depending on the circumstances of each case. The court held that the taking of property in pursuance of legitimate social, economic or other policies may be in the public interest, even if the community at large has no direct use or enjoyment of the property taken.<sup>60</sup>

Deciding between these two conflicting approaches to the issue is crucial for the interpretation of the South African Constitution. Chaskalson argued that if s 28(3) of the South African 1994 Constitution was to be construed as an absolute prohibition against transferring property from one private owner to another, land reform might be constitutionally impossible.<sup>61</sup> According to him, adopting the narrow interpretation would mean that the only land reform programme which would pass this interpretation of the public purpose test would be one based on the creation of state farms. Budlender is of the view that even under the Interim Constitution it was very likely that expropriation for land reform or other social purpose would not have been invalidated by the argument that they are not for public purposes or because they result in a transfer of title from one private individual to another.<sup>62</sup> He proposed a

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law.' In this section 'deprived' is read as 'expropriated'; see Van der Walt AJ *Constitutional property law* (2005) at 265 fn 315.

<sup>60</sup> *James v United Kingdom* (1986) 8 EHRR 123 para 45.

<sup>61</sup> Chaskalson M 'The property clause: Section 28 of the Constitution' (1994) 10 *SAJHR* 131-139 at 137.

<sup>62</sup> Budlender G 'The constitutional protection of property rights: Overview and commentary' in Budlender G, Latsky J & Roux T (eds) *Juta's new land law* (original service 1998) chapter 1 at 55

purposive approach, which requires the courts not to look at a particular constitutional provision in isolation when dealing with land reform cases, but to locate it in the broader context of the aims and goals of the Constitution.<sup>63</sup> Van der Walt submits that it was imperative to ensure that the narrow approach would not be followed blindly in South Africa and argues that the double-barrelled formulation of s 25(2) was designed to make this abundantly clear.<sup>64</sup>

The issue of third party transfers is not restricted to expropriation for land reform purposes either. It is important to note that in cases where a private person benefits from an expropriation that was undertaken purely for economic development, it is also problematic to decide whether the public interest requirement would be satisfied. Similarly, there are other third party transfers where an expropriation was not intended for the benefit of an identifiable person but for the benefit of the public at large, although the expropriation in effect benefits a private person, for example expropriation for the sake of a public utility provided by a private contractor. It must be noted that such expropriations might well be for a public purpose and hence the transaction could be constitutional if it is in the public interest under s 25(2), read with s 25(4)(a). Section 25(2) of the 1996 Constitution was probably designed to cater for some of these difficulties but perhaps complicates the matter even further, in that it requires that an expropriation must be for a public purpose *or in the public interest*. Because of this double-barrelled provision the formulation of s 25(2) is probably so wide that it becomes easier to argue that an expropriation that ultimately benefits a third party can sometimes be regarded as nevertheless being in the public interest.

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<sup>63</sup> Budlender G 'The constitutional protection of property rights: Overview and commentary' in Budlender G, Latsky J & Roux T (eds) *Juta's new land law* (original service 1998) chapter 1 at 55.

<sup>64</sup> Van der Walt AJ *Constitutional property law* (2005) at 244.

This chapter investigates the public purpose / public interest requirement in South African law from the pre-1993 period until now. The chapter starts off with a discussion of the 1975 Expropriation Act. Despite the adoption of the 1993 and 1996 constitutions, the Expropriation Act is still valid and applicable, although there are obvious difficulties with interpreting and applying the Act, which was promulgated during the apartheid years and is thus not instilled with the transformative intent at the heart of the Constitution. To mention just one obvious example of the problems caused by applying a pre-constitutional Expropriation Act in line with the 1996 Constitution, the Act now has to be read with due attention for the public purpose / public interest requirement in s 25(2) of the Constitution and not merely public purpose, as it is stated in the Act.

The position before 1993 will be investigated first. In this period expropriation of land was purely legislation-driven. Furthermore, in making decisions about the validity of expropriation, the courts were bound by the system of parliamentary sovereignty that prevailed at the time. In establishing the public purpose requirement a mere rationality test was mostly relied on during this period, because the courts were bound by policy decisions of parliament. As will appear from the analysis below, the courts were nevertheless reasonably strict in ensuring that expropriation was for a public purpose, as they understood that term at the time.

The position changed after 1993, when the Interim Constitution was introduced. The difficulties and the problems that emerged during and after the drafting of the Interim Constitution will be discussed. The first case that came before the Constitutional Court dealing with expropriation will also be discussed to look at how the court applied and interpreted the property clause in s 28 of the Interim Constitution.

Debates amongst academic writers regarding the property clause in the Interim Constitution are also discussed.

After 1996, the property clause in the Final Constitution included an additional problem, because expropriation could then be for a public purpose or in the public interest. Case law and academic debates dealing with the interpretation and application of these two requirements will be discussed. The Expropriation Act is not entirely consistent with the 1996 Constitution, but the Act is still in force and valid in South African law. Interpreting the Expropriation Act under the Constitution during the post-1996 period will be discussed towards the end of this chapter.

Finally, this chapter includes a discussion of several specific problems with the public purpose requirement as they appear in South African law. One of the most critical issues in South Africa is expropriations for land reform purposes and other third party transfers. The academic debate and case law regarding these types of expropriations will be discussed in the final section of the chapter.

## **2.2 The Position until 1993**

Before 1993, expropriation was governed exclusively by the Expropriation Act 63 of 1975, which is still in force, and its predecessors. In the absence of a constitutional property clause and any form of constitutional review, the public purpose requirement was interpreted and applied more or less in the framework provided for by the Act. Generally speaking, it is fair to say that prior to 1993 the South African courts applied a mere rationality test but were nevertheless reasonably strict in

ensuring that expropriation of land was for a public purpose as they understood this term.<sup>65</sup>

In pre-constitutional South African law, the courts generally distinguished between public purpose in a narrow sense and in the broader sense. In the broader sense, it was taken to refer to a purpose that affects the whole public or local population. In the narrow sense, public purpose was restricted to government purposes.<sup>66</sup> Choosing between the wider and the narrower interpretation depended upon the legislative context within which the phrase appeared. The meaning of public purpose was contrasted with private or personal interest and was therefore related to purposes that are not purely private or personal.<sup>67</sup> In the pre-constitutional era, expropriation of land for public utility or other state purposes has been accepted, but not for private benefit or for purely economic reasons. Where the phrase 'public purpose' was used in legislation it was mostly interpreted in the wider sense.<sup>68</sup> Any purpose that would benefit the country or the general public would qualify as public purpose, but the benefit does not have to accrue to every member of the public or even a significant part of the public.<sup>69</sup> The following overview of pre 1993 case law illustrates this approach.

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<sup>65</sup> Section 2(1) of the Expropriation Act 63 of 1973 provides that: 'subject to the provisions of this Act the Minister may, subject to an obligation to pay compensation, expropriate any property for public purposes or take the right to use temporarily any property for public purposes.'

<sup>66</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 217; see also Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) at 95.

<sup>67</sup> Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) at 95.

<sup>68</sup> Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) at 95.

<sup>69</sup> Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) at 96.

In *African Farms & Townships Ltd v Cape Town City Municipality*<sup>70</sup> the applicant applied for an order declaring the notice of expropriation by the respondent municipality invalid and setting it aside. The local authority expropriated the applicant's property for the purpose of widening a street on part of the applicant's property and for the implementation of the municipality's foreshore plan, which was part of the respondent town planning scheme and which provided for the alteration of the layout of streets in the area immediately surrounding the expropriated property. The questions before the court that needed consideration were: (1) whether the purpose for which the respondent was expropriating the applicant's land (widening the road and implementing the foreshore plan) fell within the provisions of s (2)(a) of the Act; and (2) whether the land was required for the purposes of town planning or a purpose in connection therewith. Watermeyer J stated that:

[I]n the present case the Provincial Council had the power to legislate in regard to the expropriation of land for public purposes. It has said that a municipality may expropriate land for the purposes of a town planning scheme and I am unable clearly to say that expropriation for these purposes is not expropriation for public purposes. On the contrary, the municipality is the authority charged with the duty of planning a town. In doing so it is performing a public function, and when it takes steps to implement its scheme it is likewise performing a public function. If in order to do so it is necessary to expropriate land, then such expropriation is in my opinion an expropriation for public purposes.<sup>71</sup>

This decision makes it clear that expropriation for town planning purposes would satisfy the public purpose requirement in town planning legislation that allows for expropriation. The application by the applicant was accordingly dismissed with costs.

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<sup>70</sup> 1961 (3) SA 392 (C).

<sup>71</sup> *African Farms & Townships Ltd v Cape Town City Municipality* 1961 (3) SA 392 (C) at 397.

In *Slabbert v Minister van Lande*<sup>72</sup> the expropriation involved land bordering on the official residence of the Prime Minister and it was intended to obtain for him a greater measure of security and privacy. The applicant in the present case owned land which bordered on land called Libertas, which was controlled by the Minister. The Minister notified Slabbert (applicant) that his land was going to be expropriated for a public purpose. According to the Minister the purpose of expropriation of the applicant's land was to get more safety and privacy for the Minister. The applicant contended that this was not a public purpose that allowed expropriation, and that the notice of expropriation was illegal and invalid and should be declared null and void. The first question before the court was whether such expropriation was justified, and secondly, whether this was an expropriation for 'public purposes' as meant in s 2 of Proclamation 5 of 1902 (T), as amended by s 1 of the Expropriation Amendment Act 31 of 1958. The court decided that the words 'public purpose' can have a broad or a narrow meaning, depending on the context within which it is used. The court held further that safety of the Minister is a public matter, notwithstanding whether he is in parliament or on state land. His safety is connected to better land administration and is not of a personal nature, which means that it falls within a wide definition of public purpose. The court held that the expansion of Libertas and safety or protection of the Minister affects the public as it is in their interest.

In *Fourie v Minister van Lande*<sup>73</sup> the first respondent wanted to exercise its statutory power of expropriation to expropriate a house in order to provide housing for one of

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<sup>72</sup> 1963 (3) SA 620 (T); see also *Gildenhuys A Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 96.

<sup>73</sup> 1970 (4) SA 165 (O).

the technicians working for second respondent, the Deputy Postmaster-General.<sup>74</sup> The question was whether this expropriation would have been for a public purpose, seeing that it would benefit a private individual. The applicant's argument before the court was that 'there can be a public purpose in taking land if that land when taken is in some way or other made available to the public at large.'<sup>75</sup> In considering this argument, the court analysed the concept of public purpose at length. The court held that, with reference to s 281 of the 1965 Expropriation Act,<sup>76</sup> the legislator intended that the words 'public purpose' must be understood in the broader sense. In the broad sense, public purpose includes those purposes whereby the whole population or local public are affected and not only matters pertaining to the state or government. Therefore, the maintenance and expansion of the Republic's telecommunication system was considered in the present case to be a public purpose in the broad sense. The court relied on the assumption that where an idea has an established meaning based on judicial interpretation, the government can use such an idea in subsequent legislation without qualifying it.<sup>77</sup> The intention is that the idea should carry its already established meaning.

In *White Rocks Farm (Pty) Ltd v Minister of Community Development*,<sup>78</sup> three plaintiffs were registered owners of certain properties in respect of which the defendant served notices to expropriate. The plaintiffs contended that the expropriation was invalid because it was not for a public purpose, arguing that the

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<sup>74</sup> In terms of Post Office Act 44 of 1958, the Department of Posts and Telegraphs, as part of their duty to ensure the maintenance of an effective telecommunication service, was obliged to provide housing for technicians employed by the second respondent.

<sup>75</sup> *Fourie v Minister van Lande* 1970 (4) SA 165 (O) at 173C.

<sup>76</sup> Act 55 of 1965.

<sup>77</sup> *Fourie v Minister van Lande* 1970 (4) SA 165 (O) at 170E-175.

<sup>78</sup> 1984 (3) SA 785 (N).

reason for expropriation was a financial one, in that it was cheaper to expropriate than to declare the affected properties a mountain catchment area under the Act.<sup>79</sup> The court held that the establishment of a mountain catchment area was a matter affecting South Africa as a whole and consequently the expropriation of the plaintiff's property was for a public purpose. The court dismissed the argument that the establishment of a Mountain Catchment Area was not for a public purpose and emphasised that it was for a public purpose.<sup>80</sup> This case is an example of the broader meaning that was mostly assigned to the notion of public purpose in some pre-constitutional cases.

In *Rondebosch Municipal Council v Trustees of Western Province Agricultural Society*<sup>81</sup> the meaning of the phrase 'public purpose' was considered in a different context, namely s 115(1), (2), and (3) of the Bills of Exchange Act 45 of 1882, which concerns liability for and payment of rates. In this case, an application was brought by an appellant (Rondebosch Municipal Council) for an order for certain immovable property of the respondent Society (Trustees of the Western Province Agricultural Society) to be removed from the evaluation roll of the Rondebosch Municipality, on the ground that it was exempted from rateability by s 115 of the Municipal Act of 1882. The property in question was donated by Mr CJ Rhodes, who transferred it to the respondents in 1893 under the condition that it should 'be used solely for ordinary purposes of Agricultural, Horticultural and Dog shows or charitable purposes.' The appellants argued that the land was not occupied by the respondents and therefore did not fall within the exception.<sup>82</sup> This argument was disputed by

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<sup>79</sup> Mountain Catchment Areas Act 63 of 1970.

<sup>80</sup> 1984 (3) SA 785 (N) at 794.

<sup>81</sup> 1911 AD 271.

<sup>82</sup> 1911 AD 271 at 288.

Laurence J, stating that the appellant's argument that the land is unoccupied or not occupied by the respondent society cannot be maintained. He stated that the land is not only owned by the respondents, but they have also houses built on that land.<sup>83</sup> The question was whether the Western Province Agricultural Society, which was established for the promotion of agriculture, was exempted from payment of rates on the grounds of its fulfilling a public purpose. In line with the early expropriation cases, the court held that the term 'public purpose' may refer to either all purposes which pertain to and benefit the public (as opposed to private individuals), or to those more restricted purposes which relate to the state and the government of the country, that is, government purposes.<sup>84</sup> This decision is an example of a case where the court decided that the narrow meaning of the phrase should apply, in other words restricted to purposes which relate to the state, based on the phraseology of the Act and the context within which the phrase is used.

In *Administrator Transvaal v Van Streepen (Kempton Park) (Pty) Ltd*,<sup>85</sup> the then Administrator of the former province of Transvaal needed the existing rail link to Sentrachem for the construction of a public road. The rail link was situated on property that belonged to Van Streepen, the respondent. The Administrator issued a notice in terms of s 7(1)<sup>86</sup> of the Ordinance 22 of 1957, expropriating the respondent's land to accommodate relocation of a private railway line within the broadened road adjacent to the upgraded road. The intention of the Administrator was to transfer the expropriated land to second appellant in order to satisfy its

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<sup>83</sup> 1911 AD 271 at 289.

<sup>84</sup> 1911 AD 271 at 283.

<sup>85</sup> 1990 (3) SA 644 (A).

<sup>86</sup> Section 7(1) empowers the Administrator by notice to acquire any land and cause it to be registered in the name of the state for the construction or maintenance of any road.

demand for security of tenure over the relocated railway line. The respondent challenged the expropriation on the following grounds, amongst other things that,

(a) since the state and/or public utilities have the power to relocate public services, the Administrator does not require such power and existence of such power is thus not to be implied,

(b) if the Administrator is vested with the power to relocate public services, he was not similarly empowered in relation to private services, and

(c) because land is to be acquired in the name of the state it did not follow that it had to be acquired for use of the state or one of its organs.<sup>87</sup>

The respondent's objections were upheld in the Provincial Division. The matter went on appeal and two issues were raised, namely whether the Administrator's purported expropriation of the respondent's land fell within the scope of the powers conferred upon him by s 7(1) of the Ordinance, and whether notice 1909 was invalid for want of an adequate description of the land it was sought to acquire.<sup>88</sup> On the first issue, the Court decided that:

'The present appeal as stated previously, does not concern the manner in which the Administrator exercised his power. When, therefore, the Administrator expropriated the respondent's land in 1985 he gave effect to what he had planned to do, and had intended to achieve, from the time the approved scheme was accepted and first implemented. He was not resorting to subterfuge to achieve something that had never previously been in his contemplation. He was putting right what he had never previously mistakenly and incorrectly set about doing. What he did fell within the

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<sup>87</sup> 1990 (3) SA 644 (A) at 645.

<sup>88</sup> 1990 (3) SA 644 (A) at 654B.

ambit of his powers. Notice 1909 was accordingly not invalid for lack of authority in terms of s 7(1) of the ordinance.<sup>89</sup>

Construction of the road in the present case could have been accomplished without the expropriation of Van Streepen's property. Smalberger JA held that the expropriation of land for the benefit of a private individual cannot be for a public purpose even though it may be in the public interest.<sup>90</sup> The Appellate Division was clear that expropriation for third party transfers was not regarded to be for a public purpose. In this case what the Appellate Division stated is worth noting, namely that:

'This *dictum* should not, however, be taken outside of its context. The case concerned the expropriation of land from the respondent for the purpose of establishing a private rail link to Sentrachem's Chloorkop plant, a private undertaking which had the status of a strategic industry. The pre-existing rail link to the Chloorkop plant had earlier been expropriated for the construction of a public road and an ancillary purpose of the disputed expropriation was to minimise the compensation that would have been payable by the administrator to Sentrachem. In these circumstances, while the expropriation may have been in the public interest, the purpose of the expropriation could hardly have been described as a public purpose. The same need not necessarily be true of expropriations which involve the transfer of land from one private party to another but which are performed pursuant to a land reform policy.'<sup>91</sup>

The *Van Streepen* decision therefore defined public purpose more narrowly and public interest to be broader, and pointed out that not everything that is in the public interest broadly speaking would be for a public purpose as required by the Act.

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<sup>89</sup> 1990 (3) SA 644 (A) at 661H-I.

<sup>90</sup> 1990 (3) SA 644 (A) at 661D-E.

<sup>91</sup> 1990 (3) SA 644 (A) at 661C-D.

Eisenberg<sup>92</sup> points out that this decision cannot be used as authority for the proposition that expropriation of private property for transfer to another private party cannot constitute a public purpose. This point is anticipated by the last sentence of the decision quoted above. Eisenberg argues that the purpose of transferring the property was not building a public road but reducing the compensation that would be payable to the other party.<sup>93</sup> According to her, the public purpose requirement does not require direct public use and access to property, but rather requires that the expropriation must generate some advantage for the public. She further argues that, in order to establish the main objective of expropriation, the courts must differentiate between expropriations intended to benefit specific individuals and those that have the unintended side-effect of incidentally benefiting private individuals.<sup>94</sup>

Budlender<sup>95</sup> agrees with Eisenberg that this narrow approach should not be followed generally, for two reasons. Firstly, he contends that Smalberger JA was not interpreting the phrase 'public purpose' but that he was interpreting a provincial ordinance which authorised the administrator to 'acquire' any land and to cause it to be registered in the name of the state for the construction or maintenance of any road or for any purpose in connection with the construction or maintenance of any road. Secondly, he agrees with Eisenberg that the dictum has to be read in the context of the facts of the case. The purpose in the present case was to establish a

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<sup>92</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 220.

<sup>93</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 220.

<sup>94</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 221.

<sup>95</sup> Budlender G 'The constitutional protection of property rights: Overview and commentary' in Budlender G, Latsky J & Roux T (eds) *Juta's new land law* (original service 1998) chapter 1 at 44.

private rail link to a private undertaking. An ancillary purpose was to minimise the compensation which would otherwise have been paid by the Administrator to Sentrachem as a result of an earlier expropriation for purposes of the road. It is clear from the words of Smalberger JA that the expropriation was for the benefit of another private party (Sentrachem) and not for a public purpose which would have benefited the local public as whole. Eisenberg argued further that in order to establish the main objective of the expropriation, a distinction must be made by the courts between expropriations which are intended particularly to benefit specific individuals and those that have the unintended incidental effect of benefitting private interests.<sup>96</sup>

Budlender went further to argue that

'it is difficult to disagree with the Appellate Division's view that this was not an expropriation for public purposes, even though it may have been in the public interest. Here the expropriation was indeed, in the words of Smalberger JA, essentially for the benefit of another. However, it does not follow that expropriation in order to give effect to a broad policy or social reform could never be for public purposes merely because the nett effect was to transfer land from certain private individuals to other private individuals. In other words, it is the purpose rather than the transfer itself which has to be considered.'<sup>97</sup>

The pre-constitutional cases discussed above indicate that the public purpose requirement was mostly interpreted rather strictly by courts, even though they applied a mere rationality test and not a substantive test. The courts were determined to ensure that expropriation of land is conducted for its intended purpose. This was done to guard against the abuse of the expropriation process by both the state and private individuals. From these cases it is clear that before 1993

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<sup>96</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 221.

<sup>97</sup> Budlender G 'The constitutional protection of property rights: Overview and commentary' in Budlender G, Latsky J & Roux T (eds) *Juta's new land law* (original service 1998) chapter 1 at 50.

expropriation of land for the benefit of private individuals was generally prohibited. The *Van Streepen* case is an example of how the possibility of expropriation for the benefit of a private person can be easily abused and this decision led to a huge academic debate. The argument by Eisenberg and Budlender about the *Van Streepen* decision is very important in indicating the way forward on how the courts should deal with public purpose expropriations. The *Van Streepen* decision distinguished public purpose from public interest. Gildenhuis is of the view that the *Van Streepen* decision could have contributed to the fact that the 1996 Constitution refers to 'public interest' and 'public purpose' as a validity requirement for expropriation.<sup>98</sup>

The term 'public purpose' can have a wide or narrow interpretation.<sup>99</sup> If the public purpose is interpreted in a wide sense, then it may mean matters which may affect the whole population or the local public. According to Gildenhuis,<sup>100</sup> this is the opposite of private or personal purposes and entails a purpose which is not of a purely private or personal nature.<sup>101</sup> When the term 'public purpose' is narrowly interpreted it may mean matters involving or concerning the state.<sup>102</sup> If the term 'public purpose' appears in South African expropriation legislation, it should be interpreted in a wide sense,<sup>103</sup> which includes the narrow interpretation of 'government or state purpose' but which is not limited to this interpretation,<sup>104</sup> unless

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<sup>98</sup> Gildenhuis *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 98.

<sup>99</sup> Gildenhuis *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 95.

<sup>100</sup> Gildenhuis *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 95.

<sup>101</sup> *Slabbert v Minister van Lande* 1963 (3) SA 620 (T) at 621H; *African Farms and Townships v Cape Town Municipality* 1961 (3) SA 392 (C) at 396H.

<sup>102</sup> Gildenhuis *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 95.

<sup>103</sup> *White Rocks Farm (Pty) Ltd v Minister of Community Development* 1984 (3) SA 785 (N) at 793 H-I; *Fourie v Minister van Lande* 1970 (4) SA 165 (O) at 175D-E.

<sup>104</sup> *Slabbert v Minister van Lande* 1963 (3) SA 620 (T) at 621F.

the context and the wording of the Act indicate that the narrow interpretation should be followed.

### **2.3 The Position between 1993 and 1996**

The Interim Constitution of 1993<sup>105</sup> contained a Bill of Rights that included the protection of property in s 28.<sup>106</sup> The first property clause to be entrenched in the Constitution played an important role in the country's new constitutional order. There were differences of opinion between the African National Congress, the National Party and other political parties and groupings in deciding the exact phrasing of the clause. One aspect of the debate concerned the choice between 'public purpose' or 'public interest' in the expropriation sub-clause.<sup>107</sup>

The issue was handed over to the Technical Committee which later reported that 'public purpose' was more inclusive than the phrase in the 'public interest.'<sup>108</sup> Chaskalson<sup>109</sup> argued that the conclusion of the Technical Committee was wrong, stating that the meaning of 'public purpose' in South Africa is narrower than 'public interest.' This argument finds support in the discussion of case law above, which shows that an expropriation for the benefit of a private party would not always or

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<sup>105</sup> Act 200 of 1993.

<sup>106</sup> Section 28 of Act 200 of 1993.

<sup>107</sup> Chaskalson M 'Stumbling towards section 28: Negotiations over the protection of property rights in the Interim Constitution' (1995) 11 *SAJHR* 223-240 at 237.

<sup>108</sup> Chaskalson M 'Stumbling towards section 28: Negotiations over the protection of property rights in the Interim Constitution' (1995) 11 *SAJHR* 223-240 at 237.

<sup>109</sup> Chaskalson M 'Stumbling towards section 28: Negotiations over the protection of property rights in the Interim Constitution' (1995) 11 *SAJHR* 223-240 at 237.

easily be recognised as an expropriation for a public purpose, but it might be easier to argue that such an expropriation is in the public interest.

When the Constitution was finalised, s 28<sup>110</sup> of the Interim Constitution provided for expropriation of property for a public purpose. This caused debate amongst academic writers with regard to definitional difficulties in s 28. One of the questions that were raised was what constitutes a public purpose. The question was specifically relevant because the Expropriation Act,<sup>111</sup> which was still in existence and in force, also requires that expropriation should be for a public purpose.

The first and only case that came before the Constitutional Court on s 28 was *Harksen v Lane NO and others*.<sup>112</sup> The applicant contended that s 21 of the Insolvency Act<sup>113</sup> was in conflict with the property guarantee in s 28, thereby giving the first opportunity for the Constitutional Court to consider s 28 of the Interim Constitution. The Constitutional Court decided that s 21 of the Insolvency Act was not unconstitutional and that it did not constitute an expropriation without compensation in conflict with the property clause in s 28(3). In coming to this decision the court relied on the decision of the former Transvaal Supreme Court in *Beckenstrater v Sand River Irrigation Board*<sup>114</sup> and two Zimbabwean cases<sup>115</sup> to

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<sup>110</sup> Section 28 (3) of Act 200 of 1993 provides that: 'where any rights in property are expropriated pursuant to a law referred in subsection 2, such expropriation shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into all relevant factors, including, in the case of determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investment in it by those affected and the interests of those affected.'

<sup>111</sup> 63 of 1975.

<sup>112</sup> 1998 (1) SA 300 (CC).

<sup>113</sup> Act 24 of 1936.

<sup>114</sup> 1964 (4) SA 510 (T) at 515C.

support its conclusion that an expropriation amounts to more than a mere dispossession and that it in fact requires the expropriator permanently to appropriate or acquire or become the owner of the property or right in question.

Goldstone J in this case pointed out and made it clear that the distinction between deprivation and expropriation of property as provided in ss 28(2) and 28(3) of the Interim Constitution has long been recognised in South African law and in many other jurisdictions as well.<sup>116</sup> The difference, as the court portrays it, is the fact that a deprivation falls short of the acquisition of rights in property by a public authority for a public purpose, which is what characterises an expropriation. Based on this distinction, Goldstone J decided that the effect of s 21 of the Insolvency Act, even if it did amount to transfer of ownership in the solvent spouse's property to the master or trustees of the insolvent estate, was (a) of a temporary nature and not permanent; (b) that the purpose was not to acquire the property but to ensure that the insolvent estate is not deprived of property that actually belongs to it, and (c) that it cannot be described as an expropriation.<sup>117</sup>

Van der Walt highlights two major problems with the *Harksen* judgement. Firstly he argues that

[t]he court's assumption that expropriation in terms of s 28(3) of the interim Constitution had to be given the same limited scope as set out in the Transvaal

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<sup>115</sup> *Hewlett v Minister of Finance* 1982 (1) SA 490 (ZSC); *Davies and Others v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZSC).

<sup>116</sup> 1998 (1) SA 300 (CC) para 32; see also Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 336-337.

<sup>117</sup> 1998 (1) SA 300 (CC) para 35-37; see also Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 337.

*Beckenstrater*<sup>118</sup> decision and the Zimbabwean *Hewlett*<sup>119</sup> and *Davies*<sup>120</sup> decisions is questionable, since there are fundamental differences between the decisions cited and the position in *Harksen*. However difficult the distinction between deprivation and expropriation of property may be to make, the courts will have to follow a more sophisticated approach than is evident from the *Harksen* decision. Without implying that the ultimate result by the court in *Harksen*, namely that the vesting of the solvent spouse's property in terms of s 21 did not amount to an expropriation of the property, was necessarily wrong, it should be pointed out that the reasoning offered for that result (namely that an expropriation involves an actual dispossession or acquisition of the property by the state) is questionable. Secondly, if a restrictive interpretation is to be attached to the term "expropriation", it remains to be determined when the state actually acquires something from a purported expropriation: to restrict expropriations to actual expropriations in the formal sense is unnecessarily restrictive.<sup>121</sup>

Budlender is of the view that, while the temporary nature of the deprivation was clearly very relevant in the *Harksen* case, this was not the heart and 'substance' of the deprivation. The true 'substance' was that there was no intention that the person acquiring the ownership should derive any use or benefit from it. On the contrary, he was simply to hold it until it had been decided who was entitled to ownership. It is

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<sup>118</sup> 1964 (4) SA 510 (T). This case dealt with an application for an order declaring a notice of expropriation to be set aside and declared invalid. The applicant owned portions of the farms Lochaber and Krokodilspruit in the district of Nelspruit on which water works such as weirs, dams and canals had been established. This was done to enable the applicant and the owners of the two adjoining farms to use the water of the Sand River, a public stream, which flows through the applicant's farms. The Sand River Board (respondent) served a notice to expropriate a servitude over the existing privately owned water works. The court held that the power to expropriate a servitude over land in s 94(1) would include the power to expropriate a servitude over privately owned waterworks constructed on the land and it must be regarded as part of the land. The court held further that the board had the power to expropriate the servitudes in respect of the existing waterworks. The attack on the notice to expropriate failed, and the application was dismissed.

<sup>119</sup> *Hewlett v Minister of Finance* 1982 (1) SA 490 (ZSC).

<sup>120</sup> *Davies and Others v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZSC).

<sup>121</sup> Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 337-338.

therefore submitted that the judgement should not be understood as authority for the proposition that a temporary taking can never be an expropriation.<sup>122</sup>

However, despite these criticisms it is generally agreed that the *Harksen* decision is correct in the sense that there was no expropriation. The result is that this important first decision of the Constitutional Court says nothing concerning the public purpose requirement. After this decision there were no other expropriation cases decided between 1993 and 1996 that specifically referred to s 28 of the Interim Constitution.

## **2.4 The Position since 1996**

In drafting the final Constitution, the formulation of the public interest requirement again caused problems. The African National Congress and the National Party could not decide whether to include the words 'public purpose' or 'public interest' in the expropriation sub-clause. After intensive negotiations the final draft of the Constitution was adopted by the Constitutional Assembly.<sup>123</sup> In the final draft, the requirement was formulated as 'for a public purpose or in the public interest'.

The provisions in the Final Constitution were challenged in the *First Certification Case*.<sup>124</sup> There were objections raised with regard to the fact that s 25 (1) did not make explicit provision for the protection of the right to acquire, hold and dispose of property, (2) contained inadequate provisions regarding expropriation and payment of compensation, and (3) did not protect intellectual property. The court had to look

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<sup>122</sup> Budlender G 'The constitutional protection of property rights: Overview and commentary' in Budlender G, Latsky J & Roux T (eds) *Juta's new land law* (original service 1998) chapter 1 at 44.

<sup>123</sup> Adopted on 8 May 1996.

<sup>124</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC).

whether the provisions complied with the internationally accepted human rights standards. The Constitutional Court rejected these objections on the ground that universal requirements do not exist for such provisions. The court further held that the provisions in s 25 were in line with internationally acknowledged principles in so far as such principles existed.<sup>125</sup> Section 25 was found to be effectively providing for compensation.<sup>126</sup>

The Final Constitution of 1996 provides in s 25(2)(a) that property may be expropriated only in terms of law of general application, for a public purpose or in the public interest and subject to compensation. This section gives a mandate to the state to expropriate land for a public purpose or in the public interest. It must be noted that even in the Final Constitution public purpose is not defined, although public interest is defined in s 25(4)(a) with reference to land reform, stating that the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources.<sup>127</sup> Compared to s 28(3) of the Interim Constitution,<sup>128</sup> s 25 displays some interesting changes including the land reform question in its provisions.

Given the imbalance caused by land dispossession in South Africa, there was no way that restitution of land could take place without the possibility of expropriating privately owned land. A broad compromise had emerged across the political spectrum that expropriation of landowners must be an option. It was therefore

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<sup>125</sup> *Ex parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) paras 71, 72, 73, 74, 75.

<sup>126</sup> *Ex parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) paras 71–72.

<sup>127</sup> Section 25(4)(a) of the Constitution.

<sup>128</sup> Act 200 of 1993.

obvious and natural for s 25(2) of the Final Constitution to provide for the expropriation of property, including expropriation of land for land reform purposes. To give effect to this reality, the expropriation power was made subject to two requirements: expropriation must be for a public purpose or in the public interest and is subject to payment of just and equitable compensation, the amount, time and manner of the compensation could either be agreed upon by the parties or arrived at by a court.<sup>129</sup>

The inclusion of the double public purpose / public interest provision in s 25(2) of the Final Constitution is, according to Badenhorst and Mostert,<sup>130</sup> aimed at preventing the abuse of legislative and executive power, hence it is important to discuss this double requirement and to establish how it is interpreted and what problems were raised by it.

Various cases since 1996 have dealt with s 25, *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service*<sup>131</sup> being the most important. Unfortunately, this decision says little about public purpose and public interest. The most important aspects of the decision in *FNB* is that the Constitutional Court distinguished deprivation from expropriation by noting that the former is wider than the latter and that the latter was a subset of the former (thereby deviating from the approach in *Harksen*) and that the court defined the problematic notion of

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<sup>129</sup> Section 25(2) (b).

<sup>130</sup> Badenhorst PJ and Mostert H 'Revising the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the constitutional property clause: An analysis in two parts. Part 2: Constitutionality of the Minerals and Petroleum Resources Development Act's transitional provisions' (2004) 15 *Stell LR* 22-51 at 32.

<sup>131</sup> *First National Bank of South Africa 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).

arbitrary deprivation (proscribed by s 25(1)) with reference to the existence of adequate reasons for the deprivation.

According to Roux<sup>132</sup> this case resolved much of the initial uncertainty surrounding the interpretation of s 25 of the Constitution and the court in *FNB* succeeded in striking a balance between the protection of existing rights and the promotion of the public interest. The court accepted that exacting payment of a customs debt is a legitimate and important legislative purpose, essential for the financial well-being of the country and in the interest of all inhabitants, and decided that the only problem was that the legislation cast the net too wide in this particular case, which rendered the deprivation arbitrary.<sup>133</sup>

The question of horizontal application of expropriation was also one of the critical topics that were brought to the attention of the court after 1996. Property can be expropriated from a private party and transferred to another private party, but even then expropriation will be undertaken either by the state or a party acting on behalf of the state. In *Nhlabathi v Fick*<sup>134</sup> the widow (Ms Nhlabathi) wanted to bury her late husband in a family graveyard as this was part of an established custom, but the owner of the farm (Mr Fick) refused. However, she went ahead in preparing for the funeral arrangements and upon her return to the farm, she found that the owner of the farm had locked her out of the property. This led to Ms Nhlabathi applying for an interdict to allow her to bury her husband. The interdict was based on s 6(2)(dA) of

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<sup>132</sup> Roux T 'Section 25' in Woolman S et al (eds) *Constitutional law of South Africa* (2<sup>nd</sup> ed 2003 original service) chapter 46.

<sup>133</sup> *First National Bank of South Africa Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 108 at 814H.

<sup>134</sup> *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC).

ESTA.<sup>135</sup> This subsection was inserted into the Act to allow the burial of a family member without the permission of the landowner, if they were occupying or were occupiers of land at the time of death and also if there was an established practice of previously allowing such burials on the farm. The landowner argued that s 6(2)(dA) was unconstitutional as it does not protect his property.<sup>136</sup> The court in this case had to decide whether the burial right was an expropriation. The court assumed without deciding the point that it could be a *de facto* expropriation of a servitude.<sup>137</sup> After all the arguments presented before it, the court came to the ruling that the interference with the land owner's property rights was reasonable and justifiable as provided in s 36 of the Constitution for the following reasons:

- (a) the right does not constitute a major intrusion of the landowner's property rights;
- (b) the right has to be balanced with the landowner's property right and may sometimes be subject to it;
- (c) the right exists only where there is a past practice with regard to grave sites; and
- (d) the right will, in many cases, enable occupiers to comply with a religious or cultural belief that deceased members of their family must be buried close to their homestead, so that the spirits of their ancestors might be close to them. Giving statutory recognition to that belief accords with the state's constitutional mandate to institute land reform measures.<sup>138</sup>

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<sup>135</sup> Extension of Security of Tenure Act 62 of 1997.

<sup>136</sup> *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 20.

<sup>137</sup> *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) paras 32-35.

<sup>138</sup> *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) para 35; see also Van der Walt AJ *Constitutional property law* (2005) at 281.

The court further held that, even if this right resulted in expropriation of property in order to use it for burial purposes, without compensation, it would still be justified under s 36(1). The reason behind this was the fact that the intrusion on the owner's land, measured against the gains of the occupants, was minor.<sup>139</sup> According to Van der Walt the court in this decision acknowledged the fact that expropriation without compensation could be possible in certain circumstances.<sup>140</sup> This is one of the most important decisions on s 25 yet, because the court took the initiative to amplify the methodology used in the *FNB* decision.

Another interesting and important decision was *Du Toit v Minister of Transport*,<sup>141</sup> which resulted from gravel extraction by the state on private land, for purposes of building of a public road. The Cape High Court discounted the interest of the affected land owner in expropriation of gravel from his land by attaching more weight to the prejudice to the public interest if the building of roads were to be burdened by the payment of full market value for the expropriated materials. This decision has been severely criticised on theoretical and economic grounds.<sup>142</sup> The Cape High Court, accepting the idea that the provisions of the Expropriation Act<sup>143</sup> had to be interpreted in the light of the constitutional provisions on expropriation, followed the approach in the *Khumalo*<sup>144</sup> case, where the court in determining compensation focussed on market value as the point of departure. In considering the factors to be taken into account when determining compensation, the court relied on the purpose of the expropriation (building a national road) and argued that this purpose should

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<sup>139</sup> *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) paras 31-36.

<sup>140</sup> Van der Walt AJ *Constitutional property law* (2005) at 346.

<sup>141</sup> 2003 (1) SA 586 (C); 2005 (1) SA 16 (SCA).

<sup>142</sup> Van der Walt AJ *Constitutional property law* (2005) at 276-279.

<sup>143</sup> Act 63 of 1975.

<sup>144</sup> *Khumalo v Potgieter* [2002] 2 All SA 456 (LCC).

affect the amount of compensation. This reflected an imbalance between the individual owner's interest and that of the public.

The *Du Toit* case is a perfect example of how the court had failed to distinguish between public purpose in s 25(2), which is a requirement for a valid expropriation, and the purpose of the expropriation in s 25(3)(e), which is a factor to be taken into account when calculating compensation for an expropriation. In the present case the question was whether compensation can be reduced to lower than market value simply because the public interest in the property is higher than the individual owner's interest in the property. This is where the public purpose as a justification for the expropriation should be distinguished from the purpose of the expropriation as a factor that should be taken into account when calculating compensation. The fact that the public (including Mr Du Toit) would benefit from use of the road could justify expropriation of gravel to build the road, but it is much harder to use the public benefit in this specific instance as a justification for paying just one potential user of the road, namely Mr Du Toit, lower compensation for expropriation of his gravel. The fact that an expropriation can be justified because it serves a public purpose as required in s 25(2) does not necessarily mean that the purpose of the expropriation, namely to serve the public purpose for which the expropriation is undertaken, is a factor that justifies less compensation when determining compensation as provided in s 25(3)(e). If it were, it should never be necessary to pay any compensation for expropriation.

According to Van der Walt,<sup>145</sup> the Cape High Court approached the matter from the wrong point of view. According to the author:

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<sup>145</sup> Van der Walt AJ *Constitutional property law* (2005) at 277.

'[T]he Cape High Court, based on this approach, decided that public interest in the building of roads would be prejudiced if the owner were to be paid full market value for expropriated gravel, and in its award the court therefore reduced the market value quite significantly.'<sup>146</sup>

Van der Walt is not convinced by the court's understanding in exercising its duties in the present case, taking into account the purpose of the expropriation as provided by s 25(3)(e) of the Constitution.<sup>147</sup> He contends that this is not a true reflection of how the interests of the affected land owner and the public interest should be balanced when determining just and equitable compensation.<sup>148</sup>

Section 25(3) instructs courts to find a fair balance between the public interest and the interest of those affected by expropriation, but the decision in the present case attached too much weight to the public interest and too little to the interest of the affected owner. This was done without particularly convincing justification.<sup>149</sup>

The author's argument poses a challenge to courts in deciding what to take into consideration before deciding what is just and equitable and which of the two interests is more important, the interest of the affected land owner or that of the public.

On appeal, it was held that the plaintiff (Du Toit) failed to prove the actual financial loss caused by the state, discounting it in view of the large volumes of gravel still available to the plaintiff, and focussing purely on the temporary taking of the

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<sup>146</sup> Van der Walt AJ *Constitutional property law* (2005) at 276.

<sup>147</sup> This section provides for courts to take into account the purpose of expropriation when calculating the amount of expropriation.

<sup>148</sup> Van der Walt AJ *Constitutional property law* (2005) at 277.

<sup>149</sup> Van der Walt AJ *Constitutional property law* (2005) at 277.

plaintiff's land.<sup>150</sup> Interestingly, the court in this case ignored the loss of gravel which was taken by the state.

The plaintiff appealed against the Supreme Court of Appeal decision and the Constitutional Court upheld the decision of the Supreme Court of Appeal. The majority accepted the Supreme Court of Appeal's line of argument, based on the fact that it was compensation for temporary use of the land that had to be established and it confirmed the Supreme Court of Appeal decision on this point.

The minority, on the other hand, criticised the majority view, arguing that what was expropriated was the gravel itself and concluding that the compensation award was not just and equitable. They also rejected the approach of first determining the compensation award and then asking whether it complied with the just and equitable standard in s 25. According to the minority, this approach would entrench the centrality of market value.

What came out of the Supreme Court of Appeal and the Constitutional Court decisions was that Mr Du Toit was expected to carry the burden of a national asset which was going to benefit the whole public.<sup>151</sup> Concentrating just on the temporary expropriation of the right to use the affected owner's land for state use created a precedent according to which the state can ignore the market value of the excavated gravel for building of roads without considering payment. Van der Walt's argument about this decision as to how the court should have dealt with the present case is worth noting. He suggested the following interpretation as a better one that requires the state to use s 8(1)(a) when acquiring land permanently for building of a road; s

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<sup>150</sup> 2003 (1) SA 586 (C) para 14 at 24D-I.

<sup>151</sup> Van der Walt AJ 'The state's duty to pay 'just and equitable' compensation for expropriation: Reflections on the *Du Toit* case' (2005) 122 *SALJ* 765-778 at 772.

8(1)(b) for permanent expropriation of the material used for the building of a road; and s 8(1)(c) where temporary use of land is needed in the process.<sup>152</sup> In evaluating the decision, Van der Walt commented that:

[U]ltimately one could perhaps say that the result in the *Du Toit* case is rendered unpalatable by either one of three shortcomings: justification of the low level of compensation based on the argument that the landowner only had to be compensated for temporary use of his land smacks of sophistry and relies on an unconvincing and not at all self-evident interpretation of s 8(1) of the Roads Act; the argument that compensation should be low because of the purpose of the expropriation is unconvincing in view of the structure and apparent intention of s 25(3) of the Constitution; and the argument that expropriation was aimed at the gravel and that compensation was low because the value of the gravel was low (as apparently accepted by the Constitutional Court minority) looks like a sound explanation for the result in principle but was not set out or explained with sufficient clarity and power.<sup>153</sup>

The *Du Toit* decision leaves a lesson to South African courts for future reference to distinguish between public purpose as a requirement in s 25(2) for a valid expropriation and public purpose as a factor to be taken into consideration when calculating compensation in s 25(3)(e). These two provisions should always be used according to their different contexts.

In a recent decision, *Offit Enterprises (Pty) Ltd and another v The Coega Development Corporation and Others*,<sup>154</sup> the applicants applied for an order declaring that any expropriation of their properties for the benefit of the respondents was unlawful in terms of the current legislation and not to be permitted. When the

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<sup>152</sup> Van der Walt AJ 'The state's duty to pay 'just and equitable' compensation for expropriation: Reflections on the *Du Toit* case' (2005) 122 *SALJ* 765-778 at 776.

<sup>153</sup> Van der Walt AJ 'The state's duty to pay 'just and equitable' compensation for expropriation: Reflections on the *Du Toit* case' (2005) 122 *SALJ* 765-778 at 776-777.

<sup>154</sup> *Offit Enterprises (Pty) Ltd v The Coega Development Corporation (Pty) Ltd and Others* unpublished case no 1764/07 (19 November 2008) (SECLD).

application was made the respondent did not have control of the land which belonged to the applicants. Several attempts were made to expropriate the applicant's property, but with no success at all. The case is relevant for purposes of this chapter because it concerns the validity of expropriation for purposes of transfer to a third party, but the court came to the conclusion that the order could not be granted as there was no dispute between the parties. This case is discussed in full in 2.6.2 below.

## **2.5 The Expropriation Bill 2008**

The Expropriation Act<sup>155</sup> regulates expropriations in South Africa and it provides for expropriation of land for a public purpose only. The Final Constitution, on the other hand, provides that expropriation of property may take place where the expropriation will serve a public purpose or is in the public interest, subject to compensation.<sup>156</sup>

The continued applicability of the Expropriation Act causes three major difficulties. Firstly, it predates the Constitution and it is not instilled with the transformative intent which is at the heart of the Constitution.<sup>157</sup> Secondly, the Expropriation Act is not consistent with comparable foreign statutes elsewhere in the world. Thirdly, and more importantly, the Expropriation Act is possibly inconsistent with the Constitution<sup>158</sup> as the Constitution provides for expropriation that is in the public interest and not only for a public purpose.

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<sup>155</sup> Act 63 of 1975.

<sup>156</sup> Section 25(2)(a)(b).

<sup>157</sup> GN 1654 GG 30468 of 13 November 2007 para 23.

<sup>158</sup> GN 1654 GG 30468 of 13 November 2007 para 21.

For these reasons it was important to establish a new legislative framework in order to give effect to the nation's commitment to land reform, as clearly stated in the Constitution.<sup>159</sup> The Final Constitution provides for expropriation for a public purpose or in the public interest and s 25(4)(a) explains that the nation's commitment to land reform is included in the public interest.

The Constitution is the supreme law of the country, and any law that is inconsistent with it is invalid. The Expropriation Act<sup>160</sup> is still valid and binding in South Africa. There has been a proposal for a new Expropriation Act,<sup>161</sup> since the current Act may not promote the spirit, purport and objects of the Constitution sufficiently. The Constitution sets out the factors to be taken into account in considering the public interest. It states that 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.<sup>162</sup> The Draft Policy on the Expropriation Bill explains the potential inconsistency of the current Act with this approach as follows:

'The Expropriation Act provides for expropriation for a public purpose. The construction in the Constitution is broader than public purpose, it provides for expropriation for public purpose or in the public interest. The Act restricts the ability of Government to expropriate only for public purposes whereas the Constitution permits the Government to expropriate in the public interest. There is a material distinction between public purpose and public interest. In general public purpose is limited to a narrow function linked with governmental activity in a narrow and limited sense. On the other hand, the phrase in the public interest encapsulates a variety of activities which may be for both a public purpose but would exceed the scope of the narrow definition e.g. land expropriated or land

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<sup>159</sup> Section 25(4)(a).

<sup>160</sup> Act 63 of 1975.

<sup>161</sup> Expropriation Bill 16 of 2008.

<sup>162</sup> Section 25(4)(a).

reform, land restitution and providing access to land resources( e.g. water and energy) to denied hitherto citizens on the basis of discrimination.<sup>163</sup>

A new Bill was introduced in March 2008 by the Minister of Public Works, aimed at replacing the Expropriation Act of 1975. It was drafted in conformity with the expropriation provisions in s 25(2) and s 25(3) of the Final Constitution. According to the Bill, expropriation of land can be for a public purpose or in the public interest, reflecting the wording of s 25(2) of the Constitution. The Bill was nevertheless criticised by private landowners and political organisations who claimed that it would allow for the expropriation of any property in the public interest, for example shares. One of the major criticisms of the Bill was the move away from the willing-buyer willing-seller model and the proposal to vest the final determination of the amount of compensation in the Minister. The opponents of the Bill also criticised the sweeping powers that the Bill gave to the government to decide what property should be expropriated in the public interest and what amount should be paid for it. This will, according to the critics, limit the affected owners' ability to contest those decisions in court.

The critics argued that 'the Bill was neither constitutional nor lawful, posing a serious threat to property rights.'<sup>164</sup> Public interest seems to be a wider concept than public purpose.<sup>165</sup> It was this wider meaning that gave rise to the fears of the Bill's critics.<sup>166</sup> The main concern was the inclusion of the public interest requirement in the Bill,

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<sup>163</sup> GN 1654 GG 30468 of 13 November 2007 para 24.1.

<sup>164</sup> Groenewald Y 'New expropriation law challenged' *Mail & Guardian* (4 April 2008) [available at [www.mg.co.za](http://www.mg.co.za) as on 04 April 2008].

<sup>165</sup> Van der Walt AJ *Constitution property law* (2005) at 243.

<sup>166</sup> Hartley W 'Absa comes under fire over expropriation Bill' *Business Day* (19 June 2008) [available at [www.businessday.co.za](http://www.businessday.co.za) as on 19 June 2008] para 7; see also Sapa 'Civil rights group slam Land Bill' *Business Report* [available at [www.busrep.co.za](http://www.busrep.co.za) as on 18 June 2008].

which they saw as creating unlimited grounds for expropriation. Another argument brought forward by the critics was the definition of public interest in the Bill, which reflected the same contents in s 25(4) (a) of the Final Constitution. They argued that this definition was too broad and that it left room for uncertainty as to the expropriating authority's interpretation of matters falling within the public interest.<sup>167</sup>

The Bill was also criticised because it applied to movables and not only to land.<sup>168</sup>

After long discussions and criticism by various political structures and private land owners, the Bill was withdrawn for review.<sup>169</sup> This served as a relief to those who were going to be affected by the Bill.

The most contentious issue regarding the Bill was the question of compensation, which is still on the agenda as one of the constitutional issues that the government still needs to address. Determination of the amount of compensation by the court was one of the major issues that caused much criticism of the Bill. One of the most controversial issues in the Bill was whether market value was or should be the only or main determining factor as far as the calculation of compensation is concerned. This created fears amongst investors who would not invest in a country with an unbalanced approach to property rights. Critics of the Bill argued that the changes brought about by a new expropriation dispensation would have a serious effect on property owners and financial institutions, since it would lead to uncertainty for property owners and security holders about their property rights, which might now be

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<sup>167</sup> AGRI SA 'Submission on the Expropriation Bill' *Parliamentary Monitoring Group* (14 May 2008) [available at [www.pmg.org.za](http://www.pmg.org.za) as on 14 May 2008].

<sup>168</sup> See Clause 1 of the Bill definition of 'property'.

<sup>169</sup> The Bill was withdrawn in August 2008.

exposed to expropriation without any certainty about the level of compensation.<sup>170</sup> Another issue that was attacked and regarded to be unconstitutional was an individual's right to appeal against the determination of compensation, which was said to be limited by the Bill.<sup>171</sup> This fear had been created by various misleading interpretations of the Bill by those who were afraid to lose all their privileges to land reform or redistribution programmes.

According to the 1975 Expropriation Act, the power to expropriate vests in the Minister of Public Works. The Expropriation Bill extended the powers of the Minister to expropriate property on behalf of a juristic person for a public purpose or in the public interest.<sup>172</sup> As far as juristic persons are concerned, the Act is different from the Bill as the list of who may be expropriated is not stated in the Act.

## **2.6. Third Party Transfers**

Third party transfers occur when the state expropriates land of a private owner for transfer to another private party. Third party transfers are an important issue in South African expropriation law. The question is whether they are in the public interest or not. Expropriations of this nature may be in the public interest as long as the expropriation and the transfer serve a legitimate public purpose or an important public interest. This is particularly true in cases of land reform. Expropriations of this nature are generally problematic in comparative constitutional property law. In cases where a person benefits from an expropriation that was undertaken purely for an

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<sup>170</sup> AGRI SA 'Submission on the Expropriation Bill' *Parliamentary Monitoring Group* (14 May 2008) at 19 [available at [www.pmg.org.za](http://www.pmg.org.za) as on 14 May 2008].

<sup>171</sup> AGRI SA 'Submission on the Expropriation Bill' *Parliamentary Monitoring Group* (14 May 2008) [available at [www.pmg.org.za](http://www.pmg.org.za) as on 14 May 2008].

<sup>172</sup> Clause 4 of the Expropriation Bill 16 of 2008.

economic development, it is unlikely that the public interest requirement would be satisfied. In cases where a private party benefits from an expropriation that also serves a public purpose in that a private party is responsible to provide public utilities, expropriation of this nature could also satisfy the public interest requirement.

Third party transfers are particularly important in the context of land reform, especially in cases where land has to be expropriated for redistribution and restitution of land. Roux's argument with regard to third party transfers is as follows:

'[t]he fact that a law permits the expropriation of property for the purposes of transferring it to a third party rather than the state would not give rise to a finding of unconstitutionality under s 25(2)(a), provided that the overall purpose of the law was to promote the public interest. For example, chapter III of the Land Reform (Labour Tenants) Act provides for the judicial expropriation and transfer of property from one private individual to another. The state at no point acquires the property thus expropriated. The entire scheme of expropriation provided for in the Act, however, is clearly in the public interest, and therefore not unconstitutional. In case there were any doubt about this, s 25(4) (a) of the Constitution expresses this point clearly.'<sup>173</sup>

Van der Walt is also of the view that the wide definition in s 25(4)(a) was to prevent expropriations for land reform from being invalidated for not being in the public interest purely because they involve transfer of the expropriated property to private beneficiaries.<sup>174</sup>

In a recent decision, *Offit Enterprises (Pty) Ltd v The Coega Development Corporation (Pty) Ltd*,<sup>175</sup> the importance of expropriations that amount to third party transfers, outside of the area of land reform, that can nevertheless be for a public

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<sup>173</sup> Roux T 'Section 25' in S Woolman et al (eds) *Constitutional law of South Africa* (2<sup>nd</sup> ed 2003 original service) chapter 46 at 46-33.

<sup>174</sup> Van der Walt AJ 'The impact of the bill of rights on property law' (1993) 8 *SA Public Law* 296-319 at 302.

<sup>175</sup> Unreported case no 1764/07 (19 November 2009) (SECLD).

purpose or in the public interest was demonstrated. The applicants brought an application by way of notice of motion for an order declaring that any expropriation of the applicant's properties for the benefit of the respondents was not to be permitted and was unlawful. The order sought to prevent any of the respondents from expropriating the properties of the first respondent. The applicants argued that the respondent was not in a possession of a valid Independent Development Zone (herein referred to as IDZ) operator permit and therefore that its activities in operating the Coega IDZ were unlawful. Jansen J looked at s 25(1) of the Final Constitution and at the Expropriation Act, which grants the third and fourth respondents (the Minister of Public Works and Minister of Trade and Industry) certain powers to expropriate. It was held that the first respondent had no power to expropriate the applicants' properties as that would infringe the applicants' protected constitutional property rights.

The second respondent had on several occasions attempted to expropriate the applicants' properties but with no success. Ebrahim J held that the expropriation for the purpose of transferring the properties to the first respondent was not legitimate as it was against the provisions of s 2 of the 1975 Expropriation Act.<sup>176</sup> He concluded that the Expropriation Act and the Eastern Cape Land Disposal Act<sup>177</sup> did not vest the second respondent with the authority to expropriate the applicants' properties for the purpose of transferring them to the first respondent.

In the present case Jansen J, having considered all the facts and circumstances, discussed s 25(1) and 25(2) and the Expropriation Act, stating that it is a law of

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<sup>176</sup> Act 63 of 1975.

<sup>177</sup> Act 7 of 2000. This Act does not authorise the acquisition of immovable property for the purpose of transferring it to another entity or person, nor does it authorise the acquisition of property on behalf of such entity or person.

general application and that it remained in force subject to its consistency with the Constitution. Section 2 of the Expropriation Act limits the power to expropriate to expropriation for a public purpose, while s 25(2) extends this power to cases that are in the public interest. He argued that ‘in as much as the provisions of the Expropriation Act are inconsistent with the Constitution, the Expropriation Act must be interpreted by “reading in” the contrary provisions of the Constitution.’<sup>178</sup> Interestingly, he referred to the *White Rocks Farm* and *Van Streepen* cases in clarifying his point that expropriation for the benefit of a private party may be in the public interest and valid even where it was not strictly for a public purpose in the sense of either state or government use of the land.<sup>179</sup> He stated that the Coega IDZ is an incentive scheme created by the fourth respondent by Regulation in terms of the Manufacturing Development Act 187 of 1993. It was clear from the proclamation of the Coega area as an IDZ that the fourth respondent was satisfied that the development would have strategic economic advantages, and was also satisfied that it would promote integration with local industry, increase value added production and create employment and other economic and social benefits in the Eastern Cape Region. He continued that the IDZ incentive scheme clearly falls within the ambit of the wide meaning of public purpose as it affects the whole population as well as the local public of Port Elizabeth and the Eastern Cape and that it is also a scheme that is in the public interest.<sup>180</sup>

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<sup>178</sup> The Constitution of the Republic of South Africa of 1996.

<sup>179</sup> *White Rocks Farm (Pty) Ltd v Minister of Community Development* 1984 (3) SA 785 (N) at 7931; *Administrator Transvaal v Van Streepen (Kempton Park) (Pty) Ltd* 1990 (3) SA 644 (A) at 660G-661G.

<sup>180</sup> *Offit Enterprises (Pty) (Ltd) v The Coega Development Corporation (Pty) Ltd* unreported case no 1764/07 ( 19 November 2008) (SECLD) at 21.

On the face of it, the decision seems to confirm that expropriation could be for a public purpose or in the public interest even if it benefits a private person. However, the decision never makes this point explicitly because the court concluded that the applicant failed to prove that they are entitled to the declaratory order sought. The reason for that was that there never was a valid expropriation that could be tested against the public purpose / public interest requirement: the respondents who did have the power to expropriate did not attempt or intend to use it, and the respondent who did in fact attempt to expropriate the land did not have the statutory authority or power to do so. The attempted expropriation was therefore invalid because of lack of authority and not because it was not for a public purpose or in the public interest.

Van der Walt fully agrees with this decision, emphasising that the public purpose requirement cannot be read too restrictively and that it must include a purpose that affects the general or local public and not just matters pertaining the state or government.<sup>181</sup> The court held that there was no live dispute between the parties because the first two respondents cannot expropriate and the last two indicated that they did not intend to do so. The decision therefore remains inconclusive on the point of third party transfers, but the case does illustrate the fact that expropriation for purposes of transfer to another private party is not necessarily unconstitutional for not being for a public purpose or in the public interest.

The *Offit Enterprises* decision illustrates the point that expropriations that amount to third party transfers might sometimes be for a public purpose or in the public interest even when they have nothing to do with land reform. This would primarily be the case when the expropriation is intended to assist a private enterprise in acquiring

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<sup>181</sup> Van der Walt AJ 'Constitutional property law' 2008 (4) *Juta's Quarterly Review* para 2.1.

property that it requires to provide a public service on behalf of the state. This point (and the limits of this qualification of the public purpose requirement) is discussed in more detail in the next chapter.

## **2.7 Conclusion**

This chapter has started by explaining the meaning of the public purpose requirement as provided in the 1975 Expropriation Act (before 1993) and in s 28(3) of the Interim Constitution and how the courts have applied and interpreted this requirement. It has been shown in this chapter that prior to 1996 it was likely that the court would give a wide interpretation (any purpose that serves the interests of the wider community) to the term public purpose in terms of the 1975 Act and of s 28(3), unless the text of the relevant act and the context indicated that the narrow interpretation (state or government use) was applicable.

It is still unclear how the situation has now been changed by s 25(2) of the 1996 Constitution, which authorises expropriation for a public purpose or in the public interest. Section 25(4) even takes it further by stipulating that public interest includes the nation's commitment to land reform. It is clear through various cases and opinions of property law scholars that the meaning of the public interest requirement in s 25(2) is not clearly defined. There is so far no definition of what public interest is within the context of s 25(2)(a) of the Constitution. The current Expropriation Act,<sup>182</sup> which is apparently inconsistent with the Final Constitution, is still valid and binding and has to be interpreted in accordance with the wider definition of public purpose / public interest in the Constitution. The Expropriation Bill was introduced in 2008 to

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<sup>182</sup> Act 63 of 1975.

repeal the Expropriation Act of 1975 and replace it with a new Act that will be in line with the Constitution, but the Bill has been shelved for the time being. One of the major contentious issues in the Bill was the public interest requirement, which merely echoes the constitutional requirement.

Van der Walt<sup>183</sup> is of the view that the public purpose requirement in the Expropriation Act<sup>184</sup> would be consistent with the Constitution and therefore still valid if it is interpreted in conformity with s 25(2)(a) of the Final Constitution. This would mean that the public interest requirement is read into the public purpose requirement in the Act in any event, even without the intervention attempted in the Expropriation Bill. It is further stated by Budlender that one should be cautious in applying the interpretation of an ordinary statute to the interpretation of a provision in a Constitution.<sup>185</sup> This means that the meaning of public purpose in statutes is not the same as the meaning of public purpose under the Constitution, and the latter should be the most important in case of conflict.

An expropriation's validity as to whether it complies with the formal requirements may always be challenged in court<sup>186</sup> but, judging from case law, the courts would not easily interfere in situations where the executive or legislature decided that a specific purpose constitutes a public purpose or that a specific purpose is in the public interest. Gildenhuis submits that a mere assertion that expropriation is for a public purpose or in the public interest will be accepted by the courts as *prima facie*

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<sup>183</sup> Van der Walt AJ 'Constitutional property law' 2008 (4) *Juta's Quarterly Review* para 2.1.

<sup>184</sup> Act 63 of 1975.

<sup>185</sup> Budlender G 'The constitutional protection of property rights: Overview and commentary' in Budlender G, Latsky J & Roux T (eds) *Juta's new land law* (original service 1998) chapter 1 at 48 para 4.3.

<sup>186</sup> Gildenhuis A *Onteieningsreg* (2<sup>nd</sup> ed 2001) at 98; see also *Fourie v Minister van Lande* 1970 (4) SA 165 (O); *Slabbert v Minister van Lande* 1963 (3) SA 620 (T).

evidence.<sup>187</sup> The specific purpose or intended use of the land should, however, be mentioned.

If the person whose land was expropriated alleges that the expropriation was not in the public interest or that it was not for a public purpose then he has to prove it.<sup>188</sup> It is primarily the expropriator's duty to decide whether the intended use of land is in the public interest or is for a public purpose; a court will not interfere with the expropriator's decision unless the use is palpably without reasonable foundation.<sup>189</sup>

One aspect that remains unclear is whether, and when, expropriation that benefits another private party (third party transfers) would be permissible under the public purpose/ public interest requirement. Generally speaking, third party transfers would not necessarily render an expropriation unconstitutional merely because a third party benefits from the expropriation or because the land is transferred to another private party. It has been accepted even before 1994 that property could be expropriated and transferred to another private person if that is necessary for and justified by a public service (such as a utility) provided by that person on behalf of the state. Furthermore, in the South African context failure to allow third party transfers would, as Eisenberg stated, be contrary to the principles of the Constitution in so far as it would frustrate land reform.<sup>190</sup> The approach suggested *obiter* by the court in *Offit Enterprises* should probably be the approach to be followed by our courts in third

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<sup>187</sup> *Gildenhuys A Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 98; see also *Theunissen Town Council v Du Plessis* 1954 (4) SA 419 (O) at 424G.

<sup>188</sup> *Gildenhuys A Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 98; *Theunissen Town Council v Du Plessis* 1954 (4) SA 419 (O).

<sup>189</sup> *Gildenhuys A Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 98; *Hawaii Housing Authority v Midkiff* 1984 467 US 229 at 242.

<sup>190</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 221.

party transfer cases. It is important for South African courts to take note of what Van der Walt suggests regarding the interpretation of expropriation cases. The author submits that in every individual case the courts should satisfy themselves that:

(1) expropriation is indeed authorised by legislation and that it serves an identifiable public purpose or public interest;

(2) not every incidental benefit that might accrue for the public generally should necessarily justify an expropriation that clearly serves private interests, in other words, public benefit should not be translated into public interest too easily;

(3) if an expropriation serves a legitimate public purpose or interest, the mere fact that it also incidentally benefits a private party should not itself render the action illegitimate and unlawful.<sup>191</sup>

When one is looking at the manner in which third party transfers should be interpreted it is clear that s 25(4) should be interpreted in its constitutional and historical context and that it should therefore probably allow third party transfers that are justified by their land reform or other public purposes. Southwood<sup>192</sup> argues that 'in interpreting the phrase public interest in s 25(2)(a) and its amplification in s 25(4)(a), it is important to look at the history and background of the adoption of these two provisions of the Constitution in order to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.' The Constitution is the supreme law of the country and all laws, legislation and administrative acts should be in accordance with the Constitution. The expropriation cases that are brought before the court must be argued based on constitutional

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<sup>191</sup> Van der Walt AJ 'Constitutional property law' 2008 (4) *Juta's Quarterly Review* para 2.1.

<sup>192</sup> Southwood MD *The compulsory acquisition of rights* (2000) at 21.

issues. This is important as it is the aim of s 25 to remedy the injustices of the past, not to always look at the past in trying to find a constitutional remedy, especially in cases of expropriations for land reform. Budlender suggests that the best way to deal with expropriations, especially in the courts, is the purposive approach which requires the courts not to look at the particular constitutional provision in isolation, but to locate it in the broader context of the aims and goals of the Constitution. He is of the view that once this is done, the case for a broad interpretation of public purpose becomes even clearer.<sup>193</sup>

In some foreign jurisdictions expropriations for land reform were rejected and in some these expropriations were justified. This aspect is discussed in the next chapter. The foreign case law indicates that courts need to be flexible in their approach to the extent that it does not affect the social or economic reforms in cases where expropriation is needed for redistribution of private property.<sup>194</sup> A purposive method of interpreting and applying legislation needs to be considered where the focus is on the public purpose and public interest requirement in s 25.

This chapter has highlighted the impact of the Constitution on existing law and the role that the Constitution plays in the interpretation of the bill of rights and legislation. As was suggested by various property law scholars, this chapter concludes that a purposive interpretation of the public purpose / public interest requirement is required. The next chapter will look at similar interpretations in foreign case law for comparative analysis.

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<sup>193</sup> Budlender G 'The constitutional protection of property rights: Overview and commentary' in Budlender G, Latsky J & Roux T (eds) *Juta's new land law* (original service 1998) chapter 1 at 55.

<sup>194</sup> Budlender G 'The constitutional protection of property rights: Overview and commentary' in Budlender G, Latsky J & Roux T (eds) *Juta's new land law* (original service 1998) chapter 1 at 55.

## Chapter 3

### Public Purpose and Public Interest in Foreign Law

#### 3.1 Introduction

This chapter will discuss how other countries deal with the public purpose / public interest requirement for expropriation. The Final South African Constitution 1996 allows courts to have regard to foreign law when interpreting national legislation and the Bill of Rights.<sup>195</sup> This chapter refers to case law dealing with the public purpose requirement in foreign jurisdictions, specifically American and German law, with additional references to Australia, the European Convention on Human Rights and the United Kingdom. It is important to look at how these countries define, apply and interpret public purpose and public interest because they have of course had to deal with the issues for a much longer time; in some instances the courts in these jurisdictions have developed distinctive approaches to the interpretation of the public purpose requirement and to related issues such as third party transfers. The foreign law on the public purpose requirement can be useful in comparison to South African law, because these countries have experience in implementing and dealing with a constitutional property clause. Germany, for instance, is the closest to South Africa as the phraseology of the South African property clause was largely based on the German property clause.

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<sup>195</sup> Section 39(1) of the Final Constitution states that when interpreting the Bill of Rights, 'a court, tribunal or forum (b) must consider international law; and (c) may consider foreign law.'

## 3.2 United States of America

### 3.2.1 Introduction

The Fifth Amendment to the US Constitution requires expropriation to be for public use.<sup>196</sup> In general terms it is said that public use involves acquiring land for public use in the sense of building schools, parks, roads and other public facilities on it. The Fifth Amendment of the United States Constitution provides that:

'No person shall be deprived of life, liberty, or property, without due process of the law, nor shall private property be taken for public use without just compensation.'<sup>197</sup>

The implication is that the state, by virtue of its power of eminent domain, may expropriate private property. The state may do so only under two conditions: firstly, the expropriation must be for public use; secondly, the expropriation must be accompanied by payment of just compensation to the expropriated land owner.

### 3.2.2 Public Use Requirement

There is no accurate definition for the public use requirement, as it changes with the changing outlook of society.<sup>198</sup> The public use doctrine focuses on what the

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<sup>196</sup> The Fifth Amendment was incorporated in the American Constitution in 1791 and with the Fourteenth Amendment in 1868. The Fifth Amendment was at first regarded to apply only to the federal government, excluding the states. See *Barron v Baltimore* 7 Pet 243 (1833) (SC) at 247; see Taggart M 'Expropriation, public purpose and the Constitution' in C Forsyth & I Hare (eds) *The golden metwand and the crooked cord: Essays on public law in honour of Sir William Wade QC* (1998) 91-112 at 91; see also Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 399. The US Supreme Court ruled in 1897 that because of the Fourteenth Amendment, the Fifth Amendment does apply to the states: *Chicago Burlington and Quincy Railroad v Chicago* 166 US 226 (1897) at 236.

<sup>197</sup> The Fifth Amendment of the Constitution of the United States of America was adopted in 1791.

government proposes to do with the land after taking it and not its use by the owner before taking.<sup>199</sup> Public use makes no distinction between homes and other kinds of property. Homeowners are not specially protected in cases where the government acquires land for traditional public use, no matter how the government justifies that particular public use.<sup>200</sup> Public use may include any purpose relating to public safety, health, or convenience. The most common example of public use is the taking of land to build a school or a road or redevelopment of a destroyed neighbourhood.

Potentially, the term 'public use' in the Fifth Amendment could lend itself to a very narrow interpretation that would exclude all but actual state or public use of the expropriated property. According to Allen, 'the early American cases applied the narrow use doctrine to the acquisition of property for its investment value.'<sup>201</sup> Most of these cases held that taking property for the purpose of adding state revenues was not an exercise of the power of eminent domain.<sup>202</sup>

*New York City Housing Authority v Muller*<sup>203</sup> dealt with a city statute which authorised the clearing of slums in order to build low-income housing. The challenge before the court was that private property was being taken to provide housing to other private individuals. The houses to be built were going to be public, but they were going to be occupied by private individuals; hence the challenge was that they were taken for private use. The New York court of appeals rejected this challenge and agreed with the state that a slum clearance was in this case for a valid public use as it reduced

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<sup>198</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 209.

<sup>199</sup> Fee J 'Eminent domain and sanctity of home' (2006) 81 *Notre Dame LR* 783-818 at 783.

<sup>200</sup> Fee J 'Eminent domain and sanctity of home' (2006) 81 *Notre Dame LR* 783-818 at 783.

<sup>201</sup> Allen T *The right to property in Commonwealth Constitutions* (2000) at 218.

<sup>202</sup> Allen T *The right to property in Commonwealth Constitutions* (2000) at 218.

<sup>203</sup> *New York City Housing Authority v Muller* 270 NY 333 (1936).

juvenile delinquency, crime, and disease in the area.<sup>204</sup> Slum clearance and the building of new housing were seen to be beneficial to the public. This decision established that expropriation for the purpose of slum clearance and redevelopment of an area would satisfy the public use requirement.

One of the biggest problems with the public use requirement has always been to justify expropriations that benefit a third party. In the United States of America the question of expropriations for the benefit of a third party has been and still is a controversial issue which is still under debate. According to Eisenberg, third party transfers are sometimes not meant for the benefit of private individuals, but rather to achieve socio-economic results that could not be achieved otherwise. She argues that the narrow, literal interpretation of the public use requirement became increasingly insupportable as the United States became more industrialised and that a broader definition of public use was eventually needed.<sup>205</sup> The starting point always remained that expropriation for an improper purpose or for purely private benefit would be unconstitutional,<sup>206</sup> but the scope of what constitutes public use moved away from a narrow definition (actual state or public use) to a much wider interpretation that could be described as public purpose rather than public use.

In *Berman v Parker*<sup>207</sup> the District of Columbia was in the process of redeveloping a blighted area of the city in terms of the District of Columbia Development Act of 1945. This Act created a commission of five members, called the District of Columbia

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<sup>204</sup> *New York City Housing Authority v Muller* 270 NY 333 (1936) at 338.

<sup>205</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 211.

<sup>206</sup> *Kelo v City of New London* 545 US 469 (2005) at 477; see Gray K & Gray SF *Elements of land law* (5<sup>th</sup> ed 2009) at 1390-1391.

<sup>207</sup> *Berman v Parker* 348 US 26 (1954).

Redevelopment Land Agency. The Act granted the commission the power to redevelop all the blighted areas and eradicate any cause of blight. The case concerns expropriation of a departmental store in the area to be redeveloped. The property itself was not blighted but was identified as part of the properties to be taken by eminent domain in order to clear the area where it was situated. The owners of the department store brought a lawsuit to claim that the department store was not blighted and its redevelopment was not necessary and would not constitute public use. The land owners argued further that taking the land under eminent domain and giving it to developers amounted to what they called a 'taking from one businessman for the benefit of another businessman.' They contended that this action violated the public use clause of the Fifth Amendment to the Constitution.<sup>208</sup>

The Supreme Court accepted that the courts would differ on the wide discretion of the legislator in deciding what public purpose was. What this means is that the court accepted that taking of private land for resale to a private developer in terms of general slum clearance and the development of the land was in the public interest as provided by the authorising legislation.<sup>209</sup> The legislature was seen as the main guardian of the public needs to be served and the legislature has the discretion to decide on any legislative measure adopted to serve the public interest.<sup>210</sup> This was the first case where taking of private land for economic redevelopment that would also benefit another private party was said to be for a public purpose.

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<sup>208</sup> 348 US 26 (1954) at 37.

<sup>209</sup> 348 US 26 (1954) at 32-33; where the court held that subject to specific limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive; see also Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412 at 403.

<sup>210</sup> 348 US 26 (1954) at 32; see also Van der AJ *Constitutional property law* (2005) at 262.

The most important aspect of the *Berman* decision is the US Supreme Court's formulation of its approach to the application of the public use requirement. Once the (mostly local or state) legislature has decided that a particular purpose served a public use, the Court declared, it would not easily be questioned by the courts. The courts would only depart from this deferential attitude when the expropriation was tainted by corruption or other indications of improper or unlawful action on the side of the state.<sup>211</sup>

According to Schultz,<sup>212</sup> the *Berman* decision illustrates that the power of eminent domain has to be exercised to benefit society as a whole, but that certain uses of this power may benefit narrower private interests in the hope that they will also serve the broader, public interest. This would, as the developing case law illustrates, mostly be the case in expropriations of private property for the purpose of economic development of blighted or economically inactive or under-utilized areas. According to Schultz, this approach supports using the power of eminent domain to prevent a business from closing even though it would appear to only benefit the employees of the business.<sup>213</sup>

This approach was followed in *Hawaii Housing Authority v Midkiff*.<sup>214</sup> In the *Midkiff* case the main issue was a state law (Hawaii Housing Land Reform Act 1967) that authorised a taking of private land for redistribution to other private owners. The legislature decided to force the landowners to break up their estates. In doing so, the

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<sup>211</sup> *Berman v Parker* 75 S.Ct.98.

<sup>212</sup> Schultz D 'What's yours can be mine: Are there any private takings after *Kelo v City of New London?*' (2006) 24 *Journal of Environmental Law* 195-234 at 209.

<sup>213</sup> Schultz D 'What's yours can be mine: Are there any private takings after *Kelo v City of New London?*' (2006) 24 *Journal of Environmental Law* 195-234 at 209-210.

<sup>214</sup> *Hawaii Housing Authority v Midkiff* 467 US 229 (1984); see Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412 at 402-403.

legislature used the legislation as an instrument for expropriation of residential areas against compensation and transfer of ownership of the land to current lessees. The process was instituted only after the authority had decided that the acquisition of a particular area would promote the public purposes of the Act. The landowners argued that the expropriation and transfer of ownership of their land to other persons was not for a public use and that the expropriation had to be declared unconstitutional.

The question before the court was whether the public use requirement of the Fifth Amendment prohibits the State of Hawaii from taking title in real property from one private person, against compensation, and transferring it to another private person in order to redress an imbalance in land ownership. The court decided that the public use requirement does not prohibit such a transfer. In delivering an opinion on behalf of the unanimous Supreme Court O'Connor J said the following:

'Where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the court has never held a compensated taking to be proscribed by the public use clause [...] Regulating oligopoly and the evils associated with it is classic exercise of a State's police powers [...] The mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The court long ago rejected any literal requirement that condemned property be put into use for general public [...] A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void [...] The Hawaii Legislature enacted its Land Reform Act not to benefit a particular class of identifiable individuals but to attack certain perceived evils of concentrated property ownership in Hawaii-a legitimate public purpose.'<sup>215</sup>

The Supreme Court in the *Hawaii* decision repeated its position in *Berman* that courts would defer to the wide legislative discretion in deciding what is in the public

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<sup>215</sup> *Hawaii v Midkiff* 467 US 229 (1984) at 241-245.

interest and showed that the only test that the courts will use is mere rationality control. The court was very clear in the present case that 'it will not substitute its judgement for a legislature's judgement as to what constitute a public use unless the use is palpably without reasonable foundation.'<sup>216</sup> The public use requirement in this case was therefore regarded as having the same boundaries or extent as the scope of a sovereign's police power.<sup>217</sup>

Sullivan concluded that the public purpose requirement:

'[i]s not a significant restriction on the government's power to take private property [...] *Midkiff* dispels any doubts remaining after *Berman*. It appears that as long as the public use is conceived by the legislature and the purpose is not impossible, the court will endorse a compensated taking even if the actual transfer of property is between private individuals. The court ruling signals its adoption of the broad interpretation that the public use means 'public advantage.'<sup>218</sup>

This decision approved the use of eminent domain as an instrument to redistribute private resources within society in order to achieve certain widely-drawn public purposes. Schultz is of the view that the *Berman*, *Muller*, *Midkiff* and other federal decisions have illustrated the expansive interpretation now given to the public use requirement on the federal level.<sup>219</sup>

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<sup>216</sup> *Hawaii v Midkiff* 467 US 229 (1984) at 239-244; see also Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 424-427.

<sup>217</sup> *Hawaii v Midkiff* 467 US 229 (1984) at 240.

<sup>218</sup> Sullivan RM "Eminent domain in the United States: An overview of federal condemnation proceedings" in Erasmus GM (ed) *Compensation for expropriation: A comparative study* (1990) 1 at 153,163-164.

<sup>219</sup> Schultz D 'What's yours can be mine: Are there any private takings after *Kelo v City of New London*?' (2006) 24 *Journal of Environmental Law* 195-234 at 211.

In *Poletown Neighbourhood Council v City of Detroit*<sup>220</sup> the neighbourhood was cleared to make way for the building of a new plant for General Motors Corporation. The City of Detroit relied on its power of eminent domain to compel thousands of people who lived in the area to relocate, along with their homes, businesses, six churches and one hospital. The residents sued the city on the grounds of unconstitutionality, stating that it was unconstitutional to use the power of eminent domain to condemn one person's private property to convey it to another private person in order to sustain the economy,<sup>221</sup> but the Michigan Supreme Court ruled that economic development was a legitimate use of eminent domain. The court further held that:

'The power of eminent domain is to be used in this instance primarily to accomplish the essential public purpose of alleviating unemployment and revitalising the economic base of the community.'<sup>222</sup>

Schultz is of the view that this decision offered an expansive definition of public use and expressed how a state court envisioned its role in the public use determinations under its own Constitution.<sup>223</sup> The court in this case addressed the meaning of the public use clause in the state's Constitution by indicating that:

'public use changes with changing economic conditions of society and that the right of the public to receive and enjoy the benefit of the use determines whether the use is public or private.'<sup>224</sup>

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<sup>220</sup> *Poletown v City of Detroit* 304 NW 2d 455 (Mich 1981).

<sup>221</sup> *Poletown v City of Detroit* 304 NW 2d 455 (Mich 1981) at 458.

<sup>222</sup> *Poletown v City of Detroit* 304 NW 2d 455 (Mich 1981) at 459.

<sup>223</sup> Schultz D 'What's yours can be mine: Are there any private takings after *Kelo v City of New London*?' (2006) 24 *Journal of Environmental Law* 195-234 at 213.

<sup>224</sup> *Poletown v City of Detroit* 304 NW 2d 455 (Mich 1981) at 457.

According to Van der Walt<sup>225</sup> this application of the public use requirement accommodated private development interests to such an extent that the public requirement has been declared a dead letter by commentators. Eisenberg argues that these two requirements must at all times take into consideration prevailing circumstances of each case.<sup>226</sup> According to her, the only way to do so is when the courts start to apply a less literal and more logical interpretation of the public use requirement.<sup>227</sup> She further argues that it is common in the US that when courts apply a broad interpretation of public use, they deferred to the legislature's decision of whether a public use will benefit the public or not.<sup>228</sup> The *Poletown* decision was severely criticised for the manner in which it represented an unprecedented expansion of eminent domain power and government control over private properties. Gray looked at this decision as a grave immorality, exploiting the private assets of others as a vehicle to a capital accumulation in which those others have absolutely no equity share. He saw this as an immorality which is only intensified by the fact that the enabling transaction is a forced confiscation of a cherished domestic residence.<sup>229</sup>

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<sup>225</sup> Van der Walt AJ *Constitutional property law* (2005) at 264; see also Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412.

<sup>226</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 216.

<sup>227</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 216.

<sup>228</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 214.

<sup>229</sup> Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412 at 407.

Its own earlier decision in *Poletown* was overruled by the Michigan Supreme Court in the *Hatchcock*<sup>230</sup> decision, where private land was expropriated for the benefit of a private enterprise that wanted to develop it for the public benefit. The court held that a public agency may use the power of eminent domain to acquire property for economic development purposes, subject to three requirements: (a) the exercise of eminent domain powers for the benefit of private corporations is limited to enterprises that generate public benefits, whose existence depends upon the use of land that can only be assembled by coordination of only central government; (b) the private entity that acquired the land must remain accountable to the public in its use of the condemned land; and (c) the acquisition must satisfy a special public concern test for public purposes of this nature. In *Hatchcock*, the Michigan Supreme Court therefore seemed to return to a somewhat stricter interpretation of the public use requirement, at least in cases regarding expropriation of private property for economic development from which a private developer would benefit. However, as will appear below, this decision was not generally followed in other state courts or by the Supreme Court.

A similar decision to the *Poletown* case was *City of Oakland v Oakland Raiders*,<sup>231</sup> where the City of Oakland was allowed to exercise its eminent domain power to seize all real and personal business assets of the Raider's football franchise. The team owners leased a coliseum in which the team played from a public, non-profit city/country corporation. When the agreement to renew the lease failed after the team announced its intention to remove itself to Los Angeles, the City of Oakland

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<sup>230</sup> *County of Wayne v Hatchcock* 684 NW 2d 765 (Mich 2004); see also *Kelo v City of New London* 843 A 2d 500 (Conn 2004) affirmed in 545 US 469 (2005); see Van der Walt AJ *Constitutional property law* (2005) at 264.

<sup>231</sup> 646 P2d 835 (Cal 1982).

commenced an eminent domain action to acquire all the property rights associated with the team, for example player's contracts, team equipment, television and radio contracts and so forth. The franchise owner, in arguing against the city's action, raised two grounds of argument, namely:

- (a) that the law of eminent domain did not permit the taking of intangible property not associated with reality; and
- (b) that the taking contemplated by the city could not, as a matter of law, be for any public use within the city's authority.

The question before the court was whether the state constitutional requirement that eminent domain acquisitions must serve a 'public use' was met. The court noted that the power of eminent domain was an 'inherent attribute of general government' and that 'constitutional provisions merely place limits upon its exercise.'<sup>232</sup> The court rejected the narrow reading of this requirement, stating that 'a public use is a use which concerns the whole community or promotes the general interest in its relation to any legitimate object of government.'<sup>233</sup> The court, having noted that this was an unusual application, held that 'acquisition and, indeed, the operation of a sports franchise may be an appropriate municipal function.'<sup>234</sup> The court accepted the City of Oakland's argument that 'the one crucial factor and test of public use is that the use must be for the general benefit of the *public* and not be primarily for private individual gain.'<sup>235</sup>

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<sup>232</sup> *City of Oakland v Oakland Raiders* 646 P2d 835 (Cal 1982) at 837-838.

<sup>233</sup> *City of Oakland v Oakland Raiders* 646 P2d 835 (Cal 1982) at 841.

<sup>234</sup> *City of Oakland v Oakland Raiders* 646 P2d 835 (Cal 1982) at 843.

<sup>235</sup> *City of Oakland v Oakland Raiders* 646 P2d 835 (Cal 1982); see also Schultz D 'What's yours can be mine: Are there any private takings after *Kelo v City of New London?*' (2006) 24 *Journal of Environmental Law* 195-234 at 216.

In *Kelo v City of New London*<sup>236</sup> the City delegated to the New London Development Corporation, a private non-profit organisation, the power of eminent domain which authorised a compulsory purchase of land required for the revitalisation of the waterfront area in New London. Susette Kelo owned a house that was facing the waterfront. Her land was to be compulsorily transferred to the New London Development Corporation and then leased to a private developer for 99 years at \$1 per year. She was one of the few remaining owners who refused to be bought at any price for the purposes of this development. She enjoyed and loved the view which her home afforded and its proximity to the waterfront. She was reported as having remarked that 'how come someone else can live here and we can't?' The landowners sued the city in Connecticut courts, arguing that the city had distorted its eminent domain power. The trial court granted a permanent restraining order prohibiting the taking of some of the properties in the area. The Connecticut Supreme Court held that the development in the area was for a public use and it relied on earlier decisions in *Midkiff*<sup>237</sup> and *Berman*.<sup>238</sup> The City of New London succeeded in the matter and the land owners took the matter to the Supreme Court of the United States. They argued further that if the government did so because it would generate higher tax revenue, it was wrong and unconstitutional as that will affect the poor people living in the area who cannot afford high tax revenues.

The question was whether Kelo's home was being taken for public use. The city argued that the public use requirement was satisfied by the mere fact that its development plan would rejuvenate the city and create more jobs and, most importantly, generate more tax revenue for public coffers. The Supreme Court found

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<sup>236</sup> *Kelo v City of New London* 545 US 469 (2005).

<sup>237</sup> *Hawaii v Midkiff* 467 US 229 (1984).

<sup>238</sup> *Berman v Parker* 348 US 26 (1954).

that use of eminent domain for economic development did not violate the public use clause of the state and federal constitution.<sup>239</sup> Justice Stevens confirmed the general point of departure on the public use requirement, namely that

'a purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.'<sup>240</sup>

However, having stated this general principle, a slim majority of the Supreme Court confirmed the deferential attitude it had earlier adopted in the *Berman* and *Hawaii* decisions. The court rejected the private home owners' contention that the New London redevelopment project served a purely private purpose as much of the taken property would be transferred to a private development corporation that stood to benefit from the project.<sup>241</sup> The Supreme Court, in a 5-4 decision, ruled in favour of the City of New London. The majority opinion in this case argued that the present case involved not a 'one-on-one transfer of property', but rather a series of takings as part of an 'integrated development plan' formulated at the local level and to which the court should pay substantial deference.<sup>242</sup>

What was most interesting about the *Kelo* decision was Justice Sandra Day O'Connor's dissenting opinion.<sup>243</sup> Having written the unanimous opinion for the

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<sup>239</sup> *Kelo v City of New London* 545 US 469 (2005) at 454.

<sup>240</sup> *Kelo v City of New London* 545 US 469 (2005) at 477; see Gray K & Gray SF *Elements of land law* (5<sup>th</sup> ed 2009) at 1390-1391.

<sup>241</sup> *Kelo v City of New London* 545 US 469 (2005) at 485-486.

<sup>242</sup> *Kelo v City of New London* 545 US 469 (2005) at 487.

<sup>243</sup> Justice O'Connor wrote the opinion in *Hawaii* stating that 'the Fifth Amendment of the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." These cases present the question whether the public use clause of that Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the State of Hawaii without just compensation, title in real property from lessors and transferring it to lessees in order to reduce the concentration of ownership of fees simply in the State, we conclude it does not';

Supreme Court in *Berman*, setting out the deferent approach of the court to matters pertaining to the public use requirement, she now objected to the fact that an unelected private non-profit corporation was primarily the beneficiary of the government taking. As a result, the dissenting opinion suggested that the use of this takings power to take from the poor and give to the rich would become the norm, not the exception. She stated that:

'Any property may now be taken for the benefit of another private party, but the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political, including large corporations and development firms.'<sup>244</sup>

She argued further that the decision eliminates any distinction between private and public use of property. Gray<sup>245</sup> also argues that it was wrong for the state to use its force and power in taking property, belonging to one private land owner for the benefit of another private owner where the operation of the open market has failed to generate the required bargain by means of normal negotiations. He further argued very strongly that:

'The *Kelo* case brought together many of the features of the enduring American paradox. It concerns the limits of coercive state power in the land of the free. It exposes the unresolved tension between the sanctity of private property and the power of the mighty dollar. It highlights a confrontation between little people and big business, between individual claims of personal privacy and the collective American dream of wealth and prosperity.'<sup>246</sup>

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see Van der Walt AJ *Constitutional property law* (2005) at 262-263; Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 424-425..

<sup>244</sup> *Kelo v City of New London* 545 US 469 (2005) at 497.

<sup>245</sup> Gray K 'There's no place like home' (2007) 11 *Journal of South Pacific Law* 73-86 at 77.

<sup>246</sup> Gray K 'There's no place like home' (2007) 11 *Journal of South Pacific Law* 73-86 at 77.

### 3.2.3 Evaluation

The *Kelo* decision has given rise to a huge public outcry, extensive academic criticism and reflection on the use of the state's power of eminent domain to promote economic development under circumstances that will benefit private parties. Gray<sup>247</sup> raised three important issues about the *Kelo* decision that reflect on the Supreme Court's deferential approach to expropriation for economic development generally, namely:

(a) The taking in *Kelo* involved something resembling a bill of attainder, which was directed at a specific group of people and at homes, a category of place which he thinks deserves special protection in law.<sup>248</sup>

(b) He contends that the expropriation in *Kelo* resulted in a transfer of a privately held asset to another private party who will exclusively hold it, instead of taking the land in order to provide a public utility, such as roads.<sup>249</sup> The people whose land was expropriated had no guarantee of fair and equal access to the supposedly beneficial development on the land that was taken from them. The private developers will do as they please, meaning they will reserve the right to select at their own discretion, the tenants, occupiers and users of the redeveloped site.<sup>250</sup>

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<sup>247</sup> Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412 at 406.

<sup>248</sup> Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412 at 406.

<sup>249</sup> Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412 at 406.

<sup>250</sup> Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412 at 406.

(c) He argues that in the *Kelo*-type takings, the person whose land has been expropriated 'is treated simply as a means to a desired fiscal end.'<sup>251</sup> This means that the test focuses on the intended end use of the expropriated property and on the question of legitimate means, whether it is appropriate for the state to expropriate the property rather than acquire it through a market transaction.<sup>252</sup>

Gray argued further that people were evicted deliberately just because somebody else wants to make substantial amounts of money.<sup>253</sup> Looking at the *Kelo* decision, Van der Walt submits that:

'Given the public outcry elicited by the decision in *Kelo*, on the basis of the approach of deference followed by the US courts, it could be argued that a great degree of judicial control over the public purposes requirement might be required in South Africa and that the courts should be wary of expropriations that are vaguely justified by the expected public benefit of economic stimulation, especially if the economic development or redevelopment is carried out by private entrepreneurs who are not officially publicly mandated to exercise a public duty or who are subjected to public scrutiny and controls.'<sup>254</sup>

The effect of this decision was, according to Justice O'Connor, clearly to wash out any distinction between private and public use of property and thereby delete the word public use from the Takings Clause of the Fifth Amendment.<sup>255</sup> The people who are likely to be affected most by this decision are the poor whose land is not

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<sup>251</sup> Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412 at 407-408.

<sup>252</sup> Alexander G *The global debate over constitutional property: Lessons for American takings jurisprudence* (2006) at 66.

<sup>253</sup> Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412 at 406.

<sup>254</sup> Van der Walt AJ 'Constitutional property law' (2008) 4 *Juta's Quarterly Review* para 2.1.

<sup>255</sup> *Kelo v City of New London* 545 US 469 (2005) at 497; see also Gray K & Gray SF *Elements of land law* (5<sup>th</sup> ed 2009) at 1391.

profitable.<sup>256</sup> The *Kelo* decision embodies a fundamental conflict between property rights and the application of eminent domain.

Goodin, in evaluating *Kelo*, argued that 'just because the blight designations may have discriminated against or disparately impacted low income or minority neighbourhoods in the past does not necessarily mean that they will have the same impact under post-*Kelo* legislation.'<sup>257</sup> She is of the view that the tarnished history of redevelopment to cure blight should give policymakers pause when electing the use of eminent domain for development of blighted areas.<sup>258</sup> Goodin's comment about this decision is worth noting:

'*Kelo* has prompted many states to experiment with their eminent domain laws, and in many ways this experimentation is a good thing. Hopefully, over time, states will arrive at rules that are well-tailored to their local preferences and circumstances. Returning to the stretched and troubled rhetoric of blight, however, is one choice that states should avoid.'<sup>259</sup>

The *Kelo* decision, according to Schultz, did not sound the demise of the public use provision; instead it suggested a new test for distinguishing valid uses from private takings.<sup>260</sup> Epstein, after his evaluation and analysis of the *Kelo* decision, submits that some level of scrutiny is appropriate to all government land use decisions. He

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<sup>256</sup> Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412 at 401.

<sup>257</sup> Goodin AW 'Rejecting the return to blight in post-*Kelo* state legislation' (2007) 82 *NYULR* 177-208 at 200.

<sup>258</sup> Goodin AW 'Rejecting the return to blight in post-*Kelo* state legislation' (2007) 82 *NYULR* 177-208 at 201.

<sup>259</sup> Goodin AW 'Rejecting the return to blight in post-*Kelo* state legislation' (2007) 82 *NYULR* 177-208 at 208.

<sup>260</sup> Schultz D 'What's yours can be mine: Are there any private takings after *Kelo v City of New London*?' (2006) 24 *Journal of Environmental Law* 195-234 at 234.

argues that the political processes alone are ill-suited to protect the property rights of ordinary individuals and the peace and prosperity of a nation.<sup>261</sup>

Decisions like *Berman*, *Poletown*, *Midkiff*, and *Kelo* clearly show how the state can be harsh in exercising its expropriation powers. If the courts are overly deferential towards state decisions regarding expropriation for economic development purposes, this could easily encourage unfair and questionable exercises of the power of eminent domain. Decisions of this nature should not be encouraged, as the government can easily abuse its powers of expropriation and must be closely guarded to prevent this abuse of eminent domain. Having looked at the court decisions above, it is clear that the public use requirement is not restricting the state or government in the US when exercising the power of eminent domain. Private development interests seem to be promoted at the cost of individual small property interests and, particularly, the home interest was never given the special protection it arguably deserves.<sup>262</sup>

In the wake of the *Kelo* decision, there have been several initiatives to prevent further exercises of the expropriation power for what is seen as purely private benefit, especially in cases where private land is taken for economic development where the current state of the land does not pose a real threat for public health or safety. In 2006 the former President of the United State of America George W Bush

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<sup>261</sup> Epstein RA 'Public use in a post-*Kelo* world' *John M Olin Law & Economics Working Paper* No 408 (2<sup>nd</sup> Series) (2008) [available in The Chicago Working Paper Series Index: <http://www.law.uchicago.edu/Lawecon/index.html> and the Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1142961> as on 21 June 2009] at 22.

<sup>262</sup> Gray K 'There's no place like home' (2007) 11 *Journal of South Pacific Law* 73-86.

issued an Executive Order prohibiting the taking of private property for purposes that do not serve a public purpose.<sup>263</sup> Section 1 of the order provides that

'it is the policy of the United States to protect the rights of Americans to their private property, including by limiting the taking of private property by Federal Government to situations in which the taking is for public use, with just compensation, and for the purpose of benefiting the general public and not merely for the purpose of advancing the economic interest of private parties to be given ownership or use of the property taken.'<sup>264</sup>

The order shall be implemented consistent with the applicable law and subject to the availability of appropriations. Since the order obviously only applies on the federal level it might, however, have a limited impact on expropriation for development purposes, which usually takes place on the local or state level. However, there has also been some reaction against *Kelo* on the state level. Prior to the *Kelo* decision only a handful of states prohibited the use of eminent domain powers for economic development. By July 2007, 42 states had enacted new legislation in response to the *Kelo* decision, 21 of which now prohibit development takings such as *Kelo*, while the rest have placed less absolute limits on the power to invoke the power of eminent domain for economic development.<sup>265</sup>

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<sup>263</sup> See <http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060623-10.html> [as on 15 June 2009].

<sup>264</sup> See <http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060623-10.html> (as on 15 June 2009).

<sup>265</sup> See Crow S 'Compulsory purchase for economic development: An international perspective' 2007 *Journal of Planning & Environment Law* 1102-1115 1105; Cohen CE 'Eminent domain after *Kelo v City of New London*: An argument for banning economic development takings' (2005-2006) 29 *Harvard Journal of Law and Public Policy* 491-568 at 559-566; Goodin AW 'Rejecting the return to blight in post-Kelo state legislation' (2007) 82 *NYULR* 177-208 at 192-207.

### 3.3 Germany

#### 3.3.1 Introduction

Article 14 of the German Basic Law is important for purposes of comparative analysis, as the drafting of s 25 of the South African Constitution was influenced by the phraseology of this article, especially the expropriation provision in Article 14.3. The property clause was one of the most contentious issues during the drafting of the bill of rights.<sup>266</sup> Article 14.3 of the Basic Law provides that:

‘Expropriation shall only be permissible in the public interest. It may only be ordered by or pursuant to a law which determines the nature and extent of compensation. Compensation shall reflect a fair balance between the public interest and the interest of those affected. In case of dispute regarding the amount of compensation, recourse may be heard to the ordinary courts.’<sup>267</sup>

Article 14.3 sets out the requirements for a valid expropriation. Expropriation has to be authorised by a valid law; must be undertaken only for its intended purposes, which is in the public interest; and the nature and extent of the compensation that needs to be paid has to be determined by the law in question.<sup>268</sup> This article serves as the authority for exercises of the power of expropriation and it limits the state’s power to expropriate by requiring that it must be authorised by law, be for a public purpose and that compensation must be paid for it. The public purpose requirement has been interpreted by the German courts as meaning that expropriation must be the only way in which public need(s) can be reached or satisfied. In terms of the

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<sup>266</sup> M Chaskalson ‘Stumbling towards s 28: Negotiations over the protection of property rights in the Interim Constitution’ (1995) 11 *SAJHR* 222-232.

<sup>267</sup> *Basic Law for the Federal Republic of Germany* (1949); see also Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 121.

<sup>268</sup> Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 147.

proportionality principle, expropriation has to be strictly necessary to satisfy that need by a public or a specific community.<sup>269</sup>

The German courts are very strict in applying the public purpose requirement. In German law, if the state expropriates property and the property expropriated is not used for its intended purpose that expropriation becomes invalid and the property may have to be given back (*Rückenteignung*). Kommers<sup>270</sup> argues that if the requirements in Article 14.3 are not met the basic right to property is violated. The author argues further that 'the owner's duty to tolerate an intrusion against his right to property is limited to the terms established by the Constitution itself and these limits are fixed and permanent and the legislature does not have power to change them.'<sup>271</sup> He also confirms that property cannot be taken without compensation and that compensation has to be compatible with the requirements of Article 14.3; if not, the basic right of property is violated and the expropriation is unconstitutional.

In one interesting decision,<sup>272</sup> a piece of land was expropriated in 1950 for building a road. The road was never built, and the complainant claimed return or so-called 're-expropriation' of the land. The court in consideration of the claim formulated the following principles regarding expropriation: firstly, the expropriation of land is not simply aimed at the acquisition of land, but much more at the actual use of that property for the purpose for which it was expropriated; secondly, the expropriation is only legitimised by its use for the specific public purpose for which it is undertaken; and finally, the individual only has to accept expropriation for that purpose. If the land

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<sup>269</sup> BVerfG, 1 BvR 1367/88 of 18.2.99; see Van der Walt AJ *Constitutional property law* (2005) at 259.

<sup>270</sup> Kommers DP *The constitutional jurisprudence of the Federal Republic of Germany* (1997) at 252.

<sup>271</sup> Kommers DP *The constitutional jurisprudence of the Federal Republic of Germany* (1997) at 252.

<sup>272</sup> BVerfGE 38,175 (*Rückenteignung*) [1974] at 180; see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 148.

is never used for the public purpose in question, the individual can claim that the land should be given back. The court stated that strictly speaking the case was not based on re-expropriation, since only the state has the power to expropriate, but the individual can nevertheless claim the land back if the expropriation was never carried through and if the aim for which it was undertaken is never realised, which in the present case it was not. Public purpose that justifies a particular expropriation has to be established in every individual case with regard to the authorising legislation.<sup>273</sup>

Expropriation for the benefit of a private individual was in some cases held to be unconstitutional by German courts.<sup>274</sup> An example is the *Gondelbahn* decision, which is discussed in the next section below. However, where the property is expropriated for the purpose of promoting the provision of a public utility such as electricity and the provider of the electricity is a private company, the fact that the expropriation also benefits the providing company would not necessarily render the expropriation unconstitutional. The Federal Constitutional Court has held that the expropriation in such a case serves a public purpose even though the electricity provider was a private company.<sup>275</sup> The company was carrying out public duties of the state authority in question, and therefore the problem of expropriation for private benefit did not arise. The test used by the court in justifying its decision was that expropriation in favour of a private person is justified when that person undertakes or carries out a duty for the public benefit, and when it is further clear that the expropriation serves the public benefit.

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<sup>273</sup> BVerfGE 38,175 (*Rückenteignung*) [1974] at 180; see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 148.

<sup>274</sup> BVerfGE 56, 249 (*Dürkheimer Gondelbahn*) [1981]; see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 148-149.

<sup>275</sup> BVerfGE 68, 193 [1984]; see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 126, 153.

Van der Walt argues that '[t]he public purpose that justifies expropriation has to endure beyond the act of expropriation and must have a lasting rather than fleeting or temporary quality to secure the interest of the public in the fulfilment of that purpose.'<sup>276</sup> The approach by the German courts in interpreting the public purpose requirement has been seen as strict rather than narrow, as it permits a strict but somewhat lenient interpretation of this requirement.<sup>277</sup> This approach would invalidate expropriation in cases where private property has been expropriated and given to a private party for economic benefit, but it does not exclude expropriation for the benefit of a private party that provides a public utility on behalf of the state, even though the provider makes money from the service. The courts will apply a high level of scrutiny in assessing each case, looking at whether it is necessary to expropriate for reasons clearly related to a public purpose and whether the authorising legislation indeed authorises such expropriations for that purpose.

### **3.3.2 Public Purpose Requirement**

Apart from the cases already discussed above, the German courts have also had to deal with cases where expropriation was aimed at economic development that would promote private business interests but that also arguably served the public benefit in the sense of promoting economic growth, creation of jobs and so forth. The Federal Constitutional Court has decided two important cases on this point. In the

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<sup>276</sup> Van der Walt AJ *Constitutional property law* (2005) at 256.

<sup>277</sup> Van der Walt AJ *Constitutional property law* (2005) at 253.

*Dürkheimer Gondelbahn*<sup>278</sup> case, a local entrepreneur and the local authority of the city of Dürkheim established a limited company with the purpose of building and managing a cable-car installation from the city to a nearby nature area. The company attempted to either purchase or acquire servitudes over the private properties over which the cable car would have to travel, but was unsuccessful. The local authority prepared a development plan for the city in which the expropriation of the necessary servitudes could be undertaken in terms of legislation pertaining to the building of roads. Their argument was that the cable car would serve the public transport interest by establishing access to the nature area. After a series of negotiations, permission was given for the expropriation of personal servitudes over the relevant properties. Landowners appealed against this decision, arguing that their property rights were affected by an action which was not for a public purpose.

The court placed emphasis on the fact that expropriations are allowed only if they are for a public purpose and based on statutory authority. The court eventually decided that the expropriations were unlawful on a technical question concerning the powers of the local authority and not on the question whether the expropriations were for a public purpose, even though the city council and developers argued that the development would have introduced a generally beneficial addition to the public transport system. In the end the court simply decided that the legislation upon which the expropriation was based, namely the legislation that provided for the installation and maintenance of the public road and transport system, did not authorise the expropriations in question and that they were therefore unlawful. The validity of the public purpose argument was therefore never decided directly.

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<sup>278</sup> BVerfGE 56, 249 (*Dürkheimer Gondelbahn*) [1981]; see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 147-149; Van der Walt AJ *Constitutional property law* (2005) at 257.

However, in a concurring judgement Böhmer J gave a full analysis of the public interest requirement in Art 14.3 of the German Basic law.<sup>279</sup> He wanted to emphasise that the expropriation in the present case was not undertaken for a public purpose but rather to serve the economic interests of a private entrepreneur. He concluded by stating that the public interest requirement means that the expropriation has to be strictly necessary for some public duty that has to be undertaken; adding that not all public actions which might seem to serve the general public interest or from which the public benefits are necessarily for a public purpose as is required by Article 14.3.1.

An important aspect of the decision is that there is a distinction between a narrower and a wider reference to public purpose and public interest in Article 14.3.1, Article 14.2.2 and Article 14.3.3 respectively. The narrow reference in Article 14.3.1 protects the individual interest and it limits the scope of expropriations by requiring that expropriation should be for a public purpose (also translated as in the public interest). The wider reference to the public interest in Article 14.3.3 protects the public interest by providing that compensation for expropriation should reflect a fair balance between the public interest and the interest of those affected by the expropriation.<sup>280</sup> Article 14.2.2 also refers to the public interest, stating that property entails obligations and that its use should also serve the public interest. This distinction is significant for South African law because s 25 also refers to public purpose / public interest in s 25(2) regarding the requirements for a valid expropriation and in s 25(3) regarding the calculation of compensation. In chapter 2

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<sup>279</sup> BVerfGE 56, 249 (*Dürkheimer Gondelbahn*) [1981] 276, 277ff. See Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 147-149; Van der Walt AJ *Constitutional property law* (2005) at 257.

<sup>280</sup> Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 148.

the confusion caused by not distinguishing clearly between these two situations was illustrated with reference to the *Du Toit* case.

In *Boxberg*,<sup>281</sup> two local authorities decided to expropriate land in a certain area in terms of federal planning legislation concerned with land consolidation, in order to enable a motor company (Daimler-Benz) to establish a testing ground. They were of the view that the testing ground would help to improve the poor economic and unemployment situation in the whole region. The owners of the land lodged a complaint based on the infringement of their property rights.

The court held that the public purpose of expropriation was not sufficiently established in the authorising legislation. This decision set out and explained how the requirements for a valid and justifiable expropriation should be as set out in Article 14.3. In this case the court pointed out that the expropriation was not necessarily invalid just because it was carried out in favour of a private third party, even if it carried out a public duty for public benefit and in the public interest. In the present case the court did not find the expected general economic benefit of the testing ground sufficient to justify the expropriation in favour of a private company and the expropriation was invalid for not satisfying the requirements provided in Article 14.3 of the Basic Law.

In another interesting decision the property was expropriated and was let on a long lease to a private school. The argument before the court was that the establishment of a school was an important public purpose that benefited the city directly. This

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<sup>281</sup> *BVerfGE* 74, 264 (*Boxberg*) [1987], where expropriations to facilitate the establishment of a testing ground was found to be unconstitutional even though it might have created jobs and stimulated the economy of the region; see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 149; Van der Walt AJ *Constitutional property law* (2005) at 258-259.

expropriation was said to be for a public purpose even though the school in question was a private school. The court was satisfied that the purpose for the expropriation and control mechanisms were set out clearly in the authorising legislation and that the state had the necessary expropriation power.<sup>282</sup> It must be noted that German law takes the public purpose requirement very seriously and applies it fairly strictly, but there is always room for expropriations serving a public purpose that also happen to benefit private parties.<sup>283</sup> Kleyn is also of the view that expropriation should be allowed in cases where a private party will serve the public interest.<sup>284</sup> He sees public interest as an indefinable idea which can change according to political, social and economic priorities.<sup>285</sup> The proportionality principle should, according to Kleyn, apply in respect of expropriation and the fact that it serves a public purpose or public interest is not adequate to justify its constitutionality.<sup>286</sup> He is of the view that there should be a balancing between the purpose that expropriation serves, and the measures taken in doing so, to avoid an imbalance between the two principles.<sup>287</sup>

The *Naßauskiesung*<sup>288</sup> case is a slightly different decision that deals with legislation that is supposed to determine the content and limits of property, but that has an

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<sup>282</sup> *BVerf*, 1 BvR 1367/88 of 18.2.99; see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 259.

<sup>283</sup> Van der Walt AJ *Constitutional property law* (2005) at 260.

<sup>284</sup> Kleyn DG 'The constitutional protection of property: A comparison of the German and South African approach' (1996) 11 *SA Public Law* at 436.

<sup>285</sup> Kleyn DG 'The constitutional protection of property: A comparison of the German and South African approach' (1996) 11 *SA Public Law* at 436.

<sup>286</sup> Kleyn DG 'The constitutional protection of property: A comparison of the German and South African approach' (1996) 11 *SA Public Law* at 438.

<sup>287</sup> Kleyn DG 'The constitutional protection of property: A comparison of the German and South African approach' (1996) 11 *SA Public Law* at 438.

<sup>288</sup> *BVerfGE* 58, 300 (*Naßauskiesung*) [1981]; see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 142-145.

expropriatory effect. In this case the plaintiff used land which belonged to him for a gravel pit, and extracted the gravel below the groundwater level (*Naßauskiesung*), in that way creating a man-made lake in the gravel pit. He applied for permission to continue the excavation but it was denied, as was his claim for compensation. The Federal Court of Justice in Civil Matters referred the case to the Federal Constitutional Court for decision of the question whether the water law<sup>289</sup> in question was constitutional. The question before the court was whether the water law, which was clearly meant to establish the content and limits of property rights, was perhaps unconstitutional, and that it went too far in restricting the landowner's right regarding the use of groundwater. The property clause allows for regulation of property that determines the limits and content of property as stated in Article 14.1.2 and expropriations in terms of Article 14.3.2 of the Basic Law. In the present case the court held that expropriation is a limited category and it has its own requirements, as stated in Article 14.3, which are needed in order to make it an expropriation. The court also held that if these requirements are not met it will not amount to an expropriation and there is no need for compensation. The court was very clear to state that compensation can only be paid when the requirements as provided by Article 14.3 are met.<sup>290</sup> They came to the ruling that, in cases where a regulation like in the present case has an expropriatory effect, that law needs to be challenged rather than claiming expropriation.

It will not be within the scope of Article 14.3 for the Federal Court of Justice to grant compensation in such cases. The Federal Constitutional Court, having looked at all

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<sup>289</sup> Federal Water Resources Act.

<sup>290</sup> *BVerfGE* 58,300 [1981] (*Naßauskiesung*) at 335; see also *BVerfGE* 100, 226 [1999] (*Denkmalschutz*); see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 142-145.

the arguments, held that the restriction amounted to a regulation and not an expropriation. Accordingly, the public purpose requirement that applies to expropriation does not come into the picture in these cases. Kominers is of the view that, 'with respect to gravel pit operations, the transitional provision of the current statute is therefore reasonable since it considers sufficiently the interests of the affected party. This applies to the effects, if any, it had on his business ... [This case] brings together many of the standards and principles governing the constitutional court's construction of the content and limits clause of Article 14.'<sup>291</sup>

### 3.4 Australia

The Australian Commonwealth Constitution<sup>292</sup> does not contain a Bill of Rights and what is generally treated as the property clause in it is not a property guarantee like others. Section 51(xxxi) is a provision regarding federal state power and the relationship between the federal and the state levels of government, but it is treated as something similar to a property clause in case law.<sup>293</sup>

The Commonwealth Constitution of 1900 provides:

'51. The parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to:

[...]

(xxx) The acquisition of property on just terms from any State or person for any Purpose in respect of which the Parliament has the power to make laws;'

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<sup>291</sup> Kominers DP *The constitutional jurisprudence of the Federal Republic of Germany* (1997) at 262.

<sup>292</sup> Commonwealth of Australia Constitution Act of 1900 (UK).

<sup>293</sup> Van der Walt AJ *Constitutional property law* (2005) at 249.

What looks like a public purpose requirement in the Australian context therefore actually refers to those purposes for which the federal government has the power to create or make laws.<sup>294</sup> Based on this observation, Van der Walt explains why cases that seem to deal with the public purposes requirement are in fact not relevant. One group of Australian cases seems to establish that compulsory acquisitions are valid even if the property was expropriated and transferred to another private person, but in fact these decisions are concerned with the focus on federal and state powers in s 51.

In *Bank of New South Wales v The Commonwealth*<sup>295</sup> the plaintiff challenged the validity of the Banking Act on the grounds that it did not fall within the powers of parliament under section 51 of the Commonwealth Constitution of 1900. In this case, s 51(xxxi) was said to serve a double purpose, namely firstly to provide the federal government with the power to acquire property compulsorily and secondly to provide the individual with protection against state interferences with private property by serving as a condition upon the exercise of power. The court held that the provisions of the Banking Act were in conflict with the constitutional guarantee because it amounted to a scheme for the compulsory acquisition of property. The Australian court confirmed the compulsory acquisition for a purpose in respect of which the federal government is empowered to make laws in terms of this section.<sup>296</sup> With reference to this decision Van der Walt contends that the question whether a law effected an acquisition for purposes of s 51(xxxi) when the property was not actually

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<sup>294</sup> Section 51(xxxi) of the Commonwealth of Australian Constitution Act of 1900; see Van der Walt AJ *Constitutional property law* (2005) at 249 for discussion and analysis.

<sup>295</sup> *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1.

<sup>296</sup> *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1 at 300-301.

acquired by the federal government was just one more indication that the Australian courts are uneasy about the exact meaning and scope of compulsory acquisitions.<sup>297</sup>

*PJ Maggenis v The Commonwealth of Australia* is another illustration of why cases seemingly dealing with public purpose are not in fact important for our purposes.<sup>298</sup>

In this case it was said that an acquisition in terms of s 51(xxxi) is involved even if the property was acquired by the state itself or by another organ of state or even by another person. The identity of the acquirer was irrelevant, and the acquisition would be subject to the just terms requirement in s 51(xxxi) as long as it was done in accordance with the law of the Commonwealth concerned with the acquisition of property. The decision in fact deals with the question of state actions that are properly authorised by s 51(xxxi) and not with the public purpose requirement as that issue is understood in other jurisdictions with a standard type property guarantee.

*Clunies-Ross v The Commonwealth of Australia and Others*<sup>299</sup> does in fact deal with the public purpose requirement, but sounds a somewhat awkward note on the issue of expropriations for the benefit of a third private party. The islands were taken over by the British Crown during colonisation and given to the Clunies-Ross family. These islands were part of Singapore until they became part of Australia. The whole land was transferred to the Commonwealth of Australia, excluding land belonging to the Clunies-Ross family and surrounding land. The Commonwealth of Australia in 1983 sought to acquire all the remaining land of the Clunies-Ross family under the Land Act of 1955. The Act provides for the Commonwealth's power to acquire land for a public purpose, bringing the public purpose in through the statutory door (seeing that

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<sup>297</sup> Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 50.

<sup>298</sup> [1949] 80 CLR 382 423.

<sup>299</sup> *Clunies-Ross v The Commonwealth of Australia and Others* (1984) 155 CLR 193.

it is not really required in the Constitution, as was explained earlier). The Clunies-Ross family challenged the acquisition proceedings on the ground that the purpose was to exclude the family from the islands to prevent them from voting, and from influencing the voting of other islanders. The majority of the High Court of Australia held that:

'if the power to acquire for a public purpose which the Act confers is construed as extending to purposes quite unconnected with any need for or future use of the land, the ministerial power thereby created would be surprisingly wide in that, subject only to monetary compensation, it would encompass the subjection of the citizen to the compulsory deprivation of his land, including his home, by executive fiat to achieve or advance any ulterior purpose which was a purpose in respect of which Parliament has power to make laws ....it is, in our view, unlikely that the parliament would have intended to confer such a power other than by the use of clear words to that effect and subject to stringent and specially framed controls of safeguards against its abuse. Neither is to be found in the Act. As has been said, the language used is, prima facie, more appropriate to refer to a conventional power to acquire land because it is needed rather than to confer such an extraordinary power on the Executive.'<sup>300</sup>

Van der Walt<sup>301</sup> argued that this narrow approach by the court excluded expropriations that are meant to obtain land for other public purposes, irrespective of their social or political merits. The author argued that this was inconsistent with the wider view that was taken in jurisdictions where compulsory acquisitions for purposes of land redistribution have been said to comply with the public purpose requirement.<sup>302</sup>

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<sup>300</sup> *Clunies-Ross v The Commonwealth of Australia and Others* (1984) 155 CLR 193 at 199-200; See also Taggart M 'Expropriation, public purpose and the Constitution' in C Forsyth & I Hare (eds) *The golden metwand and the crooked cord: Essays on public law in honour of Sir William Wade QC* (1998) 91-112 at 111.

<sup>301</sup> Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 57.

<sup>302</sup> Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 57.

However, there are a few Australian cases that do concern the interpretation of the public purpose requirement in expropriation legislation, and these decisions are indeed relevant for our purposes. In *Campbell v Municipal Council of Sydney*<sup>303</sup> the Municipal Council of Sydney attempted to take land for other reasons. The court held that a body such as the Municipal Council of Sydney, which is authorised to take land compulsorily for specified purposes, will not be permitted to exercise its powers for different purposes and, if it attempts to do so, the courts will intervene. In *The Council of the Shire of Werribee v Kerr*<sup>304</sup> the Council authorised an oil company to place a pipeline along land that was thought to be an existing roadway. The Council had years ago sold the roadway to the adjoining owner (Kerr) who, after being asked whether the pipelines could be laid on his land, refused. The Council therefore agreed to the oil's company proposal that it (the Council) should compulsorily acquire the land, supposedly for the purposes of a public highway.

Huggins J held that the purpose of the Council was not to promote an invasion for the sake of a real highway for the benefit of the public, but to get a road marked on paper so that the owner of the land should not be able to enforce his rights against the trespassing company.<sup>305</sup> Huggins J was very clear that the Municipal Council was not empowered by the legislature to interfere with private title of one party for the benefit of another.

In *Prentice v Brisbane City Council*<sup>306</sup> a private land developer wanted to develop land on the far side of a river, but in order to do so it was necessary to build a bridge over the river and to acquire road access to that bridge. The Council and the

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<sup>303</sup> *Campbell v Municipal Council of Sydney* (1925) AC 338 at 343.

<sup>304</sup> *The Council of the Shire of Werribee v Kerr* (1928-1929) 42 CLR 1.

<sup>305</sup> *The Council of the Shire of Werribee v Kerr* (1928-1929) 42 CLR 1 at 33.

<sup>306</sup> *Prentice v Brisbane City Council* (1966) Qd R 394 (SC).

developer agreed that the Council would exercise its statutory power to acquire privately owned land for the roadway in return for the developer meeting all the Council's costs in acquiring the land, building the road and agreeing to build a bridge. In trying to fulfil its contractual obligations, the Council decided to acquire the plaintiff's land to provide road access to the proposed bridge. The plaintiff was successful in its application for an order to prevent acquisition. The Council had the statutory power to take any land within the city for the good government and well-being of the citizens.<sup>307</sup> However, Mansfield CJ held that the Council had no power to compulsorily acquire privately owned lands other than for public purposes and that acquisition of this land, pursuant to an agreement to assist in the carrying out of a profit making private development project, was not for a valid public purpose.<sup>308</sup>

In *Griffith's v Minister for Lands, Planning and Environment*<sup>309</sup> an appeal was lodged in the High Court against a decision of the Northern Territory Court of Appeal. A number of notices were served to compulsorily acquire the native title rights and interests over vacant Crown land in the territory. The Minister, using his powers under the Lands Acquisition Act 1989, proposed compulsory acquisition of the native title rights and interests over vacant Crown land in terms of s 43(1)(b).<sup>310</sup> This was done to enable the Minister to sell the land for commercial or private use. After the notices were served, two claimants filed applications on behalf of the two groups

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<sup>307</sup> *Prentice v Brisbane City Council* (1966) Qd R 394 (SC) at 404-405.

<sup>308</sup> *Prentice v Brisbane City Council* (1966) Qd R 394 (SC) at 408-409; compare with *BVerfGE* 56, 249 (*Dürkheimer Gondelbahn*) [1981].

<sup>309</sup> *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20.

<sup>310</sup> This section provides that, subject to this Act, the Minister may acquire land under this Act for any purpose whatsoever if pre-acquisition procedures in Parts IV and IVA as applicable have been complied with, by compulsory acquisition by causing a notice declaring the land to be acquired to be published in the Gazette.

(Ngaliwurru and Nungali) of people in response to the notices. Both claimants in this case were registered on the Register of Native Title Claims. The claimants argued that the phrase 'for any purpose whatsoever' in this section of the Land Acquisition Act did not grant the Minister the power to acquire land from one person in order to sell it to another person for private use. The court held that the acquisitions were not valid exercises of the power given in s 43(1) of the Land Acquisition Act.<sup>311</sup> The High Court allowed the appeal and set aside the orders of the Court of Appeal of the Supreme Court of the Northern Territory.<sup>312</sup>

Section 51(xxxi) of the Australian Commonwealth Constitution does not focus on individual rights but on the division of powers between the states and the Commonwealth; this makes the reference to public purpose in the section different from other jurisdictions like Germany, the United States of America and South Africa, where the power of expropriation is restricted by the public purpose requirement in the respective constitutional property clauses. Compulsory acquisitions are not like in other jurisdictions constitutionally entrenched but legislation-driven. Section 51(xxxi) provides for compulsory acquisition of property even where that property is acquired by another person other than the Commonwealth, provided the power is granted and exercised under the respective heading of s 51.

### **3.5 European Convention on Human Rights and Fundamental Freedoms 1950**

The inclusion of this section on the European Convention on Human Rights and Fundamental Freedoms is justified by the fact that it is often cited in South African

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<sup>311</sup> [2008] HCA 20 para 185.

<sup>312</sup> [2008] HCA 20 para 186.

constitutional cases. South Africa is not a member State of the European Convention and therefore the Convention and case law on it is not binding international law as far as South African courts are concerned, but the law on this Convention is still obviously regarded as a kind of foreign law with special significance. Article 1 of the First Protocol to the European Convention provides that 'no one shall be deprived of his possessions'<sup>313</sup> except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'<sup>314</sup> The law referred to could either be legislation or some form of a legal rule that authorises expropriation. The European Court of Human Rights will, in applying the property clause in Art 1, check whether the right of property has been interfered with as provided in Art 1, whether that interference was provided for by law, whether that interference was in the public interest and, finally, whether the interference with a right to property was proportional.<sup>315</sup>

In the case law under the Convention, the idea of public interest is quite wide and decisions to expropriate property will be subjected to consideration that includes social, political and economic issues. Case law under the European Convention of Human Rights leaves a wide margin of appreciation to the national legislatures who implement the social and political policies and respects the legislature's judgement

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<sup>313</sup> It is important to note that when the term 'deprivation' is used in Rule 2 of Art of the First Protocol, it refers to expropriation in South African terms: see Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 99.

<sup>314</sup> Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms (1950).

<sup>315</sup> Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 113.

as to what is in the public interest, unless that judgement is manifestly without reasonable foundation.<sup>316</sup>

In terms of the case law under the Convention expropriation for land reform purposes and land redistribution can be said to be justifiable and in the public interest. Expropriation of this nature is possible, as long as the guarantee provided in Art 1 of the First Protocol is not violated. This position was confirmed by the European Court of Human Rights in *James v United Kingdom*.<sup>317</sup> This case dealt with an expropriation of land which was part of the land reform programme introduced by the Leasehold Reform Act of 1967. This Act provides occupying tenants of houses let on long leases in England and Wales with the right to acquire the freehold of the house, or an extended lease, on certain terms and conditions.<sup>318</sup> It was alleged that the expropriation was illegitimate, as the expropriated property was to be transferred to another private individual. The court held that depriving a person of his property (expropriation) for the benefit of another private party can generally not be in the public interest. However, the European Court of Human Rights added that compulsory transfers of property from one person to another person may, depending on the circumstances of each case, constitute a legitimate means of promoting the public interest. In coming to this conclusion the court had to investigate whether the reforms in question were aimed at a legitimate public purpose. This was done by looking at the historical and social circumstances surrounding the case.

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<sup>316</sup> Van der Walt AJ *Constitutional property law* (2005) at 266.

<sup>317</sup> *James v United Kingdom* [1986] 8 EHRR 123; see also Van der Walt AJ *Constitutional property law* (2005) at 266-267.

<sup>318</sup> Section 1(1)(a) of the Leasehold Reform Act of 1967.

### 3.6 United Kingdom

English law with regard to the public purpose requirement is different from the other jurisdictions discussed above because of the principle of parliamentary sovereignty: the debate about the legitimacy of the purpose of any expropriation takes place in Parliament when the law is made and not in court.<sup>319</sup> The legislature indicates the purposes for which property may be taken and the function of the courts is to ensure that those powers of compulsory acquisition are not exceeded or used for improper purposes, without questioning the legislative or executive decision to expropriate.<sup>320</sup> The authority to acquire land is obtained from the British Parliament, either directly in a Public General Act or in a Private Act.<sup>321</sup> In ensuring that expropriations would not be unlawful, extra-parliamentary controls are exercised through administrative review or interpretation of the authorising legislation, but not by constitutional review. Furthermore, although the European Convention on Human Rights 1950 is now incorporated into English law through the Human Rights Act 1998, constitutional review of expropriation on the basis of judicial control over the public purpose requirement is limited because of the absence of a written constitution and, consequently, a constitutionally entrenched public purpose requirement. In so far as compulsory acquisition is restricted by the public purpose requirement, both the power to expropriate and the public purpose requirement are contained in legislation.

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<sup>319</sup> Allen T *The right to property in Commonwealth constitutions* (2000) at 201.

<sup>320</sup> Allen T *The right to property in Commonwealth constitutions* (2000) at 201; Van der Walt AJ *Constitutional property law* (2005) at 267; see also Taggart M 'Expropriation, public purpose and the Constitution' in C Forsyth & I Hare (eds) *The golden metwand and the crooked cord: Essays on public law in honour of Sir William Wade QC* (1998) 91-112 at 101-103.

<sup>321</sup> Taggart M 'Expropriation, public purpose and the Constitution' in C Forsyth & I Hare (eds) *The golden metwand and the crooked cord: Essays on public law in honour of Sir William Wade QC* (1998) 91-112 at 102.

As appears from the following overview of case law, the public purpose requirement has nevertheless played a role in cases concerning expropriation of land for economic development.

In *Ainsdale Investments Ltd v First Secretary of State*<sup>322</sup> the Westminster City Council exercised a statutory power of compulsory acquisition on the ground that the condemned property, a building in Soho worth 1 million pounds, was not making a proper contribution to the housing stock of the City of Westminster. The property was, in fact, being used for purposes of prostitution and the local authority made it clear that it intended to terminate what it called 'a waste of potential housing accommodation'. The High Court rejected a number of challenges raised by the corporate freehold owner on its own behalf and on behalf of the other users of the building. The court ruled that there had been no violation of the European Convention. The court noted the fact that the freehold owner would receive 'full compensation for the loss of the property'. Owen J agreed that the compulsory purchase order was 'necessary in the wider public interest' and that 'a fair balance has been struck between the need to protect the fundamental rights of the owners and alleged occupiers and the public interest.'<sup>323</sup>

In *Smith v The Secretary of State for Trade and Industry*,<sup>324</sup> three Romany Gypsies and Irish Travellers challenged and objected against the approval of a compulsory purchase order for land that they occupied. The land was needed for the redevelopment in preparation for the 2012 Olympic and Paralympics Games. The

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<sup>322</sup> [2004] HLR 956; see Gray K 'Human property rights: The politics of expropriation' (2005) 16 *Stell LR* 398-412 at 407- 408; see also Gray K & Gray SF *Elements of land law* (5<sup>th</sup> ed 2009) at 1391.

<sup>323</sup> [2004] HLR 956 at 40-41. See also Gray K & Gray SF *Elements of land law* (5<sup>th</sup> ed 2009) at 1390-1391.

<sup>324</sup> *Smith & Others v The Secretary of States for Trade and Industry* [2007] EWHC 1013 (Admin).

Inspector who was appointed to hold a local public enquiry, heard objections on behalf of those persons who occupied plots in the area in question. The residents contended that no compulsory order should be made until alternative sites had been provided. The Inspector in his report recommended that the order should not be confirmed until the Secretary of State is satisfied that suitable relocation sites will be available in order to meet the reasonable needs of the Gypsies.<sup>325</sup> The defendant, after reading the Inspector's report, decided that the order should be confirmed.<sup>326</sup> The claimants in 2007 started the legal proceedings and they wanted an order from the court to quash the decision of the defendant to confirm the compulsory purchase. They brought the proceedings under s 23 of the Acquisition of Land Act 1981.<sup>327</sup> During the proceedings the parties have agreed that the decision under challenge is a decision to confirm the order. Justice Williams, in looking at the first ground, held that the defendant acted unlawfully in confirming the compulsory purchase order since the decision to confirm constituted unlawful interference with the claimants' right under Article 8 of the European Convention on Human Rights.<sup>328</sup> The defendant and the London Development Agency did not assert that confirmation of the order does not interfere with the claimants' rights to respect for their private and family life and their home.<sup>329</sup>

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<sup>325</sup> [2007] EWHC 1013 (Admin) para 8.

<sup>326</sup> [2007] EWHC 1013 (Admin) para 9.

<sup>327</sup> Section (1) of the Act provides that if any person aggrieved by a compulsory purchase desires to question the validity thereof, or of any provision contained therein, on the ground that the authorisation of the compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in s (1) of this Act, he may make an application to the High Court.

<sup>328</sup> [2007] EWHC 1013 (Admin) para 27.

<sup>329</sup> [2007] EWHC 1013 (Admin) para 28.

Justice Williams, after making reference to previous cases, came to the following conclusion. On the first ground, he found that a defendant had established that his decision to confirm the order in December 2006 was proportionate and that the interference with the Claimants' rights under Art 8 was justified.<sup>330</sup> The second ground was the interference with the claimants' rights under Art 8 and the court held that the defendant in this case has considered and understood the effect of his decision upon claimants. The court, having looked at all the grounds raised by the claimants, came to the conclusion that the defendant's decision to confirm the compulsory purchase order was justified and the claim failed.<sup>331</sup> Hickman<sup>332</sup> disagrees with the court's decision in the *Smith* case, stating that Williams J avoided the result the plaintiffs asked for by defining the objective of the purchase very narrowly. The author contends that the decision was side-stepped to rob the proportionality test of its function as a means for ensuring that there is a fair balance between individual rights and the desires of the general community, at least in many cases.<sup>333</sup> He is of the view that it is doubtful whether it is often possible accurately to distil the objectives of a measure accompanied by an explicit statement of its aims.<sup>334</sup> The author gives suggestions as to how the structure of proportionality should be clarified in domestic law.<sup>335</sup>

*Sole v Secretary of State for Trade and Industry and Others*<sup>336</sup> also dealt with an application for a compulsory acquisition order under s 23 of the Acquisition of Land

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<sup>330</sup> [2007] EWHC 1013 (Admin) para 50

<sup>331</sup> [2007] EWHC 1013 (Admin) para 67.

<sup>332</sup> Hickman T 'The substance and structure of proportionality' 2008 *Public Law* 694-716 at 705.

<sup>333</sup> Hickman T 'The substance and structure of proportionality' 2008 *Public Law* 694-716 at 706.

<sup>334</sup> Hickman T 'The substance and structure of proportionality' 2008 *Public Law* 694-716 at 705.

<sup>335</sup> Hickman T 'The substance and structure of proportionality' 2008 *Public Law* 694-716 at 714.

<sup>336</sup> *Sole v Secretary of State for Trade and Industry and Others* [2007] EWHC 1527.

Act of 1981. The London Development Authority wanted to use the compulsory order to achieve the comprehensive regeneration of the Lower Lea Valley by enabling development for the London Olympics 2012. The challenge was related to the area where the claimant, Mr Sole, lived. The Secretary of State for Trade and Industry confirmed the compulsory purchase order for the purposes of development for the London Olympics 2012. Planning permissions were granted by the four Boroughs for those parts of the proposed developments within their boundaries. A draft relocation strategy was submitted to accommodate the residents that would be evicted as a result of the acquisition, but it was never approved. The residents claimed that the CPO should not be confirmed as a result of the London Development Agency's failure to provide an effective relocation strategy,<sup>337</sup> relying on the claimant's Article 8 rights.<sup>338</sup> The court dismissed the claim, holding that there was no need to make the CPO conditional on a final relocation strategy.<sup>339</sup>

In *Alliance Spring Co Ltd v First Secretary of State*<sup>340</sup> similar principles were applied. This case dealt with the expropriation of local businesses and homes in order to make way for a new stadium for Arsenal Football Club. In order to get the necessary permission, it was necessary to establish that whatever scheme was proposed would result in an overall benefit for the area in planning terms. The granting of planning permission was challenged by an application for judicial review.<sup>341</sup> After an attempt to persuade the Court of Appeal to grant permission failed, a compulsory purchase

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<sup>337</sup> [2007] EWHC 1527 para 12.

<sup>338</sup> [2007] EWHC 1527 para 21.

<sup>339</sup> [2007] EWHC 1527 para 26.

<sup>340</sup> *Alliance Spring Co Ltd v First Secretary of State* [2005] EWHC 18.

<sup>341</sup> [2005] EWHC 18 paras 4, 6.

order was made in June 2002.<sup>342</sup> The Inspector recommended that the order should not be confirmed, but the secretary of state did not agree.<sup>343</sup> Five claimants who owned businesses in Queensland Road relied on s 23 of the Acquisition of Land Act of 1981<sup>344</sup> in their argument that they will suffer an interference with their rights under Article 1 of the First Protocol to the European Convention on Human Rights.<sup>345</sup> The court dismissed the claim and decided that compulsory purchase powers are granted in the public interest and so, provided they are exercised in accordance with the law and in a proportionate fashion, will not constitute a breach of the Article.<sup>346</sup> The court held that:

‘the council was entitled to make use of the AFC’s desire to have a new stadium to produce and promote a scheme which it regarded as a comprehensive redevelopment of the area in the public interest.’<sup>347</sup>

The secretary of state was entitled in his judgement to conclude that the main purpose, and certainly the main effect, of the compulsory acquisition was to achieve a comprehensive and desirable redevelopment of a deprived area.<sup>348</sup>

Justice Collins further held that:

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<sup>342</sup> [2005] EWHC 18 para 5.

<sup>343</sup> [2005] EWHC 18 para 7.

<sup>344</sup> The Act provides that ‘if any person aggrieved by a compulsory purchase order desires to question the validity thereof, or if any provision contained therein on the ground that the authorisation of a compulsory purchase thereby granted is not empowered to be granted under this Act or any such enactment as is mentioned in s (1) of this Act [which includes the 1990 Act], he may make an application to the High Court.’

<sup>345</sup> Article 1 of the First Protocol provides that; ‘every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.’

<sup>346</sup> [2005] EWHC 18 para 9.

<sup>347</sup> [2005] EWHC 18 para 20.

<sup>348</sup> [2005] EWHC 18 para 20.

'the Secretary of State was entitled to form his own judgement and this he did. He had to regard all relevant factors. The fact that the scheme was led by and to a large extent dependent of a private developer is no reason why it should be rejected.'<sup>349</sup>

The claim was eventually dismissed base on the reasons given by the court.

### 3.7 Conclusion

This chapter has discussed how each of the jurisdictions discussed above interpret and apply the public purpose requirement in their respective property clauses or, in the absence of a constitutional property clause, in their expropriation legislation. Different approaches from different jurisdictions can help South Africa not to repeat the same mistake that the US Supreme court made as reflected in cases discussed in 3.2.2. It is also important to take note of what Van der Walt says, namely that South African courts should be wary of expropriations that are vaguely justified by the expected public benefit of economic stimulation, especially if the economic development is carried out by private beneficiaries who are not officially publicly mandated or subjected to public scrutiny and controls.<sup>350</sup> At the same time, as was argued in chapter 2, a too narrow interpretation of the public purpose/public interest requirement could frustrate expropriation for the sake of land reform, which is clearly something that should be possible in the South African situation. The point therefore seems to be to find an interpretation of the requirement that would give effect to the requirement as it is stated in s 25(2) of the South African Constitution, read with s 25(4), that will simultaneously prevent abuses of the power to expropriate and also

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<sup>349</sup> [2005] EWHC 18 para 23.

<sup>350</sup> Van der Walt AJ 'Constitutional property law' (2008) 4 *JQR* para 2.1.

allow the state to expropriate property for purposes that would serve a genuine and serious public necessity even though a private person might incidentally benefit from it.

The US courts have applied the public use requirement very leniently, even in cases where private properties were taken or expropriated for the private benefit of other private persons or for purposes of economic redevelopment or stimulation. The taking of private property for transfer to another private owner is said to be permissible where such use is primarily for the benefit of the public and the private benefit is conferred only as an incidental benefit on the subsequent private owner.<sup>351</sup>

Rubinfeld argues that the takings clause was never intended to prevent transfers from A to B, that being the area of the due process clause and natural law constraints.<sup>352</sup> Many of the American courts have drawn a distinction between public use and public purpose or public interest and it was held in *Poletown*<sup>353</sup> that, while urban redevelopment would not necessarily constitute a public use, it could under certain circumstances conceivable constitute a public purpose or public interest. It is important for the courts to take into account the history and circumstances of a particular area when determining whether the use of eminent domain under those instances would constitute a public use or public purpose. In *Berman* the Supreme Court unanimously upheld the constitutionality of the District of Columbia's use of eminent domain, pursuant to statutory authorisation for the purpose of acquiring commercial property. The development of the definition of public use resulted to court's comments that 'the concept of public welfare is broad and inclusive ... [and]

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<sup>351</sup> *Poletown v City of Detroit* 304 NW2d 455 (Mich 1981) at 458.

<sup>352</sup> Rubinfeld J 'Usings' (1993) 102 *Yale LJ* 1099-1124 at 1077.

<sup>353</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 213.

the power of eminent domain is merely the means to an end.<sup>354</sup> The means used to exercise eminent domain could include incidentally benefiting a private enterprise or the authorisation to take private property for resale to other private parties. In *Hawaii*, on the other hand, the Supreme Court broadened the public use definition even more. The issue was around the constitutionality of a Land Reform Act enacted by the Hawaii Legislature, where the housing authority ordered the lessors to submit to the compulsory arbitration as required by the Act. When they challenged the matter in the federal court, the taking was found to be in line with the Fifth Amendment's public use requirement. *Hawaii* followed the decision in *Berman*, which was later relied on in making the decision in *Kelo*. This chapter has discussed how academic commentators have viewed these most talked about American decisions.

David Feehan<sup>355</sup> argues against what he regards as the abuse of eminent domain for the benefit of other private users, especially in cases where the condition of property is not dilapidated, like Sussette Kelo's house, which was still in good condition. Eisenberg's suggestion that 'the public use/public purpose requirement must almost by definition take into account the prevailing circumstances of a particular era' is worth noting.<sup>356</sup> The author further argues that the courts must apply a less literal and more logical interpretation of the public purpose requirement.<sup>357</sup> Allen is of the view that the public purpose requirement had very little impact on legislative

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<sup>354</sup> *Berman v Parker* 348 US 26 (1954) at 33; see also Schultz D 'What's yours can be mine: Are there any private takings after *Kelo v City of New London*?' (2006) 24 *Journal of Environmental Law* 195-234 at 209.

<sup>355</sup> Feehan DM 'Public purpose - What does it really mean?' *Downtown Idea Exchange* 53(2) (January 15, 2006).

<sup>356</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 216.

<sup>357</sup> Eisenberg A 'Public purpose and expropriation: Some comparative insights and the South African Bill of Rights' (1995) 11 *SAJHR* 207-221 at 216.

programmes for the redistribution of property.<sup>358</sup> Epstein<sup>359</sup> criticised the earlier Supreme Court decisions (*Berman*, *Midkiff*) which were used in defence of the *Kelo* decision. He argued that there is little doubt that the *Kelo* decision was consistent with the broad language that was adopted in *Berman* and *Midkiff*. He contends that 'in both of these unfortunate unanimous decisions, the Supreme Court said what it meant and meant what it said', despite justice O'Connor's later protestations to the contrary, ironically about her ill-conceived decision in *Midkiff*.<sup>360</sup> In his view, neither *Berman* nor *Midkiff* was relevant to *Kelo*. None of the earlier Supreme Court decisions involved the dislocation of ordinary people in possession of their homes for economic development by other private parties. Epstein argued further that *Kelo* could have been disposed of on narrow grounds if the Supreme Court found that the takings proposed by the New London authorities were premature.<sup>361</sup> This was because no one in New London had yet figured out what to do with the land which, for the record, remained vacant and unproductive nearly three years after the Supreme Court's decision.<sup>362</sup> The author is of the view 'that no matter how widely the

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<sup>358</sup> Allen T *The right to property in Commonwealth constitutions* (2000) at 211.

<sup>359</sup> Epstein RA 'Public use in a post-*Kelo* world' *John M Olin Law & Economics Working Paper* No 408 (2nd Series) (2008) [available in The Chicago Working Paper Series Index: <http://www.law.uchicago.edu/Lawecon/index.html> and the Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1142961> as on 21 June 2009] at 14-15.

<sup>360</sup> Epstein RA 'Public use in a post-*Kelo* world' *John M Olin Law & Economics Working Paper* No 408 (2nd Series) (2008) [available in The Chicago Working Paper Series Index: <http://www.law.uchicago.edu/Lawecon/index.html> and the Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1142961> as on 21 June 2009] at 15; see also *Kelo v City of New London* 545 US 469 (2005) at 500.

<sup>361</sup> Epstein RA 'Public use in a post-*Kelo* world' *John M Olin Law & Economics Working Paper* No 408 (2nd Series) (2008) [available in The Chicago Working Paper Series Index: <http://www.law.uchicago.edu/Lawecon/index.html> and the Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1142961> as on 21 June 2009] at 16.

<sup>362</sup> Epstein RA 'Public use in a post-*Kelo* world' *John M Olin Law & Economics Working Paper* No 408 (2nd Series) (2008) [available in The Chicago Working Paper Series Index:

net is cast for nonmonetizable communal benefits, the *Kelo* condemnations generated no net social benefits, either for the City of New London or anyone else.<sup>363</sup> Gray, on the other hand, commented that ‘there is a deep immorality in exploiting the private assets of others as a vehicle to a capital accumulation in which those others have absolutely no equity share, an immorality which was merely intensified by the fact that the enabling transaction is a forced confiscation of a cherished domestic residence.’<sup>364</sup> Cohen is also among the American academic commentators who saw the *Kelo* decision as a mistake, and he proposed a complete ban of takings in cases of economic development,<sup>365</sup> even if it means that the Constitution must be amended. He contends that ‘it is desirable to provide a mechanism for making exceptions for those rare cases where it might be desirable to use the power of eminent domain for beneficial and benign projects that would likely be owned by a non-government entity, such as museums, zoos, stadiums, arenas and not-for profit hospitals.’<sup>366</sup> However, it has to be pointed out that a complete ban on takings for economic development would also outlaw takings that, while benefiting a private party, benefit the general public as well.

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<http://www.law.uchicago.edu/Lawecon/index.html> and the Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1142961> as on 21 June 2009] at 16.

<sup>363</sup> Epstein RA ‘Public use in a post-*Kelo* world’ *John M Olin Law & Economics Working Paper* No 408 (2nd Series) (2008) [available in The Chicago Working Paper Series Index: <http://www.law.uchicago.edu/Lawecon/index.html> and the Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1142961> as on 21 June 2009] at 16.

<sup>364</sup> Gray K ‘There’s no place like home’ (2007) 11 *Journal of South Pacific Law* at 83.

<sup>365</sup> Cohen CE ‘Eminent domain after *Kelo v City of New London*: An argument for banning economic development takings’ (2005-2006) 29 *Harvard Journal of Law and Public Policy* 491-568 at 558.

<sup>366</sup> Cohen CE ‘Eminent domain after *Kelo v City of New London*: An argument for banning economic development takings’ (2005-2006) 29 *Harvard Journal of Law and Public Policy* 491-568 at 566.

Finally, in opposing the *Kelo* decision Gray and Gray argued that the *Kelo* decision could mean that “real property” may have ceased to be “real” in the authentic, historic sense<sup>367</sup> and that ‘private property would have become simply a mush of social and economic resource to be reallocated at will by the state.’<sup>368</sup> The negative reaction from commentators and the reaction of state legislatures indicate that there is general disagreement with the outcome of the *Kelo* case. However, having said that it should be reiterated that *Kelo* merely confirmed existing law and did not bring about any major change in US case law; the point remains that the US courts will generally be very lenient in allowing executives and legislatures wide discretion to determine whether a specific kind of subsequent economic or development use justifies expropriation of private property.

In German law, expropriations that benefit a private party are allowed if they are carried out in the course of making it possible for the private party to carry out its mandate on behalf of the public (eg providing electricity for the public), but strict judicial control is exercised over compliance with the public purpose requirement, particularly with regard to the authority for the expropriation. Schmidt-Aßmann describes the German jurisprudence as follows:

‘the legislature is, to a large extent, responsible for defining public purpose, and the judiciary is characteristically reluctant to overturn legislative determinations [...] however, the legislature does not have an unfettered discretion to consider any purpose as a public purpose justifying expropriation. Instead, to be public in nature, the purpose must satisfy certain requirements as to severity and importance...it is also possible for an expropriation to be directed specifically towards the benefit of a private entity [...] although here, two conditions are necessary - it must be guaranteed in advance that the expropriated land will be permanently transferred to that private

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<sup>367</sup> Gray K & Gray SF *Elements of land law* (5<sup>th</sup> ed 2009) at 101.

<sup>368</sup> Gray K & Gray SF *Elements of land law* (5<sup>th</sup> ed 2009) at 1392.

entity, and secondly, although the intended benefit may be principally private in character, at least some part of the overall benefit must be public.<sup>369</sup>

In German law it has been said that not everything that benefits the public is necessarily in the public interest or is for the public purpose.<sup>370</sup> Public purpose is treated by the German Federal Constitutional Court as an open-ended but important constitutional requirement that cannot be amended by normal legislation or by administrative decision. This means that a stricter compliance can be required by the legislator in certain cases, but it cannot weaken the public purpose requirement.<sup>371</sup> German law does not stand in the way of land reform and similar initiatives that require expropriation where a private person benefits, even when it is interpreted reasonably strictly.<sup>372</sup>

Van der Walt points out some important results of the German approach which are worth noting namely; (1) expropriation for improper, arbitrary and frivolous purposes will not be valid; (2) expropriation can be valid despite the fact that it also benefits private persons, provided it serves a legitimate public purpose; (3) the courts use a different level of scrutiny in testing the justification of expropriation for a public purpose requirement, depending on the nature of the beneficiary's business and the context, authorisation of expropriation is always

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<sup>369</sup> Schmidt-Aßmann E 'Expropriation in the Federal Republic of Germany' in Erasmus GM (ed) *Compensation for expropriation: A comparative study* (1990) 1 at 85-86.

<sup>370</sup> See Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) at 147-149; see also *BVerfGE* 56, 249 [1981] (*Dürkheimer Gondelbahn*) 299ff, especially 277ff; *BVerfGE* 74, 264 [1986] (*Boxberg*); Van der Walt AJ *Constitutional property law* (2005) at 253.

<sup>371</sup> Van der Walt AJ *Constitutional property law* (2005) at 254; see further Van der Walt AJ *Constitutional property clauses: A comparative study* (1999) at 147-149.

<sup>372</sup> Van der Walt AJ *Constitutional property law* (2005) at 260.

tested for its intended purpose; (4) expropriation that does not serve its goal may be reversed.<sup>373</sup>

The Australian Commonwealth Constitution does not contain a Bill of Rights and what is generally treated as the property clause in it is not a property guarantee like others. Section 51(xxxi) is a provision regarding federal state power and the relationship between the federal and the state levels of government, but it is treated as something similar to a property clause in case law. What looks like a public purpose requirement in the Australian context therefore actually refers to those purposes for which the federal government has the power to create or make laws. As it is shown in this chapter through case law discussion, s 51(xxxi) of the Australian Commonwealth Constitution does not focus on individual rights but on the division of powers between the states and the Commonwealth; this makes the reference to public purpose in the section different from other jurisdictions like Germany, the United States of America and South Africa, where the power of expropriation is restricted by the public purpose requirement in the respective property clauses. Compulsory acquisitions are not like in other jurisdictions constitutionally entrenched but legislation-driven. Case law dealing with the public purpose requirement in expropriation legislation does suggest, however, that the courts will test whether an exercise of the power of expropriation was indeed for a purpose related to the interests or benefit of the public.

English law is different from the other jurisdictions discussed above with regard to the public purpose requirement because of the principle of parliamentary sovereignty: the debate about the legitimacy of the purpose of any expropriation

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<sup>373</sup> Van der Walt AJ *Constitutional property law* (2005) at 261.

takes place in Parliament when the law is made and not in court. The legislature indicates the purposes for which property may be taken and the function of the courts is to ensure that those powers of compulsory acquisition are not used for improper purposes, without questioning the legislative or executive decision to expropriate. The authority to acquire land is obtained from the British Parliament, either directly in a Public General Act or in a Private Act. In ensuring that expropriations would not be unlawful, extra-parliamentary controls are exercised through administrative review or interpretation of the authorising legislation, but not by constitutional review. In so far as compulsory acquisition is restricted by the public purpose requirement, both the power to expropriate and the public purpose requirement are contained in legislation.

The case law suggests that the English courts will not review a decision to acquire property compulsorily overly strictly if the expropriation is authorised by legislation, even when the acquisition is undertaken for general economic development purposes and even when it has a negative effect on the occupiers' Art 8 rights under the European Convention.

The European Convention on Human Rights, discussed in 3.6 above, is often cited in South African constitutional cases. South Africa is not a member state of the European Convention and therefore the Convention and case law on it is not binding international law as far as South African courts are concerned, but the law on this Convention is regarded as a kind of foreign law with special significance. Article 1 of the First Protocol to the European Convention provides that 'no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' The

law referred to could either be legislation or some form of a legal rule that authorises expropriation. The European Court of Human Rights will, in applying the property clause in Art 1, check whether the right of property has been interfered with as provided in article 1, whether that interference was provided for by law, whether that interference was in the public interest and, finally, whether the interference with a right to property was proportional. Furthermore, case law indicates that the English courts recognise that expropriation might have a negative effect on occupiers' Art 8 rights under the Convention as well, in the sense that it might interfere with their right to a home. In those cases the courts will apply the usual proportionality test to see whether the interference was reasonable; case law suggests that this test is satisfied rather easily in cases where land is acquired compulsorily for economic development.

After all the discussions in this chapter it is important to take note of what should be learned from comparative case law for South African law. Van der Walt suggests that in applying the public purpose requirement the following points should be considered on the basis of indications from foreign case law:

'(1) in every individual case the courts should satisfy themselves that the expropriation is indeed authorised by legislation and that it deserves an identifiable public purpose or public interest;

(2) not every incidental benefit that might accrue for the public generally should necessarily justify an expropriation that clearly serves private interests, in other words, public benefit should not be translated into public interest too easily;

(3) if an expropriation serves a legitimate public purpose or interest, the mere fact that it also incidentally benefits a private party should not in itself render the action illegitimate and unlawful.<sup>374</sup>

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<sup>374</sup> Van der Walt AJ 'Constitutional property law' (2008) 4 *JQR* para 2.1.

## Chapter 4

### Conclusion and Recommendations

#### 4.1 Introduction

This thesis investigates the meaning of public purpose and public interest in s 25 of the Final Constitution. The main question that has been asked is: how does 'public purpose' differ from 'public interest', and what impact did the Final Constitution have on the interpretation and application of the public purpose requirement in expropriation law in South Africa? This question has been investigated by looking at how the courts have dealt with the public purpose requirement for expropriation, both before and during the constitutional era in South Africa and in foreign law.

The analysis of pre-constitutional expropriation law was based on expropriation cases dealt with in terms of the Expropriation Act.<sup>375</sup> It was shown in chapter 2 that the manner in which the courts applied and interpreted the public purpose requirement in expropriation case law before 1993, between 1993 and 1996 and since 1996 had not changed significantly. This suggests that the final Constitution has not yet had a great impact on the way in which the public purpose requirement is interpreted and applied in practice. Furthermore, attempts at bringing the Expropriation Act in line with the Constitution have failed, as appears from the withdrawal, after much criticism, of the Expropriation Bill, part of which was aimed at the inclusion of the words 'public interest' in the formulation of the public purpose requirement.

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<sup>375</sup> 63 of 1975.

## 4.2 Conclusions

### 4.2.1 Pre-constitutional Period before 1993

Analysis of the interpretation of the public purpose requirement in case law and academic opinions during the pre-constitutional period (prior to 1993) indicated that the public purpose requirement was mostly interpreted rather strictly. The courts were determined to ensure that expropriation of land is conducted for its intended purpose to guard against the abuse of the expropriation process by both the state and private individuals. From the cases it is clear that before 1993 expropriation of land for the benefit of private individuals was generally prohibited or impossible. The *Van Streepen*<sup>376</sup> decision, which is an important example of case law from this period, led to a huge academic debate about the public purpose requirement. Interestingly, the *Van Streepen* decision distinguished between public purpose and public interest, although the Expropriation Act does not make this distinction. Gildenhuys is of the view that this decision could have contributed to the fact that the 1996 Constitution refers to both 'public interest' and 'public purpose' in setting out the public purpose requirement for expropriation.<sup>377</sup>

According to the early case law, the term 'public purpose' can have a wider or a narrower interpretation.<sup>378</sup> If the public purpose is interpreted in a wide sense, it refers to matters that affect the population at large or the local public. According to

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<sup>376</sup> *Administrator Transvaal v Van Streepen (Kempton Park) (Pty Ltd 1990 (3) SA 644 (A)*; See paragraph 2.2 above.

<sup>377</sup> Gildenhuys A *Onteiningsreg* (2<sup>nd</sup> ed 2001) at 98; see paragraph 2.2 above.

<sup>378</sup> *Administrator Transvaal v Van Streepen (Kempton Park) (Pty Ltd 1990 (3) SA 644 (A)*; see paragraph 2.2 above.

Gildenhuis,<sup>379</sup> the public purpose requirement entails a purpose which is not of a private or personal nature.<sup>380</sup> In the narrower sense, 'public purpose' refers to 'government or state purposes', but as a rule the courts accepted that the phrase is not limited to this narrow interpretation,<sup>381</sup> unless the context and the wording of the Act indicate that the narrow interpretation should be followed.<sup>382</sup>

#### **4.2.2 The Interim Constitution: 1993-1996**

The Interim Constitution included the first property clause to be entrenched in the Constitution, which played an important role in the country's new constitutional order. The Technical Committee involved in drafting the Constitution indicated that 'public purpose' was more inclusive than 'public interest.'<sup>383</sup> This conclusion of the Technical Committee was criticised by Chaskalson, who argued that the meaning of 'public purpose' is narrower than 'public interest.' This argument by Chaskalson finds support in the pre-constitutional cases discussed in chapter 2.

The Interim Constitution provided for expropriation of property for a public purpose. This caused debate amongst academic commentators regarding the definitional difficulties in s 28. During this period only one case was brought to the Constitutional

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<sup>379</sup> Paragraph 2.2.

<sup>380</sup> Paragraph 2.2.

<sup>381</sup> Paragraph 2.2.

<sup>8</sup> *Slabbert v Minister van Lande* 1963 (3) SA 620 (T) at 621F.

<sup>383</sup> Chaskalson M 'Stumbling towards section 28: Negotiations over the protection of property rights in the Interim Constitution' (1995) 11 *SAJHR* 223-240 at 237. see paragraph 2.3 above.

Court regarding s 28, namely *Harksen*,<sup>384</sup> but the decision did not touch upon or affect the interpretation of the public purpose requirement.

#### 4.2.3 Since 1996: The Final Constitution

Section 25(2)(a) of the Final Constitution provides for expropriation for a public purpose or in the public interest. This section also introduced more extensive land reform provisions. The broad social compromise underlying the adoption of the Constitution suggested that expropriation of land for land reform purposes must be an option. In this regard it is therefore not surprising that s 25(4)(a) provides explicitly that the public interest includes the nation's commitment to land reform and to reforms to bring about equitable access to all South Africa's natural resources.

Of the cases that were decided after 1996 dealing with s 25, the *FNB*<sup>385</sup> decision is the most important. Unfortunately this decision says nothing about public purpose and public interest. Another important post-1996 decision on expropriation is *Nhlabathi*,<sup>386</sup> where the court had to decide whether the exercise of a burial right in terms of s 6(2)(dA) of ESTA amounted to an expropriation. The court assumed, without deciding the point, that it could be *de facto* expropriation of a servitude,<sup>387</sup> without compensation, and decided that even then the interference with the landowner's property rights would be reasonable and justifiable as provided in s 36 of the Final Constitution because the intrusion on the owner's land rights, measured against the purpose of the expropriation, namely promotion of important

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<sup>384</sup> *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC); see paragraph 2.3 above.

<sup>385</sup> Paragraph 2.4.

<sup>386</sup> *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC); see paragraph 2.4 above.

<sup>387</sup> *Nhlabathi and Others v Fick* 2003 (7) BCLR 806 (LCC) at para 20; see paragraph 2.4 above.

constitutional objectives, was minor.<sup>388</sup> The decision did not explicitly set out to interpret the public purpose requirement in s 25(2), but nevertheless suggested that the purpose for which the expropriation would be authorised by s 6(2)(dA) of ESTA, namely to protect the cultural and religious rights of the occupiers as part of the land reform programme, would satisfy the requirement.

The *Du Toit*<sup>389</sup> decision is also interesting because the court failed to distinguish between public purpose in s 25(2), which is a requirement for a valid expropriation, and the reference to the purpose of the expropriation in s 25(3)(e), which is a factor to be taken into consideration when calculating compensation for an expropriation. It has been argued in chapter 2 that failure to distinguish between the two references to the public interest could result in a misinterpretation of the relevant provisions, because the one is clearly intended to ensure that expropriation is legitimate, while the other is intended to ensure that the calculation of compensation is not restricted to market value.

It is still unclear how the situation has now been changed by s 25(2), which authorises expropriation for a public purpose or in the public interest. Case law and various academic opinions have so far failed to distinguish the meaning of public purpose from public interest in s 25(2) and consequently the scope of the public purpose requirement is not clear yet.

The current Expropriation Act of 1975 seems to be inconsistent with the Final Constitution on several points, one of which is the fact that the Act refers to public purpose only, while s 25(2) of the Constitution refers to public purpose and public

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<sup>388</sup> Paragraph 2.4.

<sup>389</sup> *Du Toit v Minister of Transport* 2003 (1) SA 586 (C); 2005 (1) SA 16 (SCA); see paragraph 2.4 above.

interest. In chapter 2 it was pointed out that this apparent inconsistency led to the drafting of the Expropriation Bill of 2008.<sup>390</sup> However, one of the major issues on which the Bill was criticised was the inclusion of the reference to public interest in the public purpose requirement. The critics saw the reference to public interest as creating unlimited grounds for expropriation. The critics also objected to the definition of public interest in the Bill, which is literally the same as the definition in s 25(4)(a) of the Final Constitution. The critics claimed that this definition was too broad and that it left room for uncertainty as to the expropriating authority's interpretation of matters falling within the public interest.<sup>391</sup> The Bill was, after much criticism, withdrawn for review by Parliament. However, since the intention of the Bill was to bring expropriation legislation in line with the constitutional provisions, it is hard to see how the Bill (or any subsequent Expropriation Act) could fail to include either the reference to the public interest or the definition of the public interest currently contained in the Constitution.

Van der Walt<sup>392</sup> is of the view that the public purpose requirement in the Expropriation Act of 1975 must be consistent with the Constitution and is therefore still valid, as long as it is interpreted in conformity with s 25(2)(a) of the Constitution. What this means is that the public interest requirement is read into the public purpose requirement in the Expropriation Act in any event, even without the intervention attempted in the Expropriation Bill. Budlender<sup>393</sup> confirms that the

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<sup>390</sup> Bill 16 of 2008. This was discussed in paragraph 2.5.

<sup>391</sup> AGRI SA 'Submission on the Expropriation Bill' *Parliamentary Monitoring Group* (14 May 2008) [available at [www.pmg.org.za](http://www.pmg.org.za) as on 14 May 2008]; see paragraph 2.5 above.

<sup>392</sup> Paragraph 2.7.

<sup>393</sup> Budlender G 'The constitutional protection of property rights: Overview and commentary' in Budlender G, Latsky J & Roux T (eds) *Juta's new land law* (original service 1998) chapter 1 at 48 para 4.3; see paragraph 2.7 above.

meaning of public purpose in a statute has to conform with the public purpose requirement in the Constitution, and that the latter should prevail in case of conflict. Gildenhuis<sup>394</sup> is of the view that the mere declaration in legislation that expropriation is for a public purpose or in the public interest will be accepted by courts as prima facie evidence. In cases where a person's land has been expropriated and he/she believes that the expropriation was not for either a public purpose or in the public interest the onus is on him/her to prove it.<sup>395</sup>

#### **4.2.4 Third Party Transfers**

An issue that has been discussed in this thesis is the expropriation of private property by the state for the purpose of transferring it to another private party. These instances are often referred to as third party transfers. As discussed in chapter 2, these types of expropriation are an important issue in South African expropriation law. The question that needs to be answered is whether they are in the public interest or not. It has been shown in chapter 2 that expropriations of this nature may be in the public interest as long as the expropriation and the transfer serve a legitimate public purpose or serves an important public interest.<sup>396</sup> Allowing these types of expropriations would not render an expropriation unconstitutional just because a third party benefits from the expropriation. Even before 1994, it was accepted that property could be expropriated and transferred to another private party if that is necessary and justified by the need for providing a public service such as

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<sup>394</sup> Gildenhuis *A Ontheieningsreg* (2<sup>nd</sup> ed 2001) at 98; see also *Theunissen Town Council v Du Plessis* 1954 (4) SA 419 (O) at 424G; see paragraph 2.7 above.

<sup>395</sup> Paragraph 2.6.

<sup>396</sup> Paragraph 2.7.

public utility, on the condition that the person providing such public utilities should do so on behalf of the state. Disallowing such expropriations would be unnecessary because they are in line with the principles of the Constitution.<sup>397</sup>

Third party transfers within the context of s 25(4) should be interpreted in its constitutional and historical context, particularly in the context of land reform and other reform purposes. This is of the highest importance as it is the aim of s 25 to remedy the injustices of the past, especially in land reform cases.

Third party transfers may even be legitimate in cases not involving land reform, as appears from the recent decision in *Offit Enterprises*.<sup>398</sup> In this decision the court dealt with an expropriation that amounts to third party transfer albeit outside of the land reform area, and it demonstrated that such transfers can nevertheless be for a public purpose or in the public interest. Although the decision remained inconclusive on the question of third party transfers because it was decided on a technical point, it does illustrate the fact that expropriation for purposes of transfer to another private individual is not necessarily unconstitutional for not being for a public purpose or in the public interest.<sup>399</sup> It illustrated the point that third party expropriations might sometimes be for a public purpose or in the public interest even when they have nothing to do with land reform. This would primarily be the case when the expropriation is intended to assist a private enterprise in acquiring property that it requires to provide a public service on behalf of the state. It is therefore important to take note of Van der Walt's suggestions on how expropriation cases should be

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<sup>397</sup> Paragraph 2.7.

<sup>398</sup> *Offit Enterprises (Pty) Ltd v The Coega Development Corporation (Pty) Ltd and Others* unpublished case no 1764/07 (19 November 2008) (SECLD); see paragraph 2.6 above.

<sup>399</sup> The court decided that there was no expropriation involved on the facts, since the body that was authorised to expropriate did not do so and the one that attempted to expropriate was not authorised.

interpreted, namely that the courts should satisfy themselves that expropriation is indeed authorised by legislation and that it serves an identifiable public purpose or public interest; that not every incidental benefit that might accrue for the public generally should necessarily justify an expropriation that clearly serves private interests, in other words, public benefit should not be translated into public interest too easily; and that if an expropriation that clearly serves a public purpose or interest, the mere fact that it also incidentally benefits a private party should not itself render the action illegitimate.<sup>400</sup>

Third party transfers that have nothing to do with land reform may be legitimate, even in view of the public purpose requirement, in various instances. Examples are third party transfers where a person benefits from an expropriation that serves a public purpose in that a private party is responsible to provide public utilities, and these expropriations could satisfy the public interest requirement, as well as expropriation and transfers that form part of a land reform programme. In South Africa the position is still unclear in cases where a private person benefits from an expropriation that was undertaken purely for economic development, but in view of earlier case law it is unlikely that the public interest requirement would be satisfied in those cases. There are other third party transfers that serve other public purposes other than economic development. These cases will differ from case to case but generally they will be justified as long as they meet the public interest requirement.

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<sup>400</sup> Van der Walt AJ 'Constitutional property law' 2008 (4) *Juta's Quarterly Review* para 2.1; see paragraph 2.6 above.

#### **4.2.5 Comparative Analysis: Public Purpose in Foreign Law**

Comparative case law and academic analysis was discussed in chapter 3 to see how other countries have dealt with the public purpose and public interest requirement. This was done in order to guard against repeating the same mistakes they have made and also to learn from them as they have dealt with the requirement for a long time. In chapter 3, case law dealing with the public purpose requirement in foreign jurisdictions and academic commentators' opinions have been discussed, with specific reference to Germany, Australia, the European Convention on Human Rights and the United Kingdom.

The United States of America is one of the most interesting examples used in this thesis, as the American case law contains much that South African law can learn from. The point is to find an interpretation of the public purpose requirement that would give effect to the requirement as it is stated in s 25(2) of the South African Constitution, read with s 25(4), that will simultaneously prevent abuses of the power to expropriate and also allow the state to expropriate property for purposes that would serve a genuine and serious public necessity, even though a private person might incidentally benefit from it. The US courts have applied the public use requirement leniently, even in cases where private property was expropriated mostly for the benefit of a private person. The taking of property belonging to a private owner for transfer to another private owner is said to be permissible where such use is primarily for the benefit of the public and the private benefit is conferred on the subsequent private owner only as an incidental benefit. In the United States of America expropriation for the benefit of a third party has been and still is a controversial issue which is still under debate.

A distinction has been drawn by many American courts between public use and public purpose or public interest. In *Poletown*<sup>401</sup> it was held that, while urban redevelopment would not necessarily constitute a public use, it could under certain circumstances conceivable constitute a public purpose or public interest if the development benefits the public at large by creating jobs and stimulating the local economy. Taking into account the history and circumstances of a particular area is very important when determining whether the use of eminent domain under those instances would constitute a public use or public purpose. In the *Berman*<sup>402</sup> decision the deferential development of the definition of public use resulted in the court's comment that 'the concept of public welfare is broad and inclusive ... [and] the power of eminent domain is merely the means to an end.'<sup>403</sup> The means used in exercising the power of eminent domain could include incidentally benefiting a private person or enterprise or the authorisation to take private property for resale to other private parties. In *Hawaii*<sup>404</sup> the Supreme Court broadened the public use definition even more, indicating that the courts would as a rule defer to an indication that the legislature considered a particular expropriation to be for public use. The Supreme Court followed the decisions in *Berman* and *Hawaii* in the recent, very controversial *Kelo*<sup>405</sup> case. This decision is a straightforward taking for economic development where the public interest was an economic benefit in the form of job creation and stimulating the local economy. However, it was held that the use of eminent domain for economic development did not violate the public use clause of the state and

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<sup>401</sup> *Poletown v City of Detroit* 304 NW2d 455 (Mich 1981).

<sup>402</sup> *Berman v Parker* 348 US 26 (1954).

<sup>403</sup> *Berman v Parker* 348 US 26 (1954) at 33; see paragraph 3.2.2 and 3.7 above.

<sup>404</sup> *Hawaii v Midkiff* 467 US 229 (1984).

<sup>405</sup> *Kelo v City of New London* 545 US 469 (2005).

federal Constitution.<sup>406</sup> The Supreme Court ruled in favour of the City of New London.

Many academic writers have commented on this perhaps most talked about decision in the history of American takings law. In looking at *Kelo*, Epstein criticised the earlier decisions by the Supreme Court in *Berman* and *Midkiff* which were relied on in *Kelo*.<sup>407</sup> He argued that there is little doubt that the *Kelo* decision was consistent with the broad language that was adopted in *Berman* and *Midkiff*. The author contends that the Supreme Court said what it meant and meant what it said. Gray and Gray have argued that this decision could mean that “real property” may have ceased to be “real” in the authentic, historic sense<sup>408</sup> and that ‘private property would have become simply a mush of social and economic resource to be reallocated at will by the state.’<sup>409</sup> Cohen also saw the *Kelo* decision as a mistake, and he proposed the banning of takings for economic development, even if it means that the Constitution must be amended.<sup>410</sup> Goodin also emphasized the negative effect of using expropriation for redevelopment, pointing out that ‘the tarnished history of redevelopment to cure blight should give policymakers pause when electing the power of eminent domain for development of blighted areas.’<sup>411</sup> However, it has

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<sup>406</sup> *Kelo v City of New London* 545 US 469 (2005) at 454.

<sup>407</sup> Epstein RA ‘Public use in a post-*Kelo* world’ *John M Olin Law & Economics Working Paper* No 408 (2nd Series) (2008) [available in The Chicago Working Paper Series Index: <http://www.law.uchicago.edu/Lawecon/index.html> and the Social Science Research Network Electronic Paper Collection: <http://ssrn.com/abstract=1142961> as on 21 June 2009] at 14-15; see paragraph 3.7 above.

<sup>408</sup> Gray K & Gray SF *Elements of land law* (5<sup>th</sup> ed 2009) at 101; see paragraph 3.2.3. and 3.7 above.

<sup>409</sup> Gray K & Gray SF *Elements of land law* (5<sup>th</sup> ed 2009) at 101; see paragraph 3.2.3. and 3.7 above.

<sup>410</sup> Cohen CE ‘Eminent domain after *Kelo v City of New London*: An argument for banning economic development takings’ (2005-2006) 29 *Harvard Journal of Law and Public Policy* 491-568 at 558; see paragraph 3.7 above.

<sup>411</sup> Paragraph 3.2.3.

been pointed out in this thesis that a complete ban on takings for economic development would also outlaw takings that, while benefiting a private party, benefit the general public as well. A complete ban on takings for economic development might therefore have unforeseen consequences that go too far. Schultz is one of the minority of authors who are of the view that this decision did not sound the demise of the public use provision, arguing instead that it suggested a new test for distinguishing valid uses from private takings.<sup>412</sup> As a reaction to the *Kelo* decision, several legislative initiatives have been introduced on the state level to prevent exercises of the expropriation power for what is seen as purely private benefit, especially in cases where private land is taken for economic development where the current state of the land does not pose a real threat for public health or safety.<sup>413</sup>

The negative reaction from academic commentators and the reaction of state legislatures that introduced legislation to outlaw expropriation for economic development indicated that there is general disagreement with the outcome of the *Kelo* decision. However, it should be reiterated that this decision merely confirmed existing law and did not bring about any major changes in US case law; the point remains that the US courts will be lenient in allowing executives and legislatures wide discretion to decide whether a specific kind of subsequent economic or development use justifies expropriation of private property. These decisions clearly show how the state can be insensitive in exercising its expropriation powers. If the

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<sup>412</sup> Paragraph 3.2.3.

<sup>413</sup> Crow S 'Compulsory purchase for economic development: An international perspective' 2007 *Journal of Planning & Environment Law* 1102-1115 at 1105; Cohen CE 'Eminent domain after *Kelo v City of New London*: An argument for banning economic development takings' (2005-2006) 29 *Harvard Journal of Law and Public Policy* 491-568 at 559-566; see also <http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060623-10.html> [as on 15 June 2009]; see paragraph 3.2.3 above.

courts are overly deferential towards legislative or executive decisions to use expropriation for economic development purposes, this could easily encourage unfair and questionable exercises of the power of eminent domain. It is argued in chapter 3 that these types of decisions should not be encouraged, as the government can easily abuse its powers of expropriation and must be closely guarded to prevent abuse of the power of eminent domain.<sup>414</sup> Gray convincingly argues that private development interests seem to be promoted at the cost of individual small property interests and, particularly, that the home interest was never given the special protection it arguably deserves against eviction resulting from expropriation for economic development.<sup>415</sup>

In German law, expropriations that benefit a private party are allowed if they are carried out in the course of making it possible for the private party to fulfil its mandate on behalf of the public, but strict judicial control is exercised over compliance with the public purpose requirement, particularly with regard to the authority for the expropriation.<sup>416</sup> The German property clause is very important for comparative purposes as the South African property clause on s 25(3) was partially based on the German property clause in Article 14.3.<sup>417</sup> The German courts apply a high level of scrutiny in testing the public purpose standard. If the state expropriates property and that property is not used for its intended purpose, the expropriation becomes invalid and the property can be claimed back.

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<sup>414</sup> Paragraph 3.2.3.

<sup>415</sup> Gray K 'There's no place like home' (2007) 11 *Journal of South Pacific Law* 73-86; see paragraph 3.2.3 above.

<sup>416</sup> Paragraph 3.7.

<sup>417</sup> Paragraph 3.3.1.

Important results of the German approach that are noteworthy include the following: expropriation for improper, arbitrary and frivolous purposes will not be valid; secondly, expropriation can be valid despite the fact that it also benefits private persons, provided it primarily serves a legitimate public purpose; thirdly, the courts use a different level of scrutiny in testing the justification of expropriation against the public purpose requirement, depending on the nature of the beneficiary's business and the context; Fourthly, the authorisation of expropriation is always tested to ensure that the authorising law specifies its intended purpose; and, finally, expropriation that does not serve its goal may be reversed.<sup>418</sup>

The question of expropriation for economic development has so far not been resolved finally in German case law, but guidelines have been developed for deciding when expropriation might be for a public purpose even though it benefits another private person through economic development.<sup>419</sup> The public purpose requirement is treated by the German Federal Constitutional Court as an open-ended but important constitutional requirement that cannot be amended by normal legislation or by administrative decision. What this means is that stricter compliance can be required by the legislature in certain circumstance, but it cannot weaken the public purpose requirement.<sup>420</sup>

The Australian Commonwealth Constitution does not contain a Bill of Rights and what is generally treated as the property clause in it is not a property guarantee like others. Section 51(xxxi) is a provision regarding federal state power and the relationship between the federal and the state levels of government, but it is treated

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<sup>418</sup> Paragraph 3.7.

<sup>419</sup> Paragraph 1.3 for a brief discussion.

<sup>420</sup> Paragraph 3.7.

as something similar to a property clause in case law. What looks like a public purpose requirement in the Australian context therefore actually refers to those purposes for which the federal government has the power to create or make laws. As it is shown in chapter 3, s 51(xxxi) of the Australian Commonwealth Constitution does not focus on individual rights but on the division of powers between the states and the Commonwealth; this makes the reference to public purpose in the section different from other jurisdictions like Germany, the United States of America and South Africa, where the power of expropriation is restricted by the public purpose requirement in the respective property clauses. In Australian law, the power of compulsory acquisition is not constitutionally entrenched like in other jurisdictions but legislation-driven. Case law has shown that case law dealing with the public purpose requirement in expropriation legislation does suggest, however, that the courts will test whether an exercise of the power of expropriation was indeed for a purpose related to the interests or benefit of the public.

English law is different from the other jurisdictions discussed in this thesis with regard to the public purpose requirement because of the principle of parliamentary sovereignty: the debate about the legitimacy of the purpose of any expropriation takes place in Parliament when the law is made and not in court.<sup>421</sup> The legislature indicates the purposes for which property may be taken and the function of the courts is to ensure that those powers of compulsory acquisition are not used for improper purposes, without questioning the legislative or executive decision to expropriate. In order to acquire land authority must be obtained from the British Parliament, either directly in a public general act or in a private act.<sup>422</sup> In order to

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<sup>421</sup> Paragraph 3.6.

<sup>422</sup> Paragraph 3.6.

ensure that expropriations would not be unlawful, extra-parliamentary controls are exercised through administrative review or interpretation of the authorising legislation, but not by constitutional review that includes testing of the legislative or executive decision to expropriate for a particular purpose. In so far as compulsory acquisition is restricted by the public purpose requirement, both the power to expropriate and the public purpose requirement are contained in legislation.

The case law discussed in chapter 3 suggests that the English courts will not review a decision to acquire property compulsorily overly strictly if the expropriation is authorised by legislation, even when the acquisition is undertaken for general economic development purposes and even when it has a negative effect on the occupiers' Article 8 rights under the European Convention.<sup>423</sup>

The case law on the European Convention on Human Rights, discussed in 3.6 above, is often cited in South African constitutional cases. South Africa is not a member state of the European Convention and therefore the Convention and case law on are is not binding international law as far as South African courts are concerned, but the law on this Convention is regarded as a kind of foreign law with special significance. Article 1 of the First Protocol to the European Convention provides that 'no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.' The law referred to could either be legislation or some form of a legal rule that authorises expropriation. The European Court of Human Rights will, in applying the property clause in Art 1, check whether the right of property has been interfered with as provided in Art 1, whether that interference was

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<sup>423</sup> *Smith v The Secretary of State for Trade and Industry* [2007] EWHC 1013 (Admin); see paragraph 3.6 above for full discussion.

provided for by law, whether that interference was in the public interest and, finally, whether the interference with a right to property was proportional.<sup>424</sup>

Having considered the manner in which the public purpose requirement has been interpreted by South African courts and in foreign jurisdictions and having looked at the academic debates on the issue I am of the view suggested by Budlender and other academic writers that the best way to deal with expropriations, especially in the courts, is the purposive approach, which requires the courts not to look at the particular constitutional provision in isolation, but to locate it in the broader context of the aims and goals of the Constitution. According to Budlender, once that is done, the case for a broader interpretation of the public purpose requirement becomes clearer.<sup>425</sup> However, expropriation of property and subsequent transfer to another private party may be in the public interest as long as that expropriation and the transfer itself serve a legitimate public interest that satisfies an important public need. In cases where a private person benefits from an expropriation that was undertaken purely for economic development, it is not self-evident that the public interest requirement would be satisfied and in South Africa these expropriations should not be allowed easily. In another category where a private party benefits but provides a public utility or public service such expropriations should be allowed as the public interest requirement can be justified because the public benefits from it.

Land reform is another area where third party transfers may occur and expropriations that are undertaken for legitimate land reform purposes (e g

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<sup>424</sup> Paragraph 3.7.

<sup>425</sup> Budlender G 'The constitutional protection of property rights: Overview and commentary' in Budlender G, Latsky J & Roux T (eds) *Juta's new land law* (original service 1998) chapter 1 at 55; see paragraph 2.7 above.

restitution) should generally be justified, as it is the purpose of s 25 to rectify the injustices of the past. However, before expropriation and third party transfer of this nature is accepted as being in line with the public purpose / public interest requirement, it should be established that the expropriation and transfer indeed form part of and promote the goal of the land reform programme in question. The same goes for expropriation and third party transfer in cases where a private person benefits from the transfer because it requires the property in the course of providing a public utility.

#### **4.3 Recommendations**

This thesis has shown the problems associated with the interpretation and application of the public purpose requirement. In South Africa law these problems are not easy to deal with because cases dealing with the public purpose requirement do not occur on a regular basis. It is therefore still difficult to construe a coherent line of development that could indicate how the requirement is or should be interpreted in post-1996 expropriation law.

The apparent inconsistency between the Constitution and the Expropriation Act is also contributing to these interpretation problems. The public interest element of the public purpose requirement in s 25(2) causes most problems because it is defined by both the Constitution and the Expropriation Bill within the context of land reform in South Africa, but it does not appear in the current Act and the Bill has been withdrawn. Having said that, it is clear that there is a need for a proper definition of the public interest requirement within the context of s 25(2)(a) of the Constitution. There is a need for clear regulation of the public purpose requirement in legislation

authorising expropriations in South Africa, in conformity with the requirements of s 25(2) of the Constitution. This thesis therefore proposes the revival of the Expropriation Bill, particularly to include the same expropriation requirements as are embodied in the Constitution. Another possibility is to interpret the public purpose requirement in the current Expropriation Act to mean the same as the requirements in s 25 of the Constitution. The fact that the courts already are following this approach is not enough; it has to be written down. This will enable the courts to decide whether an expropriation is for a public purpose or in the public interest. This thesis therefore recommends that the Expropriation Act should be brought into line with the Constitution by replacing the public purpose requirement in the Act with a provision that echoes the formulation of s 25(2) (read with s 25(4)(a)) of the Constitution exactly, either by amending the 1975 Act or by way of a new Act.

A critical issue that requires urgent attention is expropriations for the benefit of third parties. The question is whether and when they can be in the public interest, particularly as far as land reform is concerned. The recommendations emanating from this thesis in this regard are as follows:

Firstly; third party transfers that benefit a private party but do not benefit the public in any way should not be allowed at all and courts should always ensure that this is not the case in any expropriation that seems to benefit a third party.

Secondly, expropriations that benefit a private party that provides a public utility and that requires the property in the course of delivering the public utility (so that the expropriation in fact benefits the public) should be allowed in so far as they satisfy the public interest requirement; the mere fact that the utility provided also benefits incidentally should not affect the outcome. For public utility expropriations, it is easy

to accept that the public purpose requirement should be applied leniently as such an expropriation promotes delivery of a public service. The *Offit Enterprises*<sup>426</sup> decision shows that expropriations that amount to third party transfers might sometimes be for a public purpose or in the public interest even if they have nothing to do with land reform. Although the decision remains inconclusive on the specific issue of third party transfers it shows that third party transfers are not necessarily unconstitutional for not being in the public interest or for a public purpose.

Thirdly, expropriations that amount to third party transfers in that they are undertaken purely for the purpose of economic development should not be considered to be for a public purpose or in the public interest purely because they stimulate the economy or create jobs; a stronger and more specific public purpose or public interest should be required with reference to the purpose for which the power of expropriation is allowed in the authorising legislation. The proposal by academic commentators in the US, in reaction to the *Kelo* decision, that expropriation for the sake of economic development should be banned in as far as it affects private homes, is problematic.<sup>427</sup> Some American states have already banned expropriation for economic development as a reaction to *Kelo* decision. However, the problem with banning these expropriations outright is that a complete ban on takings for economic development would simultaneously outlaw takings that, while benefiting a private party, benefit the general public as well. In South Africa expropriations that are purely for private benefit and that do not serve a public purpose are probably banned

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<sup>426</sup> *Offit Enterprises (Pty) Ltd v The Coega Development Corporation (Pty) Ltd and Others* unpublished case no 1764/07 (19 November 2008) (SECLD); see paragraph 2.6 above.

<sup>427</sup> Cohen CE 'Eminent domain after *Kelo v City of New London*: An argument for banning economic development takings' (2005-2006) 29 *Harvard Journal of Law and Public Policy* 491-568 at 558; see paragraph 3.7 above.

already, but it is not clear that all economic development expropriations should be banned outright.

Finally, expropriation and transfer of the expropriated property to a third party should satisfy the public purpose / public interest requirement if and in so far as the expropriation and transfer form part of and promote a clear and legitimate land reform goal. This would be in line with the intention behind s 25(4)(a) of the Constitution. It has also been shown in Chapter 3 that expropriation and transfer of this kind has been accepted as legitimate in other jurisdictions. In view of all the considerations, the public purpose / public interest requirement in s 25 should not stand in the way of expropriation for the sake of land reform, provided that the expropriation and the transfer of the property to another private person do indeed serve and promote the goals of a legitimate land reform programme.

Amongst the foreign jurisdictions discussed in this dissertation, the German approach to the public purpose requirement should be followed by South African courts. The high level of scrutiny applied according to the German approach could make it easier for South African courts to deal with the public purpose requirement in expropriation cases, even if the expropriation is aimed at land reform cases. The principle of requiring a strong indication of public necessity in applying the public purpose requirement can work in South Africa as well. The Expropriation Act, which is the authorising legislation for all expropriation in South African law, needs to be very specific and straightforward in its provisions regarding the public purpose requirement. In addition to the necessary amendment of the Act, proper and useful guidelines should be developed by the courts when they decide expropriation cases.



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