ACCESS TO LAND AS A HUMAN RIGHT: THE PAYMENT OF JUST AND EQUITABLE COMPENSATION FOR DISPOSSESSED LAND IN SOUTH AFRICA

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ABSTRACT

This thesis deals with the conceptualization of access to land by the dispossessed as a human right and commences with an account of the struggle for land between the peoples of African and European extractions in South Africa. It is observed that the latter assumed sovereignty over the ancestral lands of the former. The thesis discuses the theoretical foundation of the study and situates the topic within its conceptual parameters. The writer examines the notions of justice and equity in the context of the post apartheid constitutional mandate to redress the skewed policy of the past. It is argued that the dispossession of Africans from lands that they had possessed for thousands of years on the assumption that the land was terra nullius was profoundly iniquitous and unjust.

Although the study is technically limited to dispossessions occurring on or after the 13th June 1913, it covers a fairly extensive account of dispossession predating this date. This historical analysis is imperative for two reasons. Besides supporting the writer's contention that the limitation of restitution to land dispossessed on or after 1913 was arbitrary, it also highlights both the material and non-material cost of the devastating wars of dispossessions. The candidate comments extensively on the post apartheid constitutional property structure which was conceived as a redress to the imbalance created by dispossession. This underlying objective explains why the state's present land policy is geared towards facilitating access to land for the landless.

The thesis investigates the extent to which the present property structure which defines access to land as a human right has succeeded in achieving the stated objective. It reviews the strengths and weaknesses of the land restitution process as well as the question of the payment of just and equitable compensation for land expropriated for restitution. The latter was carefully examined because it plays a crucial role in the success or otherwise of the restitution scheme.

The writer argues that the courts have, on occasions, construed just and equitable compensation generously. This approach has failed to reflect the moral component inherent in the Aristotelian corrective justice. This, in the context of South Africa, requires compensation to reflect the fact that what is being paid for is land dispossessed from the forebears of indigenous inhabitants. It seems obvious that the scales of justice are tilted heavily in favour of the propertied class whose ancestors were responsible for this dispossession. This has a ripple effect on the pace of the

restitution process. It also seems to have the effect of favouring the property class at the expense of the entire restitution process.

The candidate also comments on the court's differing approaches to the interpretation of the constitutional property clause. The candidate contends that the construction of the property clause and related pieces of legislation in a manner that stresses the maintenance of a balance between private property interest and land reform is flawed. This contention is supported by the fact that these values do not have proportional worth in the present property context of South Africa. The narrow definition of "past racially discriminatory law and practices" and labour tenant as used in the relevant post apartheid land reform laws is criticized for the same reason of its uncontextual approach.

A comparative appraisal of similar developments relating to property law in other societies like India and Zimbabwe has been done. The writer has treated the post reform land evictions as a form of dispossession. The candidate notes that the country should guard against allowing the disastrous developments in Zimbabwe to influence events in the country and calls for an amendment of the property clause of the constitution in response to the practical difficulties which a decade of the operation of the current constitution has revealed.

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CHAPTER ONE

1. LAND: HISTORY AND PERSPECTIVES

1.1 INTRODUCTION

Land is a vital resource. Its ownership and control has been the most contentious issue in South Africa since the arrival of the white man in the country. The early history of the country can, with some justification, be summed up as a gigantic struggle for land between the indigenous peoples and white settlers.[1] The struggle for access to land has always been a perennial problem in this country.[2]

This research deals with a detailed exploration of the struggle over land between South Africans of African descent and those of European extractions in which the latter dispossessed the African of substantial portion of their ancestral land. Although the study is technically limited to dispossession that occurred on or after 19 June 1913, the author commences with an account of the colonialist's quest for land in the country and the different methods adopted to accomplish this objective. It first discusses European colonisation of the Cape by conquest and notes that this was an attempt to get control over the natural resources of the region. This discussion was meant to give perspective to the subsequent dispossession falling within the scope of the study which is dealt with in chapter 2.

The author first situates the principal themes of the study such as dispossession, human rights and justice etc. within their broad theoretical context in chapter 1 before delving into a more specific theoretical analysis of land as a human right in chapter 3. It is noted that the post-apartheid conceptualisation of access to land as a human right was logical because the massive dispossession of the ancestral land of Africans raised significant human rights considerations.

The main thrust of the study is found in chapters 4 and 5 that deal with the post-apartheid constitutionalisation of property. These chapters discuss the

[1] A publication of Human Awareness Programme Land in South Africa Grantpark (1989) 1.

[2] G Budlender and J Latsky 'Unravelling Rights to Land and to Agriculture in Rural Race Zones' (1990) SAJHR 150.

property clauses of both the interim constitution[3] enacted on the 6th April 1994 and the final 1996 Constitution[4]. It notes that the property clauses of both constitutions were in the context of South Africa revolutionary as they altered the entire normative landscape of property in the country.

The author relied on s 28(1) of the interim constitution which gives everyone "a right to acquire land and hold property" to justify two important conclusions about post-apartheid property law. Firstly, the writer argues that it constitutionalises the right of the dispossessed to access land and secondly that it predicates the basis for post-apartheid access to land on the need to ensure equitable redistribution of the country's land between blacks and non-blacks.

The study examines the property structures created by s 25 of the 1996 Constitution in detail. It refers to the delicate balance between private property and public interest and attempts to determine how it has impacted on the capacity of the dispossessed to access land. Though not a fully-fledged comparative study, the research nevertheless draws illuminating examples from appropriate foreign jurisdictions. It does so in order to interpret relevant sections of both constitutions as well as offer insights on South African post-apartheid case law. The research further examines the major post apartheid legislations enacted to give practical expression to the new rights created by the constitutionalisation of property.

The author makes his concluding remarks in chapter 6. Although this chapter is a summary of the study, the candidate also expresses his own opinion on the central question of how the constitutionalisation of property has impacted on the dispossessed capacity to access land. He also strongly calls for the amendment of the property clause in the constitution to take account of the weaknesses noticed after a decade of its operation.

1.2 AIM OF RESEARCH

Decades of dispossession[5] in South Africa inevitably led to a lopsided distribution of land between whites, black and others and the impoverishment of the blacks. This left the country with one of the most acute problems of landlessness in the world. This research investigates access to land by the dispossessed under the ambitious and wide-ranging land reform programmes adopted since 1994.

[3] Constitution of the Republic of South Africa Act 200 of 1993.
[4] Constitution of the Republic of South Africa Act 108 of 1996.
[5] See chapter two for a detailed discussion of dispossession.

The need for the reform of property law received constitutional expression in s 25 and s 26 of the 1996 Constitution, which created a new property regime. As noted earlier,[6] this constitutionalisation of property represented a very significant change in the country's institutional framework for land distribution. It also, to an extent, reflected the ANC's government policy on land.[7] The study seeks to determine the extent to which the change in the land rights paradigm has improved the dispossessed access to land.

It should be noted that one of the principal evils of the land policy under apartheid was the emergence of landlessness and homelessness. A 1997 government White Paper on land identifies landlessness as a direct result of the extensive dispossession of land owned by Africans.[8] This research aims at critically evaluating the structures created pursuant to the present land reform framework to see how these problems are being resolved.

The study will attempt to draw a connection between the problems of landlessness and the political stability of the country.[9] It will also identify the dangers inherent in the sluggishness of the restitution and redistribution processes. The isolated cases of land invasions in the country and the catastrophic disruptions in Zimbabwe have been cited to highlight the problems that might arise if the land question is not handled in a balanced manner.

Robertson[10] has dismissed the link between poverty and societal stability as rhetoric and "as an exercise in slogans designed to satisfy the aspirations of a significant constituency." This view can be best described as unfortunate. The preamble of the Restitution of the Land Rights Act notes that restitution is also rooted in s 9(2) of the Constitution dealing with the need for legislation to be enacted to address the interest of people who have in the past been victims of apartheid. Issues of poverty and the general welfare of victims of apartheid was considered as forming part of the government's larger land reform programme

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[6] See pages 2 and 3.
[7] The party's policy was however tempered by concessions resulting from the negotiation for independence.
[8] The 1997 White Paper on Land paragraph 2:5.
[9] See The Herald of 21 February 2003. The Pan African Congress (PAC) has already started expressing frustration with the perceived slowness of the land redistribution process. PAC is suggesting people-oriented mass land invasions along the Zimbabwean lines. Note: The Ivorian civil wars have strong elements of land-related grievances. BBC News, 5 March 2004.
[10] M Robertson "Land and post-Apartheid Reconstruction in South Africa" in S Bright and J Dewar Land Law: Themes and Perspective Oxford Oxford University Press (1998) 323, hereinafter referred to as Robertson.

because the White Paper of the Department of Land Affairs spelt out the objectives of the reforms thus:[11]

> *"Redressing the injustices of apartheid.*
> *Fostering national reconciliation and stability.*
> *Underpinning economic growth.*
> *Improving household welfare and alleviating poverty."*

The research will however not deal with issues of welfare and poverty in any significant details as these falls outside the scope of the study. Nor will it address land redistribution in detail for similar reasons.

1.3 HISTORICAL BACKGROUND OF STUDY

1.3.1 DUTCH SETTLEMENT

It is necessary to give an overview of European settlements and colonial activities in the region because it puts one of the themes of this study (land dispossession) in perspective. The landing in the Cape of first the Dutch and then the British set the stage for European colonisation which subsequently had profound consequences for the country's land distribution. The review begins with Dutch settlement in the region under reference.

The country's serious connections with Europe started when the Cape was first used as an outstation for European travellers heading to the Indies. The Dutch East India Company founded a refreshment centre in the Cape in 1652.[12] It is apparent that the company did not intend initially to develop a settlement in the Cape and so did not covet the lands of the local inhabitants.[13] However, the company changed its initial policy and set up a settlement in the Cape in 1657. This change was apparently driven by economic interests particularly the need to provide for cheap food and livestock for its passing vessels and staff.[14]

During this period in spite of black occupation of the region since time immemorial early company officials conveniently assumed that the territory was *terra nullius*. This idea was apparently influenced by European thinkers like

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[11] Government White Paper on Land 1997. See also A Du Toit "The End of Restitution: Getting Real About Land Claims" in B Cousins et al At the Crossroads: Land and Agrarian Reform in South Africa into the 21st Century Cape Town PLASS (UWC), NLC 2000 76, hereinafter referred to as Du Toit.
[12] R Oliver & J D Page A Short History of Africa London Rex Callings (1974) 163.
[13] Oliver and Page op cit at 163. See also page 1.
[14] Ibid. See also T H R Davenport South Africa A Modern History London The Macmillan Press Ltd (1978) 18.

Emer De Vettel[15]a French jurist who had asserted the European's legitimate entitlement to take land which savage tribes had no need for. Similar injunctions to the colonist to take land and put them to valuable use in America are contained in Locke's second treatise. This views which were very influential provided for the broad British land policy in the colonies[16].

The Dutch East Indian Company was the instrument through which Dutch colonialism was projected. It was in virtual control of affairs in the Cape from 1652 when Jan Van Riebeck arrived there to establish a refreshment station for ships travelling to and from the East.[17] Once settled in 1657, the company started acquiring land through a process described by Robertson as land deals.[18] These transactions involved tricking indigenous peoples to sign off their land in agreements that the natives thought were only granting temporary permission for settlements.[19]

The land acquired by the company in this way, including the ones the Company simply assumed ownership of, was subsequently granted to free burgers from 1657 onwards.[20] The land was laid out in farms and granted on generous terms. Bennett[21] has presented an illuminating example of a grant to Harmen colony thus:

> *"Harmen Remajene's was to receive in freehold as much land as they can bring under the plough in three years. This was to remain their property forever, with the right to sell, lease or alienate, and with a three years respite from taxation thrown in. The obligation to sell all their produce to the Dutch East Indian Company, which undertook to buy it made this a characteristic servitude-laden form of Dutch freehold."*

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[15] S Dorsett "Land Law and Dispossession: Indigenous Rights to Land in Australia" in S Bright and J Dewar (eds) Land Law: Themes and Perspective Oxford Oxford University Press (eds) (1998) 281, hereinafter referred to as Dorsett.
[16] Ibid.
[17] AT Moleah Colonialism, Apartheid and Dispossession Welmington Disa Press (1993) 48.
[18] Robertson op cit at 14.
[19] Ibid.
[20] Davenport op cit at 18. Tension inevitably erupted between the company and the natives (*Khoikhoi* Bushmen) when the company started carving up portions of these vacant lands for their use in the Cape.
[21] T H R Davenport and K S Hunt (eds) The Right to Land Lansdowne Juta & Co Ltd (1974) 54, hereinafter referred to as Davenport and Hunt.

The first comment that one must necessarily make is that such a liberal giving away of land can only be possible because the company was giving out what it did not own. The loss was that of the indigenous inhabitants, which meant nothing to the Company. The grants introduced the feudal land holding system prevalent in Europe. The difference in the incidents between what the company established in the Cape and what obtained in Europe was minor. In Europe, the obligation was to provide service while in the Cape it was to sell produce to the Company, which it undertook to buy at a fair price.[22]

This process became the main tool through which blacks were dispossessed of their land. It is interestingly based on an assumption by the Company that it had overlordship over an undefined area of land at the coast. From the Company's point of view, this overlordship over land was unlimited and extended into the hinterland.[23] This notion, which in essence results from a casual assertion of title to land because of dominating control based on might, has been a cardinal feature of the South African social construct (apartheid) which lasted until only recently.

The Company also devised a scheme in terms of which it offered land to whites.[24] Under this process, the Dutch were offered land to use for grazing of cattle on condition that they paid token rents to the Company. Those who used the land for farming were to pay tithes of a tenth of their produce to the Company. Davenport[25] observed that by this process, the settlers could build their houses and develop very large farms on land, which they neither owned nor rented. Some settlers did not bother acquiring land from the Company, but rather opted on their own to roam the countryside and settle where ever it suited them to do so.

Some free burgers in the process settled in the vicinity of *Khoikhoi* indigenous people. The ease with which these settlements were established meant that within a short time the settlers had acquired by settlement many thousands square miles of African land. Land acquisition had become almost a free for all so much so that the rules of acquisition sometimes assumed

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[22] Davenport op cit at 54.
[23] D L C Miller and A Pope Land Title in South Africa Kenwyn Juta & Co Ltd (2000) 5, hereinafter referred to as Miller and Pope.
[24] It was the Company policy during the latter part of the seventeenth century to encourage white settlements. Although the Company was essentially Dutch, it attracted staff and settlers from all over central Europe. See Davenport op cit at 19.
[25] Davenport and Hunt op cit at 54.

ludicrous dimensions. There was at one point (Batavian era) a system of delineating farms by settlers, which involved the practice of leisurely riding on horse back in all direction from a defined spot for half an hour.[26] It is in this way that the Afrikaner people who (though primarily Dutch) were an amalgam of peoples from all over Europe came to establish themselves in the Cape.[27]

1.3.2 BRITISH SETTLEMENT

British occupation of the Cape started in earnest in the eighteenth century when the Dutch East Indian Company was in decline.[28] The region was regarded by the British as of strategic commercial and military importance for the building of the British Indian Empire. It was seen both as a fortress for the defence of the entrance to the Indian Ocean as well as providing opportunity for commerce. Britain's occupation of the Cape was also motivated by the desire to forestall French designs in the region.[29]

British settlement in the Cape was directly influenced by H Dundas who was Foreign Secretary from 1784-1805.[30] Dundas[31] urged the Dutch Company in 1791 to "place all its settlements within the benefit of British power and protection" in return for a guaranteed monopoly of the spice trade and the trade with China. Although the Dutch Company declined the offer, the British landed troops in the Cape in August 1795. These troops routed the Dutch in September of the same year and took possession of the Cape.[32]

This victory was followed by the gradual extension of British dominion in the interior of present day South Africa. Once settled in the region, the history of British occupation was characterised by inconsistencies. According to Duly,[33] government authority seldom existed at the local level and where it did it was regarded by him as an "imperfect and exceedingly" primitive force. Such

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[26] Davenport op cit at 55.
[27] Davenport op cit at 19. See also note 25 above. The European colonialists conquered the *San* and *Khoikhoi* of the Western Cape with comparative ease. These indigenous peoples were quickly decimated because of weaknesses in their social structures resulting from their pastoral economy. This type of economy necessitated constant nomadic movements with the inevitable absence of strong socio-political structures Moleah op cit at 49.
[28] V T Harlow "The British Occupations 1795-1806" in E A Walker et al The Cambridge History of the British Empire Cambridge Cambridge University Press (1963) 170-173, hereinafter referred to as Harlow.
[29] Harlow op cit at 171.
[30] Ibid.
[31] Ibid.
[32] Harlow op cit at 176.
[33] L C Duly British Land Policy at the Cape 1795-1844: A study of administrative procedure in the Empire Durham Duke University Press (1968) 3.

a government could not effectively establish control over the inhabitants it claimed as its subjects.

An important feature of the inconsistency of British rule was demonstrated by its ambivalence over her continued sovereignty over the South African colony beyond the Cape. On the 21st of October 1851, Sir George Grey, a member of the British government, sent a dispatch to Sir Harry Smith, the Queen's representative in the Cape, announcing that the "ultimate abandonment of the Orange River sovereignty should be considered a settled point in our policy."[34]

In spite of the above, British rule did play a predominant role in directing the management of native inhabitants. The goal of such management was the attainment of good order and the control of native public relations. This required as a first step the control of the land. It was assumed that the native, because he was uncivilised, could not be dealt with as a negotiating partner. The land could not be the subject of any transaction between British administrators and the Africans since the territory was officially uninhabited.[35]

Opren,[36] a land surveyor, observes that Sir George Grey, the Cape Governor, dismissed the possibility of a civilised relationship with natives. Grey was of the opinion that "treaties" could not be a basis of dealing with indigenous peoples because "experience had truly shown the futility of such compacts." He stressed very clearly that "authority instead of treaties must be" the basis of dealing with natives.[37]

This authority was essentially exercised through the issuing of proclamations. Duly[38] points out that at about 1795, the vastness of the colony and the associated transportation problems delayed the implementation of government proclamations. This factor had an adverse effect on efficient land administration and created ideal conditions for land grabs by Europeans. The quest for land by Boers in the Eastern Cape and the forceful settlement on native land became pronounced during the administration of Sir Cradock in 1811. A circuit court report during this period said that all the young of this

[34] J M Opren Reminiscences of life in South Africa 1846 to the present day vol 1&2 Cape Town Shruk (1964) 93.
[35] Opren op cit at 117.
[36] Opren op cit at 7.
[37] Opren loc cit.
[38] Ibid.

region "have no other prospects than the breeding of cattle and to obtain places for that purpose." [39]

Although acquisition by confiscation was a major factors in the extension of British rule territorially, Cradock later devised a land policy that legalised lands acquired in this way. This policy that was devised to (circumvent international law's prohibition of free hold tenancies in dependent societies) gave legal security to land acquired through this method. Cradock believed that his land policy would "unite crown and colony in the pursuit of common goals."[40] In a letter written in 1811, Cradock described the kind of grant this policy entailed as follows:[41]

> *"I should wish that every proprietor of land should look upon it as his own estate, as a provision for himself and family and that no future event can injure him, or render it unproductive but the want of industry or his own mismanagement. This is the situation of England and how abundantly it is proved."*

British administrators used land as a tool to placate the settlers, since the British attached very little value to it. Opren,[42] thus states that "land was…being given away right and left, or sold at public sales" at ridiculous prices.[43]

The grantees of these British leases as a matter of consistent practice often on their own extended their holding as much as they pleased, so long as this did not incorporate the possession of other colonists.[44] Land was also granted to colonists at the frontier regions as reward for their fighting off natives in the multiple wars over land.[45] These frontier colonists were to provide a buffer between lands already annexed and natives particularly the Basutos who, enraged by the dispossessions, constantly attacked outlying outposts of the British administration and white settlements.

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[39] Duly op cit at 48.
[40] Duly op cit at 45.
[41] Duly op cit at 46.
[42] Opren op cit at 86.
[43] Farms of over 5 miles square were sold for as little as 20 pounds. See Opren op cit at 86.
[44] Opren op cit at 112.
[45] Duly op cit at 86. There was a series of nine wars from 1778-1888 between an advancing European people and the natives in the Eastern Cape. The frontier wars as these wars were called were an attempt to conquer the natives and dispossessed them of their lands. These wars which were bloody provided white settlers the opportunity to extend their territory as far north as present day Lesetho and Zimbabwe. See also Thompson op cit at 87.

One British governor after the other by proclamation annexed much of what is today the Eastern Cape of South Africa. Sir Harry Smith, the second governor in the Cape at about 1848 is considered to have been the administrator who exploited the use of proclamations to the maximum. On the 3rd of March 1848, he issued a proclamation declaring the sovereignty of the Queen over the region between the Orange and Vaal rivers. This area covering a huge track of land later became known simply as British territory.[46]

This Proclamation, which effectively meant the loss of Africans' rights to their land, was curiously stated to be for "the protection of the just and hereditary rights of the native chiefs and people."[47] The colonists and some defeated blacks actively supported these proclamations and British sovereignty. The former had good cause to support such large-scale land seizures while the latter had no choice having lost the difficult battles to defend the land. It should be noted that the exact specification of the territories involved in this proclamations was impossible to ascertain. The identification of the outer limits of the territory with the phrase 'region between the Orange and the Vaal rivers" made it possible for the territories to be infinitely extended since the areas were neither mapped nor surveyed.

British administrators who had thus cheaply acquired land by this process of proclamation made very handsome grants of it to the colonialists, both English and Boer. In the words of Duly,[48] in some instances, the land was granted gratuitously, as rewards to friends and servants of the administration. In other instances the land was granted as freeholds subject to the stipulation that the beneficiaries paid a tithe of a tenth of their grains to the government.[49] Such grants sometimes extended to sixty morgens or more.[50]

1.4 THEORETICAL FRAMEWORK

1.4.1 HUMAN RIGHTS

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[46] Opren op cit at 56.
[47] Ibid.
[48] Duly op cit at 14.
[49] The colonial office in fact treated land matters as insignificant, considering reports on land from the colony as merely miscellaneous matters. Colonial administrators were thus allowed very wide discretion to deal with issues of land. Opren op cit at 34.
[50] A morgen is a measure of land prevalent in the Netherlands, South Africa and parts of the United States. It is equal to 0.8 hectares or two acres. In Norway, Denmark and parts of Germany, it is a measure of land equal to about 0.3 hectares or two-thirds of an acre. It is used here in the first sense.
See Oxford Dictionary.Online:2003<http//dictionary.oed.com/cgi/entry/00315767?query_word and queryword –morgen and e> Accessed on 10/13/03.

This research raises the interesting concept of human rights since the right to land in s 25 of the 1996 Constitution is amongst the bills of rights. There is as yet no universally accepted definition of human rights. It has been stated that the absence of a consensus on the definition of human rights reflects the differences in the background of those who propound these definitions. It cannot however be disputed that the rights relate to claims made by human beings on their community[51] and could be classified chronologically in terms of their development.[52] Thus human rights first appeared as individual rights from the 17th to 19th centuries; then as social, cultural and political rights in the 19th and 20th centuries and finally as solidarity rights which stress development and environmental interest.

Although Coke, Voltaire and Rousseau all speculated on natural rights from which human rights derived, the present discussion is for the purpose of space limited to a review of the analysis of John Locke. This candidate believes that it is from Locke's conception of the equality of man that the idea of human rights can rightly be said to have taken form.[53] Locke believed that it was possible to identify the basic rights of man by imagining man in a depoliticised state of nature. Noting, however, that this state of nature was imperfect, Locke stated that the individuals in it concluded two social compacts to enable them regulate the inevitable conflict of interest of the individuals in it.[54]

In the first of these compacts, individuals joined together in a civil society while in the second they established a government and gave it political power to protect their rights. Locke situates the acquisition and protection of property within the context of this right as follows: [55]

> *"Though the earth and all inferior creatures be common to all men, yet every man has a property in his own person; this nobody has a right to but himself…. Whatever, then, he removes out of the state that nature*

[51] P Sieghart The Lawful Rights of Mankind An Introduction to the International Legal Code of Human Rights Oxford Oxford University Press (1985) 1.
[52] R B Mqeke Customary Law and the New Millennium Alice Loveday Press (2003) 11.
[53] Locke wrote that " all men are naturally in, and that is in a state of perfect freedom to order their actions and dispose of their possessions …as they think fit within the bounds of the law of nature without asking leave or depend on the will of another man." He attributes this equality and right to possession to the rule of "common reason and equity which is that measure God has set to the actions of men." See J Locke The Second Treatise on Civil Government and A Letter of Toleration (eds) in J W Gough Oxford Basil Blackwell (1948) 4-6.
[54] Ibid.
[55] Locke op cit at 15.

has provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property"

From Locke's theoretical standpoint, man's right to property (land inclusive) is fundamental and based on the fact that God had given the earth as a common heritage to the children of men. He noted also that God gave the children of men "reason to make use of it to the best advantage of life."[56]

The Lockeian theory of property is broad because it defines property in the context of life, liberty and estate. This thesis is limited to the notion of property in land, an idea that has swung between three (sometimes conflicting) theoretical foundations. These theoretical perspectives relate to the concept of understanding property either in terms of empirical facts, artificially defined rights or duty-laden allocation of social utility.[57] This view of understanding property in land is widespread in common law countries and has implications for the new South African property regime as well. [58]

In summary, the empirical fact perspective de-emphasises abstract theories in its attempt to explain the notion of property in land. It stresses the raw data on the ground primarily with a view of empirically establishing the relationship between land and the individual or community. On this view the ascertainment of property in land has more to do with the behavioural data such as possession than with words and documents.[59] These data are symptomatic of a deeply instinctive sense of belonging and control.

K Gray and S Gray[60] contend that the recognition of aboriginal title[61] in Australia was the direct consequence of the validity of the empirical fact theory in determining the status of land. They argue that after tens of thousands of

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[56] Ibid. This type of thinking influenced the French and American revolutions of 1789 and 1791 respectively. Sieghart thinks that these revolutions were significant because they produced constitutions that for the first time defined the rights and freedom of persons including the right to own property within the state. See Sieghart op cit at 27-28.

[57] K Gray and S Gray "The Idea of Property in Land" in S Bright and J Dewar (eds) Land Law: Themes and Perspective Oxford Oxford University Press 1998: 18, hereinafter referred to as Gray and Gray.

[58] The idea that the country was *terra nullius* would be untenable when seen from the perspective of understanding property in terms of empirical facts. The European property law concept that gives prominence to ownership is a reflection of the understanding of property as artificially defined rights.

[59] Gray and Gray op cit at 19.

[60] Gray and Gray op cit at 26.

[61] See the landmark judgment in Mabo v Queensland No 2 175 CLR 1.

years of occupancy of the land by the natives it is impossible to declare them intruders in their own land or say that the Crown's acquisition of sovereignty extinguished native interests. Although aboriginal title is not recognised in South Africa, it is safe to also conclude that post apartheid land reforms are based on the fact that Crown's acquisition of sovereignty and subsequent grant of land to European settlers did not extinguish the interest of indigenous Africans in their land.

The theory of property as right concentrates on describing land by reference to a bundle of abstract rights. Although this theory is peculiarly English, it does have significant resonance in South Africa because the current property paradigm recognises different property rights and interests. Thus s 25 of the 1996 Constitution recognises ownership, customary tenure[62] and labour tenancy.

The third theoretical perspective on which the understanding of land is based relates to the identification of the various uses to which land is put. These elements of utility are then labelled as property.[63] Land does generate multiple utilities such as for occupancy, investment or aesthetic appreciation. In Nigeria, for example, the broadest right over land is that of occupancy, which a certificate of occupancy under the Land Use Act 1980 protects.[64] Countries that pursue a utility-based approach, invariably, vest the radical title of land on the state, which holds it in trust for the people. The land reform elements of the post apartheid South Africa exhibit striking resemblance of the utility theory. The theory has close affinity with distributive justice because it stresses the government's watchdog role in land administration.

1.4.2 AFRICAN WORLD VIEW ON PROPERTY RIGHTS

The present writer believes that any discourse on human rights and land would be incomplete if there is no reference to the African continent's world-view as well. African societies did develop an ethical system under which ownership, control and management of land are defined.[65] Because decisions in ancient African communities were arrived at by consensus and the community

[62] See s 25(6) of the 1996 Constitution.
[63] Gray and Gray op cit at 39.
[64] See Foreign Finance v L S D P (1991) 5 SCNJ 52.
[65] C F Fissy Power and Privilege in the Administration of Law: Land Law Reforms and Social Diffentiation in Cameroon Leiden Africa Studies Centre (1992) 1.

was not driven by a desire for profit or wealth, collective resources were distributed in accordance with individual needs.[66] This political mechanism for distributing benefits translated into each individual member of society having rights to goods and services on the basis of need.[67] This African perspective seeks to give content to the overriding idea of human dignity, as it guarantees the provision of the needs for dignified living.

African conception of life and the relationship between the living and the ancestors strengthened respect for the dignity of man and his fundamental rights. This notion of the relationship between ancestral spirits and the behavioural patterns of the living was vividly captured as follows:[68]

> *"African societies had generated an ethical system that served the goal of human dignity as effectively as any western code…the notion of due process permeated indigenous law; deprivation of personal liberty was rare: security of the person was assured…. The African conception of human rights was an essential aspect of African humanism sustained by religious doctrine and the principles of accountability to the ancestral spirits."*

The colonialist misunderstood ancient African legal notions. This misunderstanding resulted in the failure to appreciate the basic rights developed under indigenous systems prevailing in pre-colonial Africa. The development of the repugnancy rule that operated as a test for African institutions was partly the result of this misunderstanding. Although this test was useful in curbing some of the invidious excesses of customary law, it has been criticised because it seeks to evaluate African customs by comparing them with European values.[69]

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[66] Indeed, land is in traditional African world-view seen as constituting one of the elements of nature hence open to all members of the community. Fissy loc cit. An African myth of creation puts man at the centre of the universe. This has been interpreted to suggest that the universe and its resources (land) were meant for man's use. See J S Mbiti Introduction to African Religion London Heinemann (1997) 37-38.

[67] See T Bennett 'The Compatibility of African Customary Law and Human Rights' (1991) Acta Juridica: 30.

[68] Ibid. Fissy cites an African chief who graphically regards "land as belonging to a vast family of which many are dead, few are living, and countless members are still unborn". Fissy op cit at 6.

[69] See T Bennett 'Terminology and land tenure in customary law: an exercise in linguistic theory' 1985 Acta Juridica 177. There are certain African customs which were indeed very repugnant. In Edet v Essien volx NLR 47, a Nigerian court had to disallow a custom which insisted that children born by a woman after the death of her husband belong to the deceased family because their biological father had not returned the dowry paid on her behalf before "marrying" her. Contrast this case with G Nwaribe v President District Court Orlu (1964) 8

It is obvious that belief in the powers of ancestral spirits and their intervention in the day-to-day affairs of the living are prevalent in almost all African traditional societies.[70] It shapes the African conception of his relationship to the community. It is part and parcel of positive morality which influences the way law operates in African societies in the same way as most European legal rules are connected to Judaeo-Christian origins.[71]

African customary conception of rights has strong communal and humanistic elements, which has been expressed in different ways in the continent. In South Africa, Mqeke[72] identifies the customary concept of *ubuntu* as constituting a variant of this philosophical framework. Relying on the Constitutional Court's decision in S v Makwanyane,[73] he asserts that *ubuntu* translates to humanness and morality. Seen from this perspective the concept constitutes a key foundation for human rights as solid as theories developed by Europeans. It emphasises respect for human dignity that is a firm foundational basis of human rights but does so through stressing conciliation rather than confrontation.

1.4.3 THEORIES OF JUSTICE

By way of introduction, a discussion of the theories of justice will be preceded by a brief comment on the background of the South African land restitution scheme. The land restitution programme is a direct consequence of the demand for the restoration of land, which springs from a deeply felt sense of the injustices of land dispossessions.[74]

The ANC's commitment to a new land policy is reflected in the Freedom Charter and the Reconstruction and Development Programme (RDP). The latter expressly committed the party to incorporate the right to the

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ENLR 24 where another Nigerian court held that the biological father of a child was not entitled to claim the child because he impregnated the mother of this child when she was by custom still married to the husband who had long died.

[70] Fissy op cit at 1-6.

[71] In Donoghue v Stevenson (1932) SC (HL) 31, for instance, the neighbourliness principle in the New Testament was cited as the basis for the principle of product liability. Most criminal offences e.g. murder, have their basis in the Ten Commandments in the Bible. See Keeton 1955: 111. The writer is also a Christian who believes in One True God and that Jesus Christ is the only messiah between man and God.

[72] Mqeke op cit at 10-11.

[73] 1995 (3) SA 391 (CC).

[74] T Bennett "Historic land claims in South Africa" in G.E Maanen et al (ed) Property Law on the threshold of the 21st Century Tilburg MAKLU Uitgevers \Antwepen-Apeldoom (1996) 507, hereinafter referred to as Bennett (1996).

restitution of dispossessed land in the Constitution.[75] This ideal was given content in sections 121-123 of the interim constitution which laid the foundation for the restoration of land dispossessed after the 19 of June 1913. This became a central policy of the ANC government. It is designed to affect persons and communities covering an estimated 3.5million people and their descendants who were victims of forced removals.[76]

The restitution process, however, involved a delicate balancing act. Section 121(5) of the interim constitution provides for the enactment of an Act of parliament for the restoration of rights in land. This was strengthened by s 8(3)(b)[77] which recognised the claim to restitution as a fundamental right. Restitution claims covered those whose lands were expropriated without the payment of adequate compensation.

Although s 122 took the restitution issue further by providing that a court will be set up to administer the process, it was the Restitution of Land Rights Act 22 of 1994, which set out the actual framework for the restitution process. The above Act created a specialised Land Claims Court with jurisdictions going beyond those of ordinary English courts.[78] It also had powers to order that a just and equitable compensation be paid to a claimant for restitution in lieu of the land itself in appropriate circumstances.[79]

The Land Claims Court is one of the most important elements of the restitution scheme because its powers also extend to adjudicating on legislation dealing with broader tenure reforms.[80] The apparent emphasis laid on the idea of justice in the current restitution and reform schemes makes it necessary to investigate the theoretical nature of the concept in some greater details. The lawmaker, no doubt seeks to give content to the broad objectives of the founding fathers as stated in the Preamble of the Republic of South Africa Constitution Act 108 of 1996 concerning access to social justice and the establishment of the new order founded on freedom, human dignity and justice.

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[75] The Reconstruction and Development Programme 1994 2.4.13.
[76] Miller and Pope op cit at 315.
[77] Ibid.
[78] The court has the powers to admit hearsay evidence and could, on its own motion conduct pre-trial conferences to clarify issues in doubt. This sounds more like the inquisitorial system of the Civil Law system. See C G Van der Merwe and J M Pienaar "Land Reform in South Africa" in P Jackson et al (eds) The Reform of Property Law Aldershot Dartmouth Publishing Co Ltd (1997) 363, hereinafter referred to as Van der Merwe and Pienaar (1997).
[79] Ibid. See also s 25(3) of the Constitution.
[80] For example, the Land Reform (Labour Tenants) Act 3 1996: Extension of Security of Tenure Act 62 of 1997.

Kelsen perceived justice as "one of those questions to which the resigned wisdom applies that man cannot find a definitive answer, but can only try to improve the question."[81] Both Villeln Lunstedt and Potter[82] have expressed similar sentiments. In this study, it is intended to discuss these theories from three broad perspectives viz justice as equality, justice as a disposition of mind and justice as freedom.

Plato associates justice with the idea of the absolute good. In his later books of the Republic, he constructs an ideal state, which he considers should lead to this absolute good. The ideal state is made up of defined parts just like the individual is made up of soul, spirit and body.[83] The state, according to this theory, is made up of the three orders of society, namely, the philosopher, soldiers and ordinary folks.[84] Plato asserts that justice is attained when these orders of society work harmoniously. Such harmony is achieved when people do what they are best suited to do[85].

His analysis assumes a society that is stratified. The philosophers, according to Plato's formula, would be the rulers; soldiers would perform the functions of internal and external defence, while the ordinary people supply, by their different callings the services required by the rulers and soldiers. The theory assumes that each member of these defined parts of society would perform his role without persuasion. Plato attributes this to the fact that the performance of these defined roles would be considered a duty.[86] He, however, did not say where this idea of duty originates.

Plato's theory of justice is impracticable. He himself had to abandon it in the laws. One of the main difficulties that Plato had to contend with was how to reconcile his assumption that in a just state, there would be no need for rules with the reality of the day-to-day world. Plato later conceded that his theory was purely romantic and mystical.[87] The inadequacy of Plato's theory is understandable. However it has been stated that Plato's separation of the idea from reality can be seen as reflecting the common belief that the post apartheid

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[81] H Kelson What is Justice? Law and Politics in the Mirror of Science Berkeley University of California Press (1957) 13.
[82] K K Kegan Three Great Systems of Jurisprudence London Stevens and Sons Ltd (1955) 68.
[83] Plato The Republic translated by D Lee Penguin Books (1994) 218-9. See also H F Jolowicz et al Lectures On Jurisprudence London The Athlone Press (1963) 35.
[84] Ibid.
[85] Plato (1994) op cit at 204.
[86] Ibid.
[87] J M Kelly A Short History of Western Legal Theory Oxford Oxford University Press (1993) 26.

constitution with a bill of rights represents the perfect idea, which is at odds with imperfect realities such as homelessness.[88]

For Aristotle who was a student in Plato's academy, justice is a virtue which helps man to be a noble person.[89] It is intrinsically linked to equality. Here, justice is predicated on the preposition "equals are to be treated equally and unequals unequally."[90] This maxim of treating likes alike and unequal differently is essentially political in tone and substance, because it relates to the distribution of honours and other entitlements in the society. It is because of this that justice is considered connected to public decision-making.

Aristotle divided the domain of justice into corrective justice and distributive justice. Corrective justice as the term etymological suggests involves the rectification of a wrong in the actions of people. Ordinarily, the idea of correcting a wrong inflicted is from a moral point of view unassailable. Indeed, the entire domains of the law of torts and contract functions on the basis of this theoretical premise. The immensity of man's potential for selfish and harmful actions against others shows the significance of this form of justice.

Corrective justice roughly corresponds to judicial justice for this reason. It is concerned with restoring the equilibrium when one party has, by his wrongful act, disturbed the balance. This form of justice has been divided into two, *viz* where the intervention is voluntary and where it is involuntary. This corresponds to doing justice in civil adjudications.[91]

Distributive justice, on the other hand, relates to the appropriate distribution of benefits, honours, privileges and duties among a group.[92] The phrase "appropriate" is used to reflect the fact that the distribution may be on an equal or unequal basis depending on whether the members are alike or different. This form of justice has also been referred to as legislative justice.

There is a major difference in emphasis between Plato and Aristotle. On the one hand, Plato's theory implies the right of an individual to acquire property and to be protected in the enjoyment of the rights attendant thereto.

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[88] D Johnson et al Jurisprudence A South African Perspective Durban Butterworths (2001) 10.
[89] Aristotle The Politics of Aristotle Book 1 translated by J E C Welldon Macmillan & Co Ltd London (1912) 7.
[90] Kelly op cit at 27.
[91] Ibid.
[92] Distributive justice was founded on equality based on things, which though subjective were truly relevant. This type of equality has been described as geometric, for instance, where there were to be a distribution of fluits, the best fluit should be given to the best fluit player. See J D Van der Vyver 'Ownership in International Law' (1985) Acta Juridica 120.

While on the other hand, Aristotle's concept implies a strong moral claim to an equal share in the distribution of goods. Van der Vyver[93] argues that this distinction in emphasis between Plato and Aristotle is the origin of the dichotomy between the accumulation of wealth through one's enterprising labour and the maintenance of economic equality by the state. This is expressed in the distinction between capitalism and socialism up till this day.

According to Kelly,[94] the concept of treating likes alike and unequal differently is weak and does not fit into the theory of distributive justice. It does however have significance in South Africa as it may be argued that the terms for accessing land by the dispossessed should be different from those who benefited from the dispossession.

Aristotle's distinction between distributive and corrective justice assumes immense significance in post apartheid South Africa in many domains. It resonated in the extensive debate about affirmative action and inspired the affirmative regime found in most post apartheid pieces of legislation. His theory seeks a just redress where unjust laws in the past produced massive inequalities in wealth and land distribution between the different races in the country. The principles of Aristotle's[95] corrective justice that demands that those who have suffered loss (black people) under past discriminatory laws be compensated for their loss has been confirmed by the Constitution.[96]

Functionalist scholars in South Africa, like the historical novelist Stuart Cloete, however, maintain that inequality is ubiquitous and universal and performs valuable functions. It is contended that inequality creates niches in society in which all individuals can find their best chances to develop. This helps to keep hostility amongst the diverse elements in society at the barest minimum. According to the functionalists, restitution also provides a natural system for the acceptable distribution of resources amongst the unequal in society. Inequality is according to this theory, an indispensable ingredient for a

[93] Ibid.
[94] Kelly op cit at 28. Relying on Hart, the author illustrates the difficulty of applying this maxim in a society where people have multiple differences and major similarities. With such distinctions and similarities in colour, height, religion in society, how are the points of differences/similarities to be determined for the purpose of applying the maxim? Although it may be peremptorily argued that it is unjust for a distinction like colour to form the basis of differences in treatment, the South African experience has shown that this view does not enjoy universal acceptance.
[95] Johnson et al op cit at 15.
[96] See s 25(3) (b) and 25(7) of the Constitution.

just ordering of society.[97] Applying this theory, these scholars point out that the division between black and white in South Africa is natural and just.

Hart also advances a theory that seeks to demonstrate a link between equality and justice in the Aristotelian fashion.[98] He acknowledges the classification of justice into distributive and corrective justice. Perhaps his credit lies in his realisation that equating justice with equality simpliciter does not take the theory too far. Hart attempted to fit a classical judicial redress of a wrong into the mould of the theory of treating like alike.[99]

In his opinion, where in a state 'A' commits a delict against 'B', he has thereby caused disequilibrium and upset the equality that existed previously between them. A court's judgement requiring A to pay damages restores the equilibrium. Hart's analysis reveals one important feature, namely, that no one concept of justice can function alone to secure an orderly society. Order can only be attained when various theories of justice are used in manners that complement each other.

It is generally acknowledged that religion has a very remarkable influence on history. Although all religious beliefs hold out God to be righteous, the Scripture of which this candidate is most familiar with is seriously concerned with the problems of justice in the sense that God is identified with righteousness.[100] On this basis, iniquity and oppression should be eschewed.

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[97] H W Van der Merwe 'Perspective of Racial Inequality in South Africa' (1979) Acta Juridica 50-51.

[98] H L A Hart The Concept of Law Oxford Oxford University Press (1990) 158.

[99] Hart op cit at 161-162.

[100] W Friedman Legal Theory London Stevens and Sons (1949) 28. St Thomas Aquinas argues that all law enacted by man must keep within the limits of the *lex divina* the positive laws of God as revealed in the scripture. See Friedman loc cit. Scriptural justice can be divided into that in the Old Testament and the New Testament. In the latter, Deuteronomy 32: 4 graphically and poetically illustrates the idea of being just thus:

> *"The rock, His work is Perfect,*
> *For all his ways are justice.*
> *O God of faithful and without iniquity,*
> *Just and high is He."*

Justice as seen above is a virtue and constitutes a branch of morality. The prophets were largely preoccupied with the suffering of man from the oppression of others; hence the Old Testament is replete with provisions enjoining righteousness for the weak. This is a cardinal precondition for a relationship with God. This theory is linked to equality because it in substance reveals that God's righteousness is for all, regardless of status or race.

The New Testament theory of justice is based on Jesus' teachings. In the Gospel of Mark, Jesus taught that we should do to others what we would have done to ourselves. This is the basis of the Christian concept of justice. The main ingredient of Christian doctrine of justice is love both for self and others. This is very significant because were love to regulate the relationship between the state and citizens and citizens inter se injustice would certainly be drastically reduced, if not eliminated entirely. However, this theory of justice suffers from some weaknesses. Firstly, to be successful, people have to be "selfless" or altruistic, which in practice is not the case. Even the Bible recognises that man's heart is not only continually evil, but

John Rawls' work[101] has also contributed immensely to the notion of justice. In his analysis, justice is simply involved with identifying the rules/regulations for structuring and restructuring society. This structuring and restructuring aims at ensuring that the multiple and diverse values, interests and goals of individuals in society are distributed in a manner that will achieve the ultimate good.[102] These rules are also necessary to determine and regulate the way individuals can cooperate to create goods and services in society.[103]

Rawls' theory is akin to the earlier philosophy of Aristotle because both deal with regulating society for the purpose of distributing benefits and duties. His view of justice raises the crucial question of how to determine which principles to follow. This theory is based on a variant of the recurring concept of social contract.[104] It is contended that under this hypothetical contract, people are asked at an initial stage to determine principles of structuring society, which they will consider as just or legitimate. The theory is predicated on the assumption that those involved will consider "justice" as an acceptable value to be attained. The determination of the principles to be attained is made at an initial stage where those making it cannot be influenced by self-interest.

Those making this choice operate from a "veil of ignorance" a notion striking for its novelty albeit being of utopian character.[105] In Rawls words the parties involved "are not allowed to know the social position of those they represent or the particular comprehensive doctrine of the person each represents." A similar ignorance is "extended to information about people's race and ethnic group, sex and gender and their various native endowments such as strength and intelligence."[106]

There are definite difficulties with this approach. It is based on a wide range of assumptions and represents a potpourri of distinct ideas for various philosophers.[107]The author's theory of justice is based on two principles viz an equal right to existing opportunities and the structuring of inequalities such that

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impossible to discern as well. The Christian theory of justice as expounded by Christ will immensely improve the course of a just legal system combined with other theories. See also Kelson op cit at 25-27.

[101] A theory of Justice (1972) Oxford University Press.

[102] John Rawls Political Liberalism New York Columbia University Press (1993) 15.

[103] Ibid.

[104] Ibid.

[105] Rawls op cit at 23.

[106] Rawls op cit at 24-25.

[107] Rawls himself stated that the original position where the veil of ignorance is imputed is unhistorical. Rawls op cit at 24.

the least advantaged can get the most out of society.[108] The first principle involves the distribution of things such as rights in property, freedom of expression, rule of law etc on an equal basis. In a sense this is not different from the Aristotelian idea of distributive justice.[109] It is open to the same criticism the present writer has raised in relation to the Aristotelian approach above. The following questions can be raised in regard to Rawl's theory: Will the fact that all murderers are sentenced to a one-week imprisonment be just? Rawl argues that the first principle takes priority over the second, but has not said why this should be so.

With regards to the second principle, Rawl's position is that the inequality that will be allowed will lead to everyone doing better than would have been the case if there were equal sharing. Such inequality exists in skills, intelligence etc and results in a competitive spirit to create more social goods. Rawl's theory has been criticised as being utopian and unworkable in practice since it would require a revolutionary revision of the present system of ownership of property for the purpose of redistribution. Moreover, it is based on a wrong perception of ownership because the state does not distribute most of the things the citizens own.[110] The theory neither adequately addresses the inherent distinctive attributes of individuals, nor does it indicate how to handle the unique distinct disputes that courts are called upon to deal with.

His deference principle and his theory of the maximisation of the position of the worst off in society provoke profound questions with reference to landlessness and poverty amongst South African blacks. The land reform legislation and other affirmative action statutes are consistent with the desirability to maximise the position of the worst-off in South African society. They bear Rawl's theoretical ingredients.[111]

Equally impressive is Dworkin's theory of justice. His theory of justice results from an extensive and complex review of reflective equilibrium, social contract and original position. For him, justice can be seen as fairness based on the "assumption of a natural right of all men and women to equality of concern and respect." He contends that all men and women possess this right not by

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[108] B Bix Jurisprudence Theory and Context London Sweet and Maxwell (1999) 100.
[109] See the ideas of Aristotle in this respect on page 19 above.
[110] Nozick criticised Rawls' theory because it is based on wrong assumptions and vulnerable because of the fact that individuals have freedom to make choices as they please. See Bix op cit at 103.
[111] Johnson et al op cit at 188-189.

virtue of birth, characteristic, merit or excellence, but simply as human beings with a capacity to make plans and give justice.[112] By not attempting to predicate the basis of this assumption on natural law which his theory is crucially based, Dworkin avoided the interminable controversies associated with identifying the basis of justice.

Another important contribution to the notion of justice is that of Perelman.[113] According to him, justice deals with the distribution of benefits and burdens in life. Perelman classifies justice into concrete justice and formal justice. Concrete justice deals with the distribution of benefits and burdens such that each individual receives according to the predetermined criteria. To give effect to his theory, Perelman divided people into essential categories. The essential categories include the hard working and high achievers, the average achiever, the idle and the lazy. He concludes that formal justice occurs when all those who belong to a given classification are treated alike.[114] From the above analysis, the market based land reform adopted by post-apartheid South Africa may be considered just because it allows access to land to be determined by the resourcefulness of each individual.

There is a significant school of thought, which considers justice as an attitude of mind. Proponents of this view include Ulpian, Cicero and Bishop Aquinas. All three define justice from the perspective of the rendering to each one his due.[115] Justinian also adopts a similar definition. The core element of this theory of justice is the state of mind to relate to other persons in a particular way. Bodenheimer[116] sums up this state of mind thus:

> *"unbiased and considerate attitude towards others, a willingness to be fair, and a readiness to give or leave to others that which they are entitled to have or retain…men either in private or public life …who is able to see the legitimate interest of others and to respect them…The just law giver takes into account the interest of all persons and groups when he is under a duty to represent. Thus*

[112] C R Dlamini Administrative Law of a Typical South African University Unpublished PhD thesis University of Pretoria (1994) 26.
[113] J G Riddal Jurisprudence London Butterworths (1991) 198-201.
[114] Riddal op cit at 200.
[115] E Bodenhemeir Jurisprudence The Philosophy and Method of Law Cambridge Massachusetts Havard University Press (1962) 186.
[116] Ibid.

understood justice is a principle of rectitude which require integrity of character as a basic precondition."

The contributions of Cicero were of special significance amongst the philosophers who consider justice as an attitude of mind.[117]The conceptualisation of justice from the Cisorion perspective of rectitude requiring integrity of character has a lot to commend it in the context of South Africa. Thus seen, it puts in context the reason why the majority of white South Africans accepted and took advantage of the principle of spatial segregation of races. Their willingness to acquire lands from which Africans had been forcefully dispossessed reflected both a bias and inconsiderate attitude towards others.

In a similar fashion, the laudable efforts of judges who even during the days of apartheid used their judgements to ameliorate the harsh consequences of legislations and practices that were used to dispossess black South Africans from their land, reflects a recognition of the legitimate interest of indigenous Africans.[118] Seen from this perspective, the integrity of character of these judges was a crucial element that determined the way justice was dispensed.

Finally, there is a third category of philosophers who see the link between justice and freedom as a starting point for the analysis of justice. Of these, Emmanuel Kant and Herbert Spencer are the most outstanding. Bodenhenmer[119] states that the core feature of this theory is dictated by human nature that is "irritated by the invincible restraints as well as by visible one." This nature feels joy when the individual uses his bodily and mental powers to the fullest and to reap the resulting benefits.

By this view, justice is attained when law is structured to give people the fullest expression of their innate liberty while ensuring that this does not infringe on the freedoms of others. Though based on the love of freedom that is a universal human characteristic, this conception cannot be a sound basis for

[117] Besides attributing to nature the ownership of all things, Cicero also regards nature as the source of person's rights over his/her possessions. Justice according to this view therefore involves granting to everyone what is his own and the right to retain what has been granted. The definitions of justice by Ulpian, St Augustine and Thomas Aquinas, to a large extent, merely echoed the ideas of Cicero. Jean Calvin's view that "justice includes all the demands of equity in order that everyone may be given that which belongs to him" is also linked to Cicero's conception of justice. It may be observed that this theory has some kind of link to equality. This explains why the just lawgiver has to take account of the interest of all persons. The theory is almost exclusively based on the integrity or rationality of the lawgiver for its success. See Van der Vyver (1985) op cit at 120.

[118] See Fredericks v Stellenbosch Divisional Council 1977 (3) SA (C) 113.

[119] Bodenhenmer op cit at 200.

explaining how the modern state functions. In practice, most laws operate as restraints on the individual's liberty to do as he/she pleases.[120]

It has been demonstrated that there are divergent theories associated with justice. The question that invariably comes to mind is what is it about the concept of justice that has produced such profound differences of appreciations? The answer is justice's connections to ethics. The ethical domain is not amenable to crisp definitions because they deal with moral feelings of individuals and groups which vary immensely. The distinctions in the appreciation of justice reflect these moral varieties inherent in human society.

The South African post-apartheid experience in land administration demonstrates the complexity of the land question and the necessity of the state to deal with the problem of homelessness and poverty.[121] The constitutional provisions in s 25 dealing with the need for the restitution of dispossessed land in post-apartheid South Africa is for this reason salutary. The provision seeks to ensure that citizens obtain access to land on an equitable basis.

The term equity is capable of two different meanings. It may, in its technical sense, denote a body of highly formalised rules developed by the English Chancery to mitigate the rigours of the common law. Equity is not used in this context in the constitution. It is used in the alternative sense of fairness.[122] It is a concept that allows judges some discretion to decide cases, guided only by their own sense of what is just or appropriate with regards to the peculiar facts of the dispute before them.

Equity and justice are, in this context, synonymous and can be used interchangeably. Indeed, equity as used both in s 25 of the final Constitution and in this research is an instrument to do justice with the aim of ensuring the good of the society. In applying equity as defined here, the judge is guided by good conscience.[123]

There are doubts as to the origin of equity. Philosophers have speculated on whether the Chancellors based their notions of equity on Roman praetorian

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[120] Criminal law is for instance based on restrictive rules. The action of trespass to land is restrictive in content.

[121] The virulent criticism of the police in the Witwatersrand High Court decision in Joubert & Others v Van Rensburg & Others 2001(1) SA 753 (W) reflects the complexity involved in the land question. The court was irritated by the fact that the applicants' attempts to obtain assistance from the police to evict the respondents who were squatters met with no response noting that this had more or less become standard practice in the year 2000. A J Van der Walt 'Living with new Neighbours: Land Ownership and the Property Clause' (2002) 119 SALJ 817.

[122] W Friedman Legal Theory London Stevens and Sons (1967) 490.

[123] Ibid.

law, Greek culture or the moral ideas of the canonists.[124] It is, however, certain that equity evolved as a remedy against the individual. The English law courts[125] had, in the 14th century, become formalistic and technical. The rules of pleadings were rigid, making adjudication in these courts very schematic. Litigants in common law courts sometimes lost their cases on technical points of procedure when, in fact, they ought to have won on the merits of the case.

Aristotle identifies the universal nature of law, as the reason for law's potential to result in unjust decisions. He argues that since all laws are universal, it is not possible to apply them, i.e. universal rules, to certain specific situations. Equity, in his analysis, is that which is used to correct the omissions created by the generalised nature of law. He states the position thus: [126]

> *"…all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, which it is necessary to speak universally but not possible to do so correctly, the law takes the usual case though it is not ignorant of the possibility of error… when the law speaks universally then, and a case on it which is not covered by the universal statement, then it is right where the legislature fails us and has erred by over simplicity to correct the omission to say what the legislator would have said had he been present."*

From Aristotelian viewpoint, equity is the law made by judges. The judge is guided in doing so by his individual belief of what is right and wrong with regards to the particular case before him.

Equity demands the exercise of discretion by the presiding judge. This discretionary element of equity is particularly relevant because as a rule, social needs and opinions are in today's dynamic world always ahead of laws. The law is stable but society is dynamic. Sir Maine[127] has for this reason attached immense value to equity's discretionary jurisdiction because it is a mechanism used to bring law into harmony with society.

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[124] Kagan op cit at 14.
[125] The Common Law courts were courts of common pleas, Exchequer and Kings Bench. See generally Keeton op cit at 111.
[126] Aristotle Nichomachean Ethics 367. This was, however, taken from Lord Lyold of Hamstead et al Introduction to Jurisprudence London Stevens and Sons (1957) 964.
[127] Lyold et al op cit at 965.

The view that equity is a system for filling the gaps or ameliorating the rigidity of the law is open to troubling concerns. Firstly, equity has itself developed very technical rules. The fusion of the courts of chancery and the ordinary courts in England has had tremendous impact on the doctrines of equity. This impact is more particularly felt in the domains of property law.[128]

It must be observed that equity, even as technical doctrines of the court of chancery are construed as an aspect of justice. Thus Aristotle wrote:[129]

> *"It is plain, then, what the equitable is and that it is just and is better than one kind of justice…the equitable man is the man who chooses and does such acts, and is no stickler for his rights in a bad sense…is equitable and this state of character is equity, which is a sort of justice and not a different state of character."*

This conception of equity as synonymous with justice is in the context of s 25 of the 1996 Constitution of South Africa instructive. The idea that equity could be called in to justify a departure from strict rules of positive laws or the equity and justice are indistinguishable[130] may be open to doubts in so far as s25 is concerned. This explains why equity as understood and used in this thesis is not dependent on the discretion of the presiding judge[131]

However, in spite of the above views, the idea of equity as an aspect of justice can conceptually be deduced from the fact that both notions have their organic base in equality. Justice as has been noted previously derives from the recurrent theory of treating like alike and unequal differently.[132] Equity's

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[128] Ibid. In property law the exercise of discretion is limited because as Denning points out, people who deal in property will want to predict with some certainty what will happen in event of a dispute. In such a situation, the technical meaning of words is of utmost importance. The most troubling concern is the fact that the equitable jurisdiction that leaves the judge with the liberty to make laws with his conscience, as guide is open to abuses. The judge who does not have the advantage of knowing the possible interests that inform the legislators' preferences is unlikely to be constrained by them. Lord Denning cited in Lyold et al op cit at 966. Contrast this with the comment of the judge in Joubert & Others v Van Rensburg & Others 2001 (1) SA 753 (W). A J Van der Walt has castigated the trial judge's comment as amounting to pursuing a hidden political agenda that is hostile to the land reform policy of the new South Africa. See also Van der Walt (2002) op cit at 839.

[129] Lyold et al op cit at 964.

[130] T E Holland The Elements of Jurisprudence London Henry Frowde & Stevens and Sons (1905) 36-37.

[131] Its application is constrained by the factors set out in S 25(3) (a)-(d). See full discussion on compensation in paragraph 5.5.

[132] Ibid.

affinity to equality is no less solid. The maxim "equality is equity"[133] reflects the relationship between the two. These maxims are of great antiquity and were used to provide a theoretical justification for the existence of equity. It is therefore plain that equality is an important conceptual element of equity. The resort to maxims as providing a theoretical foundation of equity was particularly common in the United States[134] because equity was viewed with suspicion in the country's courts.

Equality is at the core of the theories of human rights and justice. The idea of treating like alike and unequal differently, which permeates most theories of justice emanates directly from the notion of equality. So does the notion that human rights should apply to all without distinction to race, sex, religion, ethnic origin or any other idiosyncratic differences. The recurring nature of equality compels further analysis of equality in the context of South African constitutionalism.

According to Jaichand,[135] of all the democratic values of the 1996 Constitution, equality has enjoyed a central focus in the constitutional history of South Africa because it is the antithesis of the basic principles of apartheid. Section 9(1) of the 1996 Constitution states that everyone is equal before the law and has the right to equal protection and benefit of the law. This provision, along with s 9(3) and s 9(4) establishes formal equality by apparently levelling the playing ground in society. It will, however, be naïve to imagine that these provisions are all that is required to undo the accumulated damage caused by decades of apartheid particularly in the property law domain. The Constitution seeks to address injustices of past discriminatory laws in terms of the formula set out in s 9(2).

The land reform scheme, which has as its principal objective the concept of substantive equality, is one such measure. It can be conceptualised from a theoretical perspective of human rights because it offers the dispossessed a constitutional right of access to land on the basis of equality and human dignity. An apartheid imposed homeless individual can neither be said to have benefited

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[133] W Keeton An Introduction to Equity London Pitman and Sons Press (4ed) (1957) 111. This maxim resulted in important sub maxims e.g. equity leans against joint tenancy. Equity discouraged this form of property relationship because of its inherent inequality. See Keeton op cit at 145.
[134] Keeton loc cit.
[135] V Jaichand Restitution of Land Rights The Forced Removal Schemes: A Workbook Johanesburg Res Patria (1997) 23.

from the equality provision or living a life consistent with the notion of human dignity.

It is as well an issue of Aristotelian corrective justice because it "gives in the present that which was unjustly withheld in the past, and restores in the present that which was wrongfully taken in the past." C Albertyn and J Kentridge[136] have argued for a purposeful contextual interpretation of the Constitution so as to attain the above objectives. In a deeply divided South Africa with a painful land history caused by apartheid, it is natural that equality should be the corner stone of her post apartheid policy. The transformation from a racially based system to a multi-racial democracy would be hollow if substantive equality were not given priority.

Having adopted a liberal democratic dispensation, this country has to deal with the resultant conflict between property rights holders and what is considered the right of all individuals to use and develop their capacities through accessing land.[137] Both are considered essential prerequisites for the liberal democratic policy, which the country opted for.[138] This conflict is expressed by the crucial question of the extent the state should intervene in the sphere of property, on the one hand, and to what extent it should facilitate access by the dispossessed to land in the public interest?

Robertson,[139] after considering policy statements and laws since independence, contends that the country is pursuing a philosophy which stresses the social purpose of land in the management of its land resource. According to the author, this approach consists of three distinct, but related elements, namely, the welfare, the economic and the political components. The social purpose approach is based on the idea that land can serve to normalise the deep injustices of the past and, to this extent, it carries a "strong moral justificatory component."[140]

This makes the question of the terms for the expropriation of land for post apartheid restitution and redistribution an important socio- political issue with immense potential to derail the emerging democratic South Africa. The

[136] C Albertyn et al 'Introducing the Right of Equality in the Interim Constitution' *(*1994) 10 SAJHR 149.
[137] This raises the issue of equality of treatment of citizens with reference to land rights.
[138] M Robertson 'Land and Posy-apartheid Reconstruction in South Africa' in S Bright and J Dewar Land Law: Themes and Perspective Oxford Oxford University Press (eds) (1998) 317, hereinafter referred to as Robertson.
[139] Robertson op cit at 319.
[140] Ibid.

constitutional requirement that land expropriated for land reform should attract the payment of just and equitable compensation does not, in this writer's opinion, carry that strong moral component inherent in the Aristotelian corrective justice. It seems, with respect to this candidate that on the contrary, it reflects insensitivity to the fact that this amounts to paying handsome compensation to the present property owners for the land that their forebears took for nothing from the forebears of indigenous South Africans.

1.4.4 SOCIAL PURPOSE APPROACH TO LAND

The social purpose approach to land evolves out of the theory that property has a multifaceted role in society. There are, therefore, multiple models for defining and controlling property (land inclusive) and a major feature of this approach is the idea that land has an inescapable distributive feature.[141] This conceptual understanding of land makes an undue adherence to private ownership of land, with its concomitant exclusionary elements, unnecessary.

The social purpose concept of land could suitably apply in South Africa because of the history of land dispossession in the country. Although the objective of the social purpose approach is similar to that of the social function approach, there are clear differences between them. It is proposed to analyse the social purpose approach in relation to the notion of social function of land. Duguit, a French philosopher has been credited with playing an influential role in formulating the social approach to land.[142]

This philosopher expressed a strong dislike of the Roman property concept of dominion because of the latter's stress of an owner's absolute right to property. He was critical of the fact that this right included that of use benefit-disposal and also the right not to use the property. He argued that because an individual was a part of society, it was wrong for property to be reserved for his exclusive use. He stressed that a better view is for property to serve society, i.e. have a social function considering anything less as a violation of the modern conscience.[143]

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[141] J Singer "Property and Social Relations: From Title to Entitlement" in G E Van Maneen et al Property Law on the Threshold of the 21st Century Tilburg MAKLU Uitgevers Antwerpen-Apeldoorn (ed) (1996) 83, hereinafter referred to as Singer.
[142] Robertson op cit at 319.
[143] Ibid.

Duguit was responding to the grossly inequitable land ownership system in Latin America. Generally speaking, the region witnessed wholesale usurpation or absorption of Indian land. This resulted in the emergence of a powerful landed oligarchy owning large ranches. Most were absentee landlords who rented land out to the natives under very slave like terms, thus perpetuating mass poverty amongst the native population.[144]

A major argument of Duguits' was that a landowner had a responsibility to cultivate or manage land well or else the land could be expropriated. Property i.e. land, both confers rights and imposes obligations on the owner in the interest of the common good. In South Africa, while s125 of the Interim Constitution graphically reflects this view of land, there is neither a direct incorporation of the social function principle nor any endorsement of the policy that a forfeiture or penalty should apply for an owner's unproductive use of land in the final Constitution.[145] Robertson[146] is of the view that South Africa has stopped short of introducing these principles because it would have led to practical difficulties. In his view, to do so would have been politically insensitive, since it would have applied to those who were to benefit from land grants through the restitution and redistribution schemes.

The South African vision of land may be deduced from a statement made by the Minister of Land Affairs in January 1997. According to the Minister, "ownership of land carries with it both rights and duties." Owners of land must exercise their rights in a way which respect the human dignity and basic human rights of those who live on the land.[147] This view of land is compatible with the Latin American function approach. The agrarian land reform of the 1920s in Chile was rationalised on the basis of an owner's obligation to use property in a manner consistent with the common welfare.[148]

There is, strictly speaking, a difference between the social purpose concept of land in South Africa and the social function variant of Latin America. Although both are concerned with the need to limit private use of land in favour of wider social interest, the social function concept is distinctive in its

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[144] J R Thome "Agrarian Reform Legialation: Chile" in P Doner and D Kanel The Economic Case for Land Reform: Employment, Income Distribution, and Productivity (1974) 84, hereinafter referred to as J R.
[145] Robertson op cit at 320.
[146] Ibid.
[147] Ibid.
[148] Thome loc cit.

stress of the obligations of the landowner. Prominent amongst these is the obligation of the owner to use the property for the common welfare. This distinction is significant because it carries the serious penalty of the loss of the land or some right over it if the obligation is not fulfilled.[149] The social purpose concept of land in South Africa as noted earlier does not endorse this view.

In South Africa, social purpose is about the utilisation of land for individual and community interests. It also emphasises the community's obligation to the user. The South African community, which is represented by the state, is vested with an obligation to provide land to the people, for instance, the dispossessed so as to cater for their welfare, economic and political needs.[150] It is in this light that the new constitutional regime that enjoins the state to facilitate citizens' access to land on an equitable basis is rationalised.[151]

1.4.5 SOCIAL WELFARE COMPONENT OF LAND

The social welfare theory stresses the adoption of land use options that will lead to a redistribution of land to attain social welfare objectives such as the fight against poverty and the provision of greater security of insecure tenures.[152] The social welfare component of land has been mostly studied by sociologists and anthropologists and is concerned with the impact of land use on the individual, family and community.[153] The South African land policy is essentially welfarist in content as it is a response to the needs of the majority of black citizens.

It may be recalled that distortions in the land regimes of the past caused massive poverty in the rural areas (the homelands were hardest hit), insecurity of tenure for black and unrestricted access to land by a privileged white class.[154] From the Freedom Charter through the RDP to the current post-independence legal dispensation, there has been a discernible trend by the ANC to redress the past wrongs. This aspiration was expressed in the Freedom Charter when it said "our people have been robbed of their birthright to land." The Charter relates

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[149] Ibid.
[150] Robertson op cit at 320.
[151] See s 25(5) of the Constitution.
[152] T Allen The Right to Property in Commonwealth Countries Cambridge Cambridge University Press (2000) 202.
[153] Ibid.
[154] J Van Zyl "Natural resource management issues in rural South Africa" in J Van Zyl et al Agricultural Land Reform In South Africa: Policies, Markets and mechanisms Cape Town Oxford University Press (eds) (1996) 238, hereinafter referred as Van Zyl.

this robbery to the absence of prosperity and stressed the welfare factor when it stated, "all other industries…shall be controlled to assist the well-being of the people."

A key element of this approach is the fact that land is no longer to be viewed as a factor of production that has to be accumulated because of its monetary value. The welfare approach regards the possession of land as a crucial ingredient for the dignity of man. Section 25(6) of the 1996 Constitution which enjoins the state to remedy insecurity of tenure, is typically welfarist in content. This welfarist component is sensitive to communal aspirations and interests. It responds to their welfare need in terms of s 25(6) above and also because by recognising that the possession of land is crucial for the dignity of the community it is sensitive to the people's attachment to the land. Land plays much more than a resource role in traditional African settings. It is seen as a bridge between the living and the ancestral spirits hence an important ingredient for ritualistic purposes.

1.4.6 SOCIAL PURPOSE-ECONOMIC

It is obvious that post independent South African economic policy is aimed at creating a new society in which wealth and land will not be concentrated in the hands of a few. This approach requires a review of the dominant form of land management and agricultural production, which was based on the white owned large-scale farm accounting for 86 percent of the country's land.[155] The Green Paper published by the Department of Land Affairs has indicated a new policy direction based on small-scale production models.[156]

This new philosophy is to be applauded because it requires that fertile land be divided into small parcels and granted to families to farm. This candidate applauds this policy because it has the potential to bring economic benefits to more people, increase employment and free up the welfare budget for other productive use.[157]

1.4.7 SOCIAL PURPOSE-POLITICAL

[155] Van Zyl op cit at 238.
[156] Robertson op cit at 323.
[157] The Reconstruction and Development Programme Document paragraph 2.4.1.

One of the major consequences of apartheid was the rise in political consciousness amongst black Africans who were its major victims. Land dispossession played a prominent role in engendering a strong resistance to the apartheid superstructure in South Africa. Resentment to land dispossessions was tapped by the ANC and used as an effective weapon for political mobilisation.[158] The ANC also made access to land by the rural masses a prominent political plank.

That land was a crucial political issue is reflected by the land invasions that occurred both during pre and post-independent South Africa. Thus the RDP recognised that land is a resource to meet the basic political needs of the people.[159] The document set the tone for a fundamental land reform programme[160] by stating that "no political democracy can survive and flourish if the majority of its people remain in poverty without land."[161] Events in Zimbabwe also show the strategic importance land plays in the politics of a country. Gubbay,[162] the country's Chief Judge acknowledged that the disruptive land invasions by war veterans from 1999 was a political question which had to be dealt with by the enactment of responsible legislation addressing the redistribution of land.

The political element of social purpose approach is particularly significant in South Africa. This is so although Robertson[163] thinks that the political dimension is perceived as rhetorical. The idea of making the present land reform regime to adjust land rights between black and white and the gender sensitivity of the post independence land policies are all-important politically motivated developments.

The history of South Africa made a social purpose approach concept of land inevitable. The country's post independence reconstruction would hardly be respectable or amount to much if it is not driven by the need for land to respond to the above identified objectives. Indeed South Africa has, in this candidate's opinion, succeeded in avoiding the dangerous land related violence

[158] This is similar to what transpired in Bolivia, where the National Revolutionary Party (MNR) used the issue of access to land as a key political tool to get the support of the rural masses in the 1950s. Doner op cit at 132-133.
[159] The Reconstruction and Development Programme Document paragraph 2.4.1.
[160] The Reconstruction and Development Programme Document paragraph 2.4.3.
[161] Robertson op cit at 323.
[162] Human Rights Watch 2002 "Land Reform in the Twenty Years After Independence" <http:/www.hrw.org/reports/2002/Zimbabwe/Zimland0302-02htm> Accessed September 2003.
[163] Robertson op cit at 323.

found in Zimbabwe because it has, at least, adopted a structured approach in balancing the conflicting interests of the various stakeholders.

1.5 DEFINITION OF TERMS

1.5.1 LAND

Land is one of those concepts that are capable of multiple definitions. It is, however, defined for the purpose of this research as an immovable and indestructible area consisting of a portion of the earth's surface. This includes the space above and below the surface and anything growing on it or permanently affixed to it.[164] The constitutional court held in Alexkor Ltd & Anor v The Richtersveld Community and Others[165] that the ownership of land included ownership of the mineral and precious metals on the land.

Land as defined here has a narrower meaning than property. The idea of property denotes a defined relationship with a thing not the thing itself. Property deals with the sum of the rights of powers one can exercise over a thing. From this perspective, social security benefits may come within the contemplation of the definition of property.[166]

Land is a very important resource in South Africa. It is difficult to see how those who were dispossessed of land can live a dignified life. Indeed, John Locke treats proprietary interest in land as coming from the same normative source as the right to life.[167]

1.5.2 HUMAN RIGHT

Human beings by their very nature have certain intrinsic attributes, which distinguish them from every other creation on earth. Human rights refer to the legal protection of these attributes which human beings are said to inherently possess. Though protected by law, these rights are not the creation of any positive normative system. These rights are essentially aimed at ensuring that the dignity of man is protected. It is universally acknowledged that the

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[164] The outer space above a piece of land does not come within the contemplation of land as defined. See also P J Van der Post 'Land and Registration in some of the Black Rural Areas in Southern Africa' (1985) Acta Juridica 213.
[165] (2003) 12 BCLR 1301 (CC).
[166] The South African Constitutional Court has opted for a very expensive definition of property. See S v Zuma 1995 (2) S A 642 (CC). See also Cachalia et al op cit at 92.
[167] Kelly op cit at 269.

recognition and protection of human rights is a vital prerequisite for peace and justice not only within given communities but in the world in general.[168]

Land rights have been conceptualised from a human rights perspective because it is impossible to attribute human dignity to a landless person living in squalor as a result of apartheid policies. Section 25(4) of the 1996 Constitution as indeed the entire land reform regime in general make the redistribution of land on an equitable basis a priority. Access to land is thus recognised as one of the cluster of socio-economic rights. This recognition is salutary because the land programme under apartheid which was rooted on a policy of the exclusion of the African majority, had immense potential for the breach of the peace of the entire South African sub-region.

1.5.3 DISPOSSESSION

On arriving in the coast of South Africa, the colonist started a process of taking land, which had immemorially belonged to the indigenous black people of this region. The term "dispossession" may be defined as the act of evicting or removing non-whites from their land in South Africa. Although the phenomena first involved the removal of Africans from their ancestral land dating back to the Dutch Company era[169], this thesis is limited to dispossessions occurring from June 1913 onwards.

White settlers adopted three major strategies to dispossess non-whites of their land. They did so by wars of conquest, laws on taxes and laws about land. In the wars of conquest, the native population were no match to the colonialists because of the sophistication of the latter's weaponry. The immediate consequence of conquest was the eviction of blacks from their land. This resulted in the first major dispossession.

The discovery of minerals in South Africa led to immense demands for native labour to work in the mines. Mine owners and commercial farmers pressured the colonial administration to levy exorbitant taxes on Africans. These

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[168] See the Preamble of the Universal Declaration of Human Rights 1948. It was adopted in Resolution 217 A (111) of the General Assembly of the United Nations on 10 of December 1948.

[169] Miller and Pope op cit at 168. Contrast with De Villiers who argues that the process of dispossession predates colonialism because the first people to be dispossessed were the San people. See B De Villiers Land Reform: Issues and Challenges; A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia Johanesburg Konrad-Adenauer-Stiftung (2003) 45.

taxes[170] were meant to and did compel Africans to abandon subsistence farming and their land. The apartheid era witnessed a legislative process that facilitated dispossession because it restricted the majority of South African black population to the ownership of 13 percent of the country's land mass.

1.5.4 ACCESS TO LAND

South African history is characterised by the removal of millions of non-whites from their land. This practice engendered bitterness and carried with it the potential for political violence of immense proportions. The property clauses of the interim and 1996 Constitutions were meant to address the problems of landlessness resulting from the dispossessions of the past.

Access as used in this thesis deals with the creation of conditions for making land available to the previously disadvantaged. It is essentially concerned with the direct provision of legal rights to land.[171] It involves redressing the wrongs of the past by restoration of land to those from whom it was taken, the provision of land to the poor as well as a reform of the tenure regime to broaden non-ownership rights. Restitution, redistribution and tenure reforms are all programmes that deal with access to land in varying degrees. However, this thesis deals more with access connected to the restitution programme because it falls within the ambit of dispossession on the basis of racially discriminatory laws and practices occurring after 19 June 1913.[172]

1.5.5 RESTITUTION

Restitution in its ordinary grammatical meaning relates to the act of restoring something that has been lost or stolen.[173] It involves the return of that which has been wrongly taken from a person or community. The property relations in South Africa have been historically shaped by a forced removal of non-whites from their land. The interim constitution provides in the post amble that this

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[170] A Harley and R Fotheringham AFRA 20 Years in the Land Struggle 1997-1999 Piettermaritzburg Association For Advancement (1999) 15, hereinafter referred to as Harley and Fotheringham.

[171] Miller and Pope op cit at 565.

[172] Access is in the title of the thesis is linked to the issue of dispossessed land as addressed in s25 (6) and (7) of the 1996 Constitution.

[173] P Hanks Collins Dictionary of the English Language London Collins (1986) 1302.

had to be remedied[174] through, amongst others, the restitution framework in sections 121-123[175]and the Restitution of Land Act 1994 as amended.

1.5.6 COMPENSATION

Under the present post apartheid property regime, land invariably has to be expropriated from private property owners who are mostly white for redistribution to the dispossessed. Section 25(2) of the 1996 Constitution places a duty on the state to pay compensation to those whose lands have been expropriated. Compensation refers to the monetary payment made for expropriated land.[176]

Compensation is a key element of the land policy of the country. The justification for paying compensation for the acquisition of land from white South Africans is traced to foreign law. Both English Courts and the European Court of Human Rights have recognised a general duty to pay compensation for the expropriation of property. This duty is construed strictly and insists on the payment of compensation even where the expropriation was for a limited period or done during a period of war.[177] The amount of compensation payable is determined by the conditions laid in s 25(3).

1.6 CONCLUSION

It has been observed that land has remained the focal point in South Africa since colonial times. This is not surprising. Land has meant different things to different peoples of the country. The black South African sees land as a gift from God. It defines his identity and acts as a bridge between him and his ancestral spirits. Besides this religious symbolism, his entire economic livelihood is based on it. Access to land is for the black South African an issue of profound passion and sensitivity.

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[174] H Klug "Historical claim and the right to restitution" in J Van Zyl et al Agricultural Land Reform In South Africa: :Policies, Markets and Mechanisms Cape Town Oxford University Press (eds) (1996).393 hereinafter referred to as Klug.

[175] Constitution of the Republic of South Africa Act 200 of 1993.

[176] See s 35(1) (c) of the Restitution of Land Rights Act 1994.
A J Van der Walt The Constitutional Property Clause Ndabeni Western Cape Justice (1997) 143. See also James v United Kingdom (1986) 8 EHR; AG v De Keyser's Royal Hotel Ltd (1920) AC 508 (HL). Contrast this with the policy adopted in Zanzibar after independence where land was confiscated by the state from absentee landlords who were mostly expatriates. These expatriates got most of the land from their colonial compatriots under conditions similar to that which happened in South Africa; see Jones op cit at 21.

[177] Section 25(8) makes provision for property to be acquire without the payment of compensation in certain circumstances.

The white South African also regards land as vital economic resource. Huge portions of land have been fenced up for commercial farming and industrial undertakings. Although white attachment to land is equally passionate, the motives for white interest appear different. The Roman Dutch influence on land law in South Africa resulted in the introduction of a system of individual ownership of land. This type of land ownership is the primary interest of whites in South Africa, in spite of its fundamental difference with the African communal land holding that existed before the coming of the colonialist. The virtually absolute right of ownership attaching to the imported European notion of dominium provided maximum security of title, at the expense of the rights of the hitherto black South African owners.[178]

An important feature of the country's land tenure policy was the racially discriminatory character of the laws regulating land in South Africa. The seed of this policy was laid when the Dutch and the British settled in the region. Subsequent proclamations and legislations led to the monopolization of the land by the minority white population. The common law principles of land ownership combined with racially discriminatory laws suited white social and political interest[179] which became the dominant philosophy of the apartheid state.

The democratisation of South Africa, beginning in the early nineties, culminated in the enactment of an entirely new constitution in 1996. This constitution charted a new course with particular reference to land. A land reform policy had become imperative because of the realisation by both black and white of the dangers inherent in a land policy based on racial exclusion. It was clear that the policy of using land as a tool to secure economic and political domination of Africans has become untenable.

Justice in the new South Africa demands that society be so structured so as to make it appropriate for the equitable distribution of resources among the country's peoples. This is so because the idea of justice whether distributive or

[178] This is a view based on the classical theory that the owner of property has full powers over the property. Under this theory, the property may be subject to some state regulations, yet the owner possesses a bundle of privileges, rights, powers and immunity. This theory has been criticised as based on a model which is distorted and normatively flawed. See J W Singer "Property and Social Relations: From Title to Entitle" in G E Van Maneen et al Property Law on the Threshold of the 21st Century Tilburg MAKLU Uitgevers Antwerpen- Apeldoorn (eds) (1996) 70-71, hereinafter referred to as Singer. See also Miller and Pope op cit at 168.

[179] Miller and Pope op cit at 168.

corrective is based, however vaguely on the concept of equality.[180] The South African apartheid land policy on racial exclusion affronts the most elementary principles of justice based on equality. From whatever theoretical perspective one looks at the situation, a state policy that leaves millions homeless and desperately poor cannot be considered just and equitable.

The constitutional property clause (s25), the restitution and redistribution mechanisms aimed at redistributing lands wrongly monopolised is a measured response to the problems arising from past racially discriminatory laws and practices. The need to ensure improved access to land by the dispossessed black South Africans rank as the primary public interest for the South African state. The right to own land in an individual's lifetime is so fundamental it has been conceptualised as a human right.[181]

Friedman[182] has contended that in dealing with equality as a basis of human right, the crucial challenge is to go beyond the traditional difference dichotomy inherent in a simplistic conceptualisation of the notion. She argues that it is in theory important for a state to differentiate racial groups for the sake of deliberately redressing past discriminatory policies. It is for this reason that post apartheid South Africa has struggled to improve access to land for the dispossessed in an environment where healing and reconciliation will thrive.

[180] It has been demonstrated that equality has not always assumed a central theme with regards to justice or formed mainstream idea of classical philosophers. The right to equality has preserved for right holders a concept that excluded women, slaves and the un-propertied class from the definition of an individual. Racism appears to have its origins in this conceptualisation of justice, yet it has been observed; equality as con temporarily perceived was the major force for the fight against racial discrimination. See Friedman op cit at 14-15.
[181] C Jones 'Plus ca Change Plus ca Reste le Meme? The New Zanzibar Land Law' (1996) 40 J A L 21.
[182] Friedman op cit at 19.

CHAPTER TWO

2.1 DISPOSSESSION BY LEGISLATION

2.1.1 INTRODUCTION

Dispossession is a key feature of South African history and continues to shape the discourse on land holding and use.[1] The country's legacy of dispossession resulted from centuries of the forced removal of blacks from the land through external colonialism and racially discriminatory laws and practices. After the historical review of European settlement in the country in the preceding chapter, this chapter deals with land dispossession through the use of discriminatory legislations and policies.

An early indication that the country was going to pursue a legal approach that regarded land as a political issue rooted in the ideology of race was revealed by the Lord Milner Commission's report of 1903-5. The commission was set up to investigate government policy on land.[2] Although the commission rightly recognised the attachment of the natives to their land, it nevertheless unanimously concluded that the land should be vested in European government. The latter was to subsequently carve out portions of the land for use as reserves or locations for Africans.

This report set the stage for the systematic displacement of Africans from their ancestral land during the course of over eight decades.[3] The scale of the dispossession involved has raised significant human rights considerations[4] and explains why this candidate deals with access to land by the dispossessed as a human rights issue.

It is necessary to define dispossession here although a brief definition has already been made in the preceding chapter. Although the constitution (both the 1993 and 1996) and the Restitution of Land Rights Act as amended all make

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[1] E Lahiff "The Politics of Land Reform in Southern Africa" Research Paper Series on Sustainable Livelihood in Southern Africa: Institutions, Governance and Policy Process http: www.ids.ac.uk/slsa. Accessed on 15th October 2004.
[2] AT Moleah Colonialism, Apartheid and Dispossession Welmington Disa Press (1993) 224-225.
[3] From 1913 to when the interim constitution was enacted.
[4] K Gray "Land Law and Human Rights" in T Lee Land Law: Issues Debates Policy Devon William Publishing (2000) 221.

reference to the term it has not been directly defined. This makes a resort to academic and judicial constructions of the term inevitable.

The word dispossession is derived from the verb dispossess which the Concise Oxford Dictionary defines as "people who have been deprived of land or property."[5] The word in practice is of wide import and would apply to all instances where a people have been deprived of their land regardedless of the method used. It may be recalled that white settlers used three major strategies to dispossess Africans of their land in South Africa.[6]

C G Van Merwe and J M Pienaar[7] have stressed that dispossession is a broad concept with the capacity for expansive application. These authors rightly assert that the phrase "right in land" which is used to qualify dispossession in the Restitution Act of 1994 should cover a wide variety of rights in land lost as a result of racially discriminatory laws and practices. In their opinion it should cover registered or unregistered interests in land, the interest of a labour tenant and sharecropper, customary law interest, interest of beneficiaries under a trust and those of beneficial occupation for not less than ten years before the dispossession.

The Constitutional Court took a similar view to that of the above authors in the Alexkor case.[8] The Court stated that dispossession must carry an expansive meaning stressing that it should not be limited to the "technical question of transfer of land ownership from one entity to another."[9] It noted that it is a much broader concept which will be best understood by adopting a substantive approach. In the case under reference, the non-recognition of the customary right of the *Nama* people to carry out such activities as their traditional mining and grazing on the land, was considered as satisfying the definition of dispossession for the purpose of the Act.

The court observed that the Constitution[10] refers to the dispossession of property while the Restitution Act adopts the phrase right in property. It did not, however, think that anything turned on this distinction in the case. Indeed, the

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[5] J Pearsal The New Oxford Dictionary Oxford Oxford University Press (1998) 413.
[6] See page 36 of chapter 1.
[7] C G Van Merwe and J M Pienaar 'Law of Property (including Mortgage and Pledge)' (1994) Annual Survey 308, hereinafter referred to as Van der Merwe and Pienaar (1994).
[8] Supra.
[9] Ibid at paragraph 90.
[10] Constitution of the Republic of South Africa Act 108 of 1996.

Court used the terms interchangeably in the course of the judgment.[11] It was of the opinion that both terms in substance mean "the claiming of political and legal sovereignty over the land of indigenous people by latter occupiers of the land."[12]

2.1.2 NATIVE LAND ACT No 27 AND LAND DISPOSSESSION

The Native Land Act No 27 of 1913[13] was one of the main legislative instruments used to remove black South Africans from their land. The Act formed the basis for the allocation of land between the races in South Africa. It also placed restrictions on the acquisition and utilisation of rights to land, based on membership to a specific population group.[14] The Act designated 55,913 square kilometres of the country's land, constituting 7 percent of its land surface to black exclusive use. It left the remainder for use by other racial groups. The Act also limited the acquisition of land in scheduled areas to blacks and Native Trusts, which were later established.[15]

Whites, who made up just 13 percent of the population as against 80 percent for blacks, had control and access to over 80 percent of the country's land.[16] The restriction of whites from acquiring land in the reserves was unnecessary. There could be no conceivable reason for them to seek to own land in black areas, because the contempt of whites for blacks was evident and embedded in a deeply entrenched belief in white racial superiority.[17] It was therefore unlikely that whites would desire to take up residence in predominantly black areas. Nor would they, for the same reasons, set up businesses in black areas because the supervision of the business would result in their socialising with blacks.[18]

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[11] See paragraph 34.
[12] Ibid.
[13] Also called The Black Land Act 1913. Repealed by Abolition of Racially Based Land Measures Act 108 1991.
[14] Van der Merwe and Pienaar correctly points out that the Act set aside scheduled areas for exclusive occupation and acquisition by Africans. Van Der Merwe and Pienaar (1994) op cit at 121.
[15] V Jaichand Restitution of Land Rights The Forced Removal Schemes: A Workbook Johanesburg Res Patria (1997) 10.
[16] H Mostert 'Land Restitution and Development in South Africa' (2002) 119 SALJ 401.
[17] See in this regard Koyana "The Interaction between the indigenous constitutional system and received western constitutional law principles" in P D Kok et al (eds) (1995) 71 at 81.
[18] Ibid.

Similarly, the Act effectively prohibited the acquisition of land by blacks outside the scheduled black areas without ministerial approval.[19] It would seem that in practice, there were hardly any approvals granted because to do so would naturally provoke white anger.[20] Peasant farmers were forced to immigrate to urban areas to seek employment. This suited white economic interests because their farms, factories and mines needed cheap labour.[21] This method also adversely affected the African system of landholding. Thus, Miller and Pope quote with approval the following statement by Beinart (1994):[22]

> *"But in the early twentieth century, various interest coalesced to demand tighter controls on tenancy. Whites forced to leave the farms increasingly saw African sharecroppers and tenants as responsible. They found willing leaders in Churchmen and politicians advocating tighter segregation. Powerful groups of farmers were now prioritising labour procurement. They wanted a general charge…so that there were no bolt holds for tenants who wished to avoid more onerous contracts. These provisions were written into the Native Land Act of 1913. Forms of tenancy which did not involve a transfer of labour to the farmer were thus to be outlawed."*

In terms of s 8(2), the Act did not apply in the Cape. This was so because in terms of s 35(1) and (2) of the South African Act 1909, voting rights were extended to black South Africans of the Cape colony on the basis of land ownership in the Cape. It would have been an anomaly to extend the provisions of the Act to apply in the Cape under such circumstances.[23]

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[19] Jaichand op cit at 10.

[20] White farmers were sensitive to anything that could result in Africans gaining increased access to land. They, for instance, successfully protested the Beaumont Commission's recommendation that more land be granted to Africans. D L C Miller and A Pope Land Title in South Africa Kenwyn Juta & Co Ltd (2000) 25, hereinafter referred to as Miller and Pope.

[21] See Miller and Pope op cit at 21 who point out that the policy objective of the Act was to remove Africans perceived as threats to white economic interest. There were widespread anti-black sentiments by white farmers who were in debt because their farms were not doing well. They, however, found it convenient to attribute the reasons for their failure to the more successful African farmers. The Land Acts were enacted to address some of these concerns.

[22] Miller and Pope at 21.

[23] It is the opinion of the present writer that the 1913 Act was not in harmony with the spirit of the Constitution South African Act 1909.

The Native Land Act, which has been described as monstrous and as turning the native into a pariah[24] in his own country created multiple problems. The reserves apportioned to blacks were plainly too small to cater for the land needs of the people. It also created untold misery arising from landlessness and the concomitant poverty. Migration to the cities was inevitable.

There were, however, no known legal challenges to the Act in spite of its grave impacts on Africans.[25] It is not difficult to see why this was so. A close scrutiny of the philosophy of apartheid will reveal a complex relationship between the various institutions of state. Van der Walt has vividly captured this[26] in his description of the synergy between law and Afrikaner ethnic nationalism. He noted that the legal code was inseparably woven into the political code of exclusivism such that both had become conceptually indistinguishable. The author makes the following penetrating comment:

> *"For apartheid to work effectively as a legal system, the legislature had to be able to promulgate the necessary segregation statutes without interference from the courts. The courts had to be able to interpret and adjudicate these statutes without debilitating conflicts of conscience; and the legislature and the courts had to be able to trust that laws and court orders would be carried out by the executive."*

Judges and lawyers all had to play their assigned roles in the grand apartheid drama of justice and did so by moving away from the notion of native ownership of land. Judicial decisions in Australia with similar historical experiences showed the futility of approaching the courts to seek justice.[27] The

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[24] Miller and Pope op cit at 22. The Act of course had certain positive elements. It has been argued that the Act saved many black spots from being encroached upon especially in the Natal area where black spots had reached a high level of stability.

[25] There was, however, serious political resistance to the Act. Indeed, it has been asserted that the South African Native National Congress the precursor of the ANC was founded primarily in response to the bill stage of the Act. The hardship resulting from the Act led to the founding of African independent churches. See also A Harley and R Fotheringham AFRA 20 Years in the Land Struggle 1997-1999 Piettermaritzburg Association For Advancement (1999) 17-18, hereinafter referred to as Harley and Fotheringham.

[26] A J Van der Walt "Dancing with Codes: Protecting Developing, Limiting and Deconstructing Property Rights in the Constitutional State" in Venter et al Constitution and Law 1V Development in the Contemporary Constitutional State Johannesburg Konrad-Adenau Stiftung 2001 62, hereinafter referred to as Van der Walt (2001).

[27] See Cooper v Stuart (1889) 14 AC 286.

colonial courts had established a reputation for the denial of indigenous rights to land.

This judicial attitude can be traced to the doctrines of *terra nullius* actively advocated by John Locke and the common law doctrine that the crown is the source of title to all land.[28] The early Australian cases such as Attorney General (NSW) v Brown[29] and Cooper v Stuart[30] had established the broad principle of state ownership of land. Pieces of legislation dealing with restricting natives' access to land such as the Native Land Act of 1913 could hardly be successfully challenged under the colonial legal dispensation.

Miller and Pope express the view that the Smut and Hertzog administrations of the 1920s expressed some sympathy about the black land question. According to the author, Prime Minister Smuts was even against the continuation of racial segregation designed and entrenched by the 1913 Act.[31]

In reality, however, these regimes were involved in attempting to mislead the black population for their own ends. The principle underlying their proposed desegregation of land legislation was correctly described by one Rev. Mtimkulu who said that in Natal, the intention was to keep the black man down.[32] Mtimkulu's view seems well founded because to open up land to be bought under conditions where prices were to be determined by market forces was an indirect way of putting the lands beyond the reach of Africans. The latter had been dispossessed of their land and had been made to work under contracts with wages barely enough for survival.[33]

Although it is impossible to put an accurate figure on the number of persons dispossessed by the 1913 Act, the forced removal of Africans caused by

[28] S Bright and J Dewar Land Law: Themes and Perspectives Oxford Oxford University Press (1998) 10.
[29] (1847) Legge 312.
[30] (1889) 14 AC 286.
[31] Miller and Pope cite the Land Act Amendment Bill introduced by General Hertzog in 1926 as a basis for his conclusion. They consider this Bill to have abandoned the segregation policy because it proposed the releasing of land to be bought by both blacks and whites. Miller and Pope op cit at 22.
[32] Ibid. See also Harley and Fotheringham op cit at 15.
[33] The Black Labour Act 67 of 1964 severely restricted an African's right to work.

it was devastating for the South African black. The Act was so drastic in its impact that it is considered the first pillar of apartheid.[34]

It is true, however, that the confinement of Africans to the reserves created immense agricultural and related problems. Both Smuts and Hertzog realised that they could not be insulated from the fallouts of the explosive situations in the reserves and set up various commissions and parliamentary committees to address the crisis.[35] The commissions were almost always self-seeking and invariably heaped the main blame for the inability of the reserves to produce its food requirement on the alleged inefficiency of the Bantu. Davenport graphically captures this stereotyping of the African by the Vos Commission thus:[36]

> *"It does not require a big leap of the imagination to see the VOS report as a product of disillusioned officialdom, able to see the evidence of failure without perhaps being aware that the story of African farming had ever been different, and tending to assume an inherent inability of the African to farm the land properly. This is a familiar stereotype…not only among white farmers but also among academics who cannot be faulted for lack of sympathy towards the African. But the official reaction to African farming may well have fastened on its inherent weaknesses without taking sufficient account of those structural defects which ensured that those weaknesses will remain: above all the land shortage resulting from the initial conquest… and the unequal competition of the white farmers."*

Davenport's incisive views were salutary for identifying the real issues which was the land shortage but, unfortunate as it failed to recognise the

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[34] C Bundy "Land, Law and Power: Forced Removal in Historical Context" in C Murray No Place to Rest Forced Removal and the Law in South Africa Cape Town Oxford University Press (eds) (1990) 6.

[35] These commissions include The Lagden Commission of 1905 and the Beaumont Commission of 1917. The latter's report led to an outcry by white farmers because it suggested an increase of lands for Africans.

[36] T H R Davenport South Africa A Modern History London The Macmillan Press Ltd (1978) 6.

overpopulation resulting from the creation of the reserves as the immediate source of the crisis. It would seem that those charged with the administration of land did not want to overplay their hands for fear of upsetting the apartheid applecart. The Holloway Commission, for instance, recognised that population growth was putting strains on the limited quantity of land in the reserves. It, however, preferred recommending the option of a more economical use of the limited quantity of land in the reserves.[37] The obvious option of increasing the land acreage was not to be contemplated because, to do so, would have meant interfering with the Land Act of 1913.

It may be correct in certain respects to suggest that some of the commissions' reports were intended to consolidate the structures of the Land Act to protect the interest of white farmers. For example, the Holloway Commission's Report expressly ruled out land purchase by Black syndicates. Davenport has stated that one of the reasons for which the Land Act of 1913 was promulgated was to recover lands sold by Boer farmers to African syndicates during the difficult years of the Anglo-Boer wars.[38] Every conceivable reason was given to explain the crisis of landlessness caused by land dispossessions except the real cause, which was the inability of the reserves to support the population influx. However, the state had to respond to the acute shortage of land on the ground regardless of these reports.

2.1.3 THE NATIVE TRUST AND LAND ACT 18 OF 1936

This Act was renamed twice, firstly as Bantu Trust and Land Act and then as the Development Trust and Land Act[39]. It deserves to be analysed because it substantially contributed to the loss by blacks of their lands. This Act was at least meant to appear as a palliative intended to placate Africans for taking away their voting rights in the Cape. It was apparently recommended by the Beaumont Commission, which was set up to investigate the difficulties associated with land distribution under the 1913 Act.

[37] Davenport op cit at 64.
[38] Davenport op cit at 61.
[39] Repealed. See note 12.

The 1936 Act had, as its objective, the release of areas of land for native use with a view to promoting farming efficiency.[40] The Act released 26.616 square kilometres of additional land for black use, out of the 29.943 square kilometres recommended by the Beaumont Commission. White farmers had by their protest caused a reduction of the recommended acreage by 3327 kilometres. It would be ordinarily thought that this 1936 Act was welcome relief[41] because by making more land available, it addressed, to some extent, the problem of land dispossessions and landlessness. A critical appraisal of the Act, on the contrary, reveals that this was not to be the case.

Firstly, much of the land "released" was held and owned by Africans either directly or indirectly through existing private trust.[42] In actual fact, very few Africans actually got more land. Jaichand,[43] along with other commentators,[44] expressed the view that the Act only consolidated the existing land allocation systems in place and did not introduce any new land allocation system. Although the author uses the phrase "allocation systems," it is obvious that he is concerned with the substantive impact of the Act on actually making land available. This is evident from his earlier argument that the so-called released lands were land already in black hands.[45]

An important feature of the 1936 Act is its creation of a trust called the South African Native Trust or the South African Development Trust. This trust was vested with the acquisition and control of released land for the benefit and material welfare of natives. The trust in substance was a device employed to place land under the political control of state officials who were intrinsically bonded to apartheid. It was not a common law trust by which property is held for the interest of the beneficiaries. The following description of the trust by Jaichand is significant:[46]

> "*This kind of trust may be described as a system of paternalism which was more self serving to the needs of*

[40] Miller and Pope op cit at 25.
[41] Jaichand op cit at 11.
[42] Ibid.
[43] Ibid.
[44] See also B Chigara Land Reform Policy: The Challenge of Human Rights Law Aldershot Ashgate Publishing Ltd (2003) 20-21.
[45] Jaichand op cit at 10.
[46] Jaichand op cit at 11.

the trustee than for those the benefits were intended…the fiction of the state as trustee for the various tribes was not a valid one because where the state is hostile to the tribe, the trusteeship provides little or no protection."

It has been contended that the 1936 Act actually led to more dispossession of land. Relying on a parliamentary response by the Minister of Bantu Education and Development, Davenport and Hunt[47] showed that the Act resulted in a pronounced fall in the acquisition of land by blacks in the period after 1936. The idea therefore that the 1936 Act was meant to benefit the natives appears once again to be another publicity stunt. Chapter IV of the Act was specifically aimed at tackling the problems which white farmers described as the concentration of black people on their farms.[48] It certainly succeeded in achieving what it set out to do, because it provided the basis for the forced removal of blacks living on white owned farms.[49]

It is worth noting that land dispossessions were, during this period influenced by the effects of judicial decisions. The spirit of the combined effects of the 1913 and 1936 Land Acts against black labour tenants decidedly influenced case law. On acquisition of land through state grants, most white farmers permitted blacks (who, in fact, were original owners of the land) to stay on. The relationship was invariably based on informal contracts in which the African provided labour to the white farmer in return for the African using portions of the land for farming, grazing and other residential purposes. This practice became known as the Common Law Labour Tenancy[50] or squatter.

. The Full Bench decision of the Cape Provincial Division in Crous v Crous[51] decided in 1937 gives a clear picture of the vulnerability of the squatter under this form of tenancy although from the names it will appear that the parties were whites. In the case, the plaintiff's predecessor gave the defendant the right to occupy and land and graze cattle in return the provision of farm and domestic services. On the death of plaintiff's predecessor, plaintiff gave the

[47] Miller and Pope op cit at 2.
[48] Miller and Pope op cit at 26-27.
[49] Ibid.
[50] M D Southwood The Compulsory Acquisition of Rights Landsdowne Juta and Co Ltd (2000) 134.
[51] 1937 CPD 250.

defendant one month notice to leave. Defendant refused to move on the grounds that he could only do so after harvesting his crops cultivated on the land.

On these facts Davis J held on appeal that the defendant was a squatter noting that there was no arrangement by which a man in the position could be entitled to claim notice according to the seasons.[52] In Davis J's opinion, the maxim "huur gaat voor koop"[53] could not be relied upon to sustain the tenant's occupation because the defendant paid no rents. What this meant for Africans who were the majority of squatters was that at each sale and transfer of a farm, there was the potential that their families risked being forcefully removed from land, which they have occupied for years.

2.2 DISPOSSESSION THROUGH THE GROUP AREAS ACT

The Group Areas Act No 41 of 1950 was repealed and replaced by the Group Areas Act No 36 of 1966 which has also been repealed.[54] Both laws followed the same pattern and were designed to accomplish the same objectives. Dr D F Malan, the then Prime Minister,[55] described the bill of the latter Act as embodying the essence of the apartheid policy. Like the Land Acts before it, this legislation was aimed at the political control of the ownership of immovable property and the occupation and use of land and premises on the basis of race.[56] This Act, though aimed at urban control, was similar to the aforementioned racially based legislation in scope.

It provided for the setting aside (that is partitioning) of areas for the exclusive use by members of the specific races in the country. Those falling outside the races were regarded as disqualified persons in relation to the ownership or occupation of land in the respective areas. The Act classified the country into three racial groups *viz* whites, blacks and coloured. The coloured group was further classified into three distinct units of Indians, Chinese and Malays.[57] Although the ultimate goal of the Act was land control, there were

[52] Ibid at 253.
[53] The Afrikaans maxim '*huur gaat voor koop'* in substance means the new landlord inherits the obligations of his predecessor in title. See De Jager v Sisana 1930 AD 71.
[54] See Abolition of Influx Control Act 68 1986.
[55] J T Schoombee 'Group Areas Legislation-the political control and occupation of land' (1985) Acta Juridica 77.
[56] Ibid.
[57] Section 40 of Groups Areas Act 36 of 1966.

certain parcels of land which attracted less rigorous control. These areas were called controlled areas.

The Act, in its operation, completed the forced removals of persons who were left over under the preceding land acts. A disqualified person in lawful occupation of land within an area not apportioned to his/her race lost possession of it. This happened one-year after a proclamation of the status of the area and after the issuance of a ministerial three-month notice where the property is residential.[58] The need to ensure that the strict regime of racial separation was effective could be seen from the way corporate bodies were treated.[59] A juristic body was considered as belonging to the racial group of the individuals having a controlling share in the company. The latter, like a natural person could also not occupy property in an area outside its racial group.[60]

Persons or corporations who held land by acquisition only fared marginally better. A disqualified person holding property under this heading could continue to do so for life after the proclamation of the Group Areas Act. Those who had testamentary interests could hold property for ten years after the proclamation. The impact of this legislation was traumatic particularly for coloured and middle class blacks. Schoombee described its impact in the following words:[61]

> *"South Africa is experiencing an acute and growing housing shortage, yet whole neighbourhoods have often been flattened in the course of the Group Areas."*

The cost of the Group Areas was inestimable. Apart from the obvious landlessness described by Schoombee above, the economic burdens resulting from them simply worsened the plight of already disadvantaged groups like blacks.[62] This Act was the most hated legislation by the coloured race.[63] The resultant relocations sometimes involved the breaking up of extended families, which is a crucial social security unit of a typical African community.[64]

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[58] Schoombee op cit at 80.
[59] See section 1 of the Groups' Areas Act 36 of 1966.
[60] Schoombee op cit at 87.
[61] Schoombee op cit at 99.
[62] Ibid.
[63] Ibid.
[64] The traditional African community operates on the basis of humanism with members being entitled to communal support on the basis of need. See page 26 of Chapter 1.

Interestingly, a minister for community development commended the law as one of the greatest spiritually emancipating measures in South Africa.[65]

Section 19 of the Act gave powers to the president to declare by proclamation, certain parts in a group area as open for use for specified purposes. Areas in white areas have, pursuant to this section, been declared open for commercial use only. Such usage was strictly construed as always prohibiting any form of residential occupation even when such was demanded by the commercial imperatives of the business. Even here, non-whites had to obtain a permit to enter the commercial area to do business.

Although there were vigorous judicial challenges[66] of this Act, there was no prospect of success for two reasons: firstly, the operation of the Act was based on executive discretion which exercise was not subject to procedural fairness. The appellate courts blatantly took sides with the State and unreservedly committed themselves to ensuring that the policy objectives of the Act were achieved.[67] Secondly, the Act was silent with regard to the grounds upon which the relevant administrator would make a proclamation declaring an area as belonging to any racial group. Nor did it provide the considerations that should be taken into account in doing so.[68]

Although the Appellate Division case of Minister of Interior v Lockhat[69] related to proclamations issued under the Group Areas Act, 77 of 1957, it, in my opinion illustrates the attitude of the courts to the implementation of the Group Areas legislation generally.[70] The case involved a proclamation of a group area in Durban. Some Indian owners and occupiers of property in the area, who were affected thereby, were understandably furious with its change to a white area. They challenged the proclamation on a number of grounds, inter alia, that the administrators did not consider the availability of alternative accommodation elsewhere before issuing it. They also contended that the order resulted in substantive discrimination between whites and the dispossessed plaintiff.

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[65] Schoombee op cit at 101.
[66] The cases were reviewed in Minister of Interior v Lockhat (1961) (1) SA 587 (A).
[67] It has been shown that the courts were willing partners and played their own role in building apartheid. See Van der Walt (2001) op cit at 63.
[68] The entire operation of the Group Areas Act was based on executive discretion. See Schoombee op cit at 83.
[69] 1961 (1) SA 587 (A).
[70] See note 73.

The State in response cited various exceptions in the Act as providing justification for the Proclamation. The facts and arguments in this case disclose that the validity of the entire Act was indirectly in issue. The case was for this reason crucial. The trial judge gave judgment in favour of dispossessed plaintiffs. He, quite correctly, held that the Governor-General-in-council acted *ultra vires* when he failed to seriously consider the effect of the Act on those affected before issuing the Proclamation. The judge acceded to the plaintiff's arguments that it was necessary for the Governor to have considered the availability of suitable alternative accommodation.

On the substantive issue of the inequality and partiality against those affected, the judge also held in favour of the Indians. He stated that there was nothing in the Act which authorised discrimination against one racial group in favour of another as the instant Proclamation did. He therefore held that it could be possible to apply the Act without treating members of different races partially.

Although Henochsberg J's decision should be applauded because of its forthrightness, it should be pointed out, however, that it was in certain respects wanting. His view that were the Act to provide either expressly or indirectly the liberty for the State to do unreasonable things the court would have sanctioned it is rather unfortunate. A court cannot be expected to give effect to unreasonable acts.[71] It is difficult to see how this Act, which was regarded as embodying the very essence of apartheid, could be applied without partiality and injustice.[72]

The Governor-General successfully appealed against the judgment.[73] The Court of Appeal held that the application of the Act was left to the good sense of the Governor- General and that the courts could not review his discretionary authority. This seemingly gave a blank cheque for those vested with the powers to apply the Act. The Act's unconscionable disregard for the idea of equality and the distress caused by forceful removals was reflected in Holmes J A's judgment where he stated:[74]

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[71] Courts as a general rule aim at doing substantial justice. See Visagie v State President & Others 1989 (3) SA 859 (A) where it was held on appeal that the construction of a prohibition which infringed on the appellant's right to travel out of a magisterial district and to participate in any meeting where the government was being criticised was *ultra vires* and unfair.
[72] See note 47.
[73] 1961(1) SA 587(A).
[74] Page 602 C-E.

> *"The Group Areas Act represents a colossal social experiment and a long term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts of persons occupying certain areas would inevitably cause disruptions and within the foreseeable future substantial inequalities…reference might perhaps be made to the Group Areas Development Act 69 of 1955, see section 12 of which empowers the Board to develop Group Areas and to assist persons to acquire or hire immovable property in such areas. The question before the courts is the purely legal one whether this piece of legislation implied by authorities, towards the attainment of its goal the more immediate and foreseeable discriminatory results complained of in this case. In my view, for the reasons which I have given, it manifestly does."*

This decision confirms the widely held view that apartheid received some level of judicial support. It must, however, be criticised for its unsoundness in terms of principle. Its reliance on legal technicalities under the guise that it was called upon to construe a purely legal question is unhelpful. While courts, the world over, prefer substantial justice to technicalities, the court here ignored substantial justice in favour of mere technicality.

This decision can, however, be rationalised on the basis of the support apartheid received from some judges.[75] It also indicates rather graphically that apartheid laws were capable of the most expansive judicial interpretations in order to attain the objectives of racial segregation. Schoombee's[76] criticism of the decision is worth noting. It is, for instance, quite true that there is nothing in the Act to oust the presumption against discrimination. Equally true is the author's comments that the Act was at the bill stage described as based on justice to enhance its prospect for success.[77] This candidate finds Schoombee's

[75] Van der Walt (2001) op cit at 63.
[76] Schoombee op cit at 97.
[77] Schoombee op cit at 96.

criticism somewhat naïve because he failed to see the consistent use of legislations as a tool to achieve political ends.[78]

Lockhat's case has been followed by other appellate division's decisions.[79] A disqualified person was, in terms of the decision of the appellate courts, not entitled to a hearing before the sale of his/her property covered by a proclamation order.[80] It is safe therefore to conclude that once the relevant administrative authorities decided to forcefully evict an undesirable person from his property, nothing could stand on their way, not even the courts of law.

2.3 LAND REGISTRATION AND DISPOSSESSION

South Africa has a land registration system of great antiquity. Its land registration systems dates back to 1652 and derives from the province of Holland. It developed gradually first through the Company era then through to the Dutch and English colonial period until the enactment of the Deeds Registries Act No 47 of 1937. Generally, there are three types of land registration. These are the registration of instruments,[81] titles[82] and the registration of charges.[83] A detailed discussion of these registration types is outside the scope of this research and has not been undertaken. This aspect of the study is concerned with attempting to demonstrate a connection between registration and dispossession.

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[78] Harley and Fotheringham op cit at 36.

[79] S Adams and S Werner 1981 (1) SA 187 (A). These were two cases decided together. In the latter, the Act was challenged on grounds that it was manifestly unjust, contrary to the right to family life and the presumption that parliament intends to legislate in accordance with its international obligation to respect fundamental rights. Rumfus C J was unimpressed and reasserted the correctness of Lockhat's case. See also A Dodson "The Group Areas Act: Changing Patterns of Enforcement" in C Murray and C O'Regan No Place to Rest: Forced Removals and the Law in South Africa Cape Town Oxford University Press (ed) (1990) 144.

[80] Minister of the Interior v Mariam 1961 (4) 740 (A).

[81] This is the oldest type of registration. Here, an instrument (i.e. a document where one party confers, limits, transfers or extinguishes an interest in land in favour of another party) is filed in the registry. The deed or instrument is filed with a copy in the registry. This copy is retained while the original is endorsed and returned to the owner. This type of registration does not guarantee title although it does operate to assist the purchaser to verify the title. See P A Oluyede Nigerian Law of Conveyancing Ibadan Ibadan University Press (1978) 348.

[82] This is a registration type that is predominantly in use in Africa. This system guarantees the title of the registered land and helps (after a search of the registry) to indicate the encumbrances affecting the land in question. See Oluyede loc cit.

[83] This involves a process of registering encumbrances affecting registered land. In England, for instance, the English Land Charges Act 1925 requires registration in the land charger's register of a variety of rights vested in persons other than the registered owner. This aims at enabling a purchaser of land to discover the encumbrances on the land as soon as a search is made. See Oluyade op cit at 249.

The 1937 Act is the principal legislation governing the registration of land in the country. This Act was, however, not comprehensive. Section 16 of the Act, makes it clear that common law was to apply alongside the provisions of the Act. Section 16 has been described as fundamental because, besides making it possible for the Common Law to apply, it sets out to deal with "how real rights are to be transferred". Such a transfer could only be done by "means of a deed of transfer executed or attested by a registrar".[84] It is obvious from the later provision that the stated objective of registration is to regulate the transfer of ownership rights in land from one party to the other.[85] It was thus held in Thipa v Subramany[86] that the registration of the deed has the effect of transferring title from the grantor to the purchaser.

A more critical analysis of the registration system in South Africa, however, reveals that its impact was wider; going beyond the face value aim identified above. It has been argued that the registration process in South Africa was meant to accomplish other ulterior motives not specifically stated. Van der Post,[87] claims that the land registration system was not aimed at the traditional land registration goals in the following terms:[88]

> *"The appropriate deeds office in theory therefore should be able to furnish both the ownership and the conditions of title of land. In practice, however, the deeds office is not able to guarantee that its registers and deeds reflects the correct positions as regards either."*

It has also been suggested that the registration mechanism in South Africa could be adapted to bar Africans from acquiring interest in land by a reliance on the contention that they were not competent to acquire land. The competence to acquire rule became one of the most effective methods of consolidating dispossession and this was achieved by thwarting attempts to

[84] Miller and Pope op cit at 47.
[85] Ibid.
[86] 1954 (4) SA 126 (N).
[87] D J Van der Post 'Land law and registration in some of the black rural areas of southern Africa' (1985) Acta Juridica 216.
[88] Ibid.

acquire land by Africans.[89] The registration system thus contributed to consolidating the land dispossession policies of the white minority government.

While these arguments may have some merit, the point has to be made that the South African system is peculiar. The South African registration method cannot be exclusively classified as falling under the positive or negative system. It is something of a hybrid containing elements of both. Indeed, G J Pienaar[90] has after a careful review of the authoritative works of J W S Heyl[91] and R J M Jones[92] on the subject also acknowledged that the system carries incidents of both. Referring to its positive element Pienaar stated that although the registration system is not uniform, "it is generally regarded as accurate and reliable". Citing Heyl, this author also notes the negative elements of registration of a deed in simple form as not in theory guarantying the accuracy of the registered data.[93]

By s 3(1) (b) of the Deed Registry Act No 47 of 1937 the registrar has a duty to ensure that registration of land is executed in a manner consistent with the law. Although this makes the system look like a positive system of registration which guarantees the validity of title, it is not. The registration information may not be seen as correct for all purposes. Because the system recognised that mistakes could occur it also incorporated the negative system of registration where title is not guaranteed.[94] In both systems, the power of the registrar to decide on the registrability of the conveyance and to reverse a wrongly registered conveyance was used to restrict blacks from acquiring interest in land.[95]

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[89] D L C Miller and A Pope 'A South African Land Reform' (2000) 44 Journal of African Law 26, hereinafter referred to as Miller and Pope (no 2). Section 10(1) (d) of Act 47 vested the powers to define those qualified to register interest in land on a board established under section 9 of the same Act. These powers were to be exercised through the use of regulations hence could easily be adapted to address white interest.

[90] G J Pienaar "The Need for a Uniform System of Registration" in A J Van Der Walt Land Reform and the Future of Landownership in South Africa Cape Town Juta and Co Ltd (1991) 117, hereinafter referred to as Pienaar (1991).

[91] Pienaar (1991) op cit at 118.

[92] Ibid.

[93] Ibid.

[94] Badenhorst , Pienaar and Mostert The Law of Property (4th ed) Durban Lexis Nexis Butterworths (2001) 247, hereafter referred to as Badenhorst et al. This relates in the main to the registration of sectional title on portions of land. See also Pienaar (1991) op cit at 118.

[95] See note 88.

The practice of using registration to thwart access to land in South Africa has a long history. For example, under the Glen Grey Act of 1894,[96] dealing with allotment and transfer of lands amongst the natives of the Glen Grey area, certain restrictions were specified in respect of the alienation of land. The provisions of s 5 were particularly instructive. The section made the transfer of land subject to the Governor's approval and the conditions prescribed in schedule A. of item xil that made the land subject to be forfeited for rebellion. The schedule stressed the aim of this regulation by noting that the governor's consent was relevant in checking the suitability of new purchasers to acquire land under the Act.

It does not need much imagination to see that by making rebellion a basis for forfeiture, the Act had the weakening of African resistance to the dispossession of land in mind. This is plain since they were naturally resentful of the settlers because of the latter's expropriation of their land. Such bitterness could and did explode into rebellions and wars during this period. As noted in the proceeding chapter, the 1800s was a period dominated by many wars over land between the Dutch trekker and the indigenous peoples such as the *Xhosa* and *Zulu*.[97] The following comments by Letsoalo are apt:[98]

> *"Whatever minor causes they may have been for the many Bantu European wars, the desire for land was the fundamental cause. Sometimes it was land for pasture and cultivation, sometimes, it was land for minerals, but always it was land"*

The issue of the beneficial use of land by a registered holder as a ground for forfeiture of land had a ring of dispossession about it. It had always been the view of settlers (a view inspired by European thinkers like John Locke) that indigenous peoples were not putting land to valuable use. This kind of thinking remained one of the principal driving forces of all land dispossessions in the colonies.

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[96] This Act was the precursor of the 1937 Act.
[97] Human Awareness programme op cit at 3.
[98] E M Letsoalo Land Reform and South Africa : A Black Perspective Johannesburg Skotaville Publishers (1987) 30. The Glen Grey Act was, in the circumstances, applicable during this period both as an attempt to suppress the African's resistance to the dispossession of his land and consolidate the policies limiting his access to land.

As an instrument to ensure that African registered holders of land could be dispossessed of their land, this criterion's potential for effectiveness was immense.[99] The Act did not have any clear definition of "beneficial use", thus leaving its administrators with extremely wide discretionary powers. The administrators who were exclusively white and committed to the pursuit of settler interests were not inclined to an objective application of the Act.[100]

Apartheid pieces of legislation dealing with the criminalisation of conduct were peculiar and did not follow common trends in the English speaking countries where penal laws were directed at curbing wrongful acts because of their high degree of moral turpitude. Most land-related offences in South Africa were created to address land related political issues. Violations of pass regulations and the so-called illegal occupation of land by blacks were offences of this kind. Convictions for them were naturally a basis for the forfeiture of land by a registered black holder. The idea was to use the registration process as a leverage to ensure that blacks did not threaten the grand apartheid design to remove them from areas reserved for white exclusive ownership.

The present argument that the registration system was structured to facilitate apartheid's grand design of controlling African land use is strengthened by two factors in the registration process. Miller and Pope comment that racial control over land ownership was established through the deeds registries which used the competence to acquire rule to exclude disqualified persons.[101] The competence to acquire rule was a direct and straightforward means of effecting control whether the control was altruistic or otherwise. It is, however, obvious from the history of apartheid that such a control cannot be to the advantage of the African potential transferee.

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[99] The Act was designed to transform Africans into migrant labourers. However, most recovery of land was undertaken for the failure to pay accrued rents though these rents by today's standard were nominal. See J J Keegan Land in Fingoland Unpublished Ll.B Thesis University of Cape Town (1975) 70.

[100] The Act was structurally incapable of protecting titles acquired under it. Section 5 of the Act, for instance, stated that the land acquired under the Act could not be mortgaged but item v in Schedule A permitted the same land to be sold in execution of a debt. Though s 5 may be commended for seemingly desiring the protection of Native interest in land, in the final analysis it achieved little. Many Africans lost their land to white traders who offered them loans on the security of land. See Keegan op cit at 2.

[101] Miller and Pope (no 2) op cit at 168.

The use of Proclamations to regulate the process had significantly increased the government's capacity to use legislation to control land use for the benefit of white interest. Van der Post has revealed that the Deeds Registry Act of 1937 remained applicable only to the extent that it did not conflict with any of the multiple proclamations.[102]

In 1969, regulation 42 repealed both the Glen Grey Act and the Proclamation extending it to the other regions.[103] The regulation gave the Registrar of Deeds very wide powers to deny registration for, amongst other reasons, any valid objection.[104] This Proclamation did not contain a provision similar to s 6 of the 1937 Act. Section 6 of this Act provided that a court could only annul a registered right when exceptional circumstance exists for doing so.[105] Once again it has to be observed that the power to deny registration for any valid reason could be used where necessary to achieve the broad apartheid land designs. Moreover, by removing the court's powers to determine the validity of the annulment of a registered land right and placing it in the minister, the Proclamation intended to remove any possible obstacles to government's land control.

Regulation 14(3) provided for the grant and registration of quitrent tenure, which was essentially a sort of individual tenure subject to certain conditions. These conditions were similar to those contained in the repealed Act. Both the Act and the regulations had been commended for protecting the security of tenure of African landholders.[106] The Act was regarded as "one of the best enactments bearing on native policy ever passed" and as representing a compromise between native and European systems.[107]

The Act had indeed much to commend it because it recognised the need to make more land available for Africans particularly those successful in agriculture. It might also be credited for simplifying the registration process as well as proscribing the transfer of land to whites. This was later strengthened by the stringent procedure for the transfer and registration of land under the 1969 Land Regulations. The conveyance for transfer had to be endorsed by a family

[102] Van der Post op cit at 231. See Keegan op cit at 12.
[103] Proclamation 227 of 1898 had extended the Glen Grey Act of 1894 to Transkei.
[104] Regulation 42 (1) (b) of 1969.
[105] Van der Post op cit at 231.
[106] Ibid.
[107] Van der Post op cit at 219.

meeting, the local chief and supported by a declaration of the transferor's wife if applicable. The transfer must also contain a declaration that the purchaser is black.[108]

Although these requirements did make African land rights seemingly secured, the overall impact on land already dispossessed was minimal. Indeed, the Act was designed to transform Africans into migrant labourers.[109] It made the African politically weak because the tenure granted by it was considered communal thus disenfranchising them under The Representation of Voters Act of 1887. Furthermore, while s 5 of the Act expressly proscribed the mortgaging of the land, it was possible to sell the land to realise a debt.[110]

The use of land registration as an instrument to accomplish policy objectives is not limited to South Africa and may not always seek to achieve retrogressive goals. It was common for the colonial government to use legislation to pursue defined interest. [111] In Nigeria the colonial land registration statutes invariably provided that a registrable instrument must not be pleaded or given in evidence in court as affecting land unless it has been registered.[112]

> *The courts had to circumvent the provisions of these statutes by granting certain remedies. In Lamidi Ogbo Fakoya v St Paul's Church Shagamu[113] the Supreme Court of Nigeria rejected the submissions that an unregistered instrument cannot be given in evidence. The court held that it could be given in evidence not for the purpose of affecting land, but for the enforcement of the personal obligations of the parties thereto.[114] By this round about way, the court achieved the result which the statute directly proscribed.*

The use of the registration system to achieve the land designs under apartheid was considered suitable for the white minority government. The blacks and Indians who were victims of the system did not constitute part of the

[108] Van der Post op cit at 224.
[109] Keegan op cit at 70.
[110] See item V of Schedule A to the Act.
[111] Oluyede op cit at 257.
[112] Ibid.
[113] (1966) 1 ALL N.L.R 74.
[114] Oluyede op cit at 256.

society in the context of apartheid. There has been important developments aimed at the rationalization of the land registry and its functioning following democratisation and majority rule. Most of the restrictive rules and proclamations of the past have been repealed.[115]

2.4 INFLUX CONTROL REGULATIONS

2.4.1 URBAN AREAS

There were various pieces of legislation[116] enacted to deal with population control after the land Act of 1913. The first significant legislation used to control black people's entry and stay in urban areas was the Urban Areas Act of 1923 This Act formed the basis of urban black administration for many years.[117] The objective of the Act was stated in its long title as follows:[118]

> *"To provide for improved conditions of residence for natives in or near urban areas and the better administration of native affairs in such areas; for the registration and better control of contracts of service with natives in certain areas and the regulation of the ingress of natives into and their residence in such areas…for the restriction and regulation of the possession and use of kaffir beer and other intoxicating liquor by natives in certain areas and for other incidental purposes."*

Olivier[119] has identified the main objective of this Act to be the power to compel all blacks in an urban area to reside in such locations, village or hostel unless exempted. The ministerial power to move blacks from urban areas and relocate them in locations as aforesaid resulted in numerous dispossessions. A black that disobeyed the order (whose exercise was based on the minister's discretion) would be charged with a criminal offence.[120]

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[115] Merwe and Pienaar (1997) op cit 286-287.
[116] See The Group Areas Acts of 1950 and 1966, Black (Urban Areas) Consolidation Act 25 of 1945, Community Development Act 3 of 1966 and The Reservation of Separate Amenities Act 49 of 1953 all of which have been repealed.
[117] N J Olivier 'The Presence and Employment of Blacks in the Urban Areas of South Africa: A Historical Survey of Legislation' (1984) Acta Juridica 4.
[118] Ibid.
[119] Ibid.
[120] Ibid.

Apart from the forced removal of Africans, it seems that the Act was aimed at humiliating Africans. It stated that Africans should not be permitted to congregate within about five to ten miles from the boundaries of an urban area. It purported to restrict their possession of what it called "kaffir beer" (a derogatory term for indigenous alcoholic brew) and introduced the possibilities of fencing in their townships.[121] Although the reasons for the indignities of this Act are yet to be known, it shows the contempt that the white minority government had for indigenous peoples.

The 1923 Act reflects the fundamental principles regulating the presence of Africans in urban areas. It was to remain in force for over half a century introducing either directly or from amendments thereof some of the most inhuman rules known to humanity since slavery. The requirement, for example, that blacks should carry passes before entering urban areas was instituted under s 28 of the Native Administration Act 38 of the 1927.[122] This Act was an amendment to the 1923 Act. It is comical that the 1923 Act had as an objective the provision of improved conditions of residence for natives in or near urban areas

Sections 12 and 17 of the 1927 Act, which dealt with measures involving the removal of unemployed blacks in urban areas, described them as "idle, dissolute or disorderly".[123] These were, in substance, black people who entered urban areas for the purpose of seeking employment. The Minister was later given authority in 1930 to prohibit blacks from entering urban areas to seek employment, which powers were to apply regardless of sex. All these were possible because the influx control legislations were expressly intended to ensure that Africans were in the words of Dean:[124]

> *"only temporary inhabitants of the urban areas which were regarded as part of the European areas of South Africa…the native residential area in the town was treated simply as a temporal place of residence for those*

[121] Olivier op cit at 45.
[122] H H Corder The Rights and Conditions of Entry into and Residence in Urban Areas by Africans (1984) Acta Juridica 46.
[123] See also W H B Dean 'The Legal Regime Governing Urban Africans in South Africa – An Administrative Law Perspective' (1984) Acta Juridica 105.
[124] Ibid.

Africans whose labours was required in the urban areas."

2.4.2 SECTION 10 OF THE BLACKS (URBAN AREAS) CONSOLIDATION ACT 1945

The most important statute by which this aim was attained was the Blacks (Urban Areas) Consolidation Act of 1945[125] and its accompanying regulations. The principal instrument of influx control was s 10 of the Act. By this provision, "no black shall remain for more than 72 hours in a prescribed area unless he produces proof in the manner prescribed that"[126] he was exempted. It was a criminal offence for anyone to violate the terms of this provision.[127]

The first observation to be made is the wide territorial coverage of the Act. Section 10 prohibited blacks from entering and staying in a "prescribed area". The courts defined the phrase "prescribed areas" very liberally. In R v Thelingoana[128] it was held that the phrase also includes an urban area set aside for blacks. This tendency towards a broad judicial interpretation reflected in Thelingoana's case could be rationalised as falling within the contemplation of the spirit of influx control. These pieces of legislation were to create a climate conducive for the forced removal of blacks for good or bad reasons. The objective of the Act as indicated in its title was to remove blacks not only for the reasons specifically prescribed, but also "for other incidental purposes".[129]

Another significant feature of the Act was the fact that it placed the burden of proof in the criminal prosecution under s 10(4) on the accused black person. Section 10(5) contained presumptions in favour of the State because it required an accused to establish that he had permission to remain in the area for a period longer than the prescribed 72 hours. The intention was to facilitate a

[125] Now repealed because contrary to Constitutional provisions prohibiting discrimination on grounds of race eg s 9 of Constitution of the Republic of South Africa Act 108 of 1996.
[126] See s 10 of the Act.
[127] See s 10 (4) of the Act.
[128] 1954 (4) SA 53 (O).
[129] The Act was by its long title meant " to consolidate the laws in force in the union which provide for improved conditions of residence for natives in or near urban areas and the better administration of native affairs in such areas; for the registration and better control of contracts of service with natives in certain areas in, such areas; for the exemption of coloured persons from the operation of pass laws; for the restriction and regulation of the possession and use of kaffir beer and other intoxicating liquor by natives in certain areas and for other incidental matters."

stringent application of this legislation so as to ensure that no undesirable black person slipped through the dragnet of the influx control regime. The defences to the offence under s 10(4) were severely limited.

It should in this respect be observed that the definitions of the prescribed areas could change at any time.[130] Blacks who moved from one urban area to another forfeited their exemption status. Although s 10(1) stated that proof of exemption had to be done in the prescribed manner, none was prescribed in fact.[131]

It has been contended that by the provisions of s 10(1) of the Act no African resident of urban areas had a right of remaining in the area in a strict legal sense.[132] This view was judicially affirmed in Administrateur Van Suidwes-Afrika v Pieters.[133] The court in this case rejected the submission that an individual was entitled to a hearing before being refused a permanent resident permit. The court based its decision on the ground set out in s 10 of the Act.

Dean[134] has identified two reasons for the court's approach: first, the statutory restrictions placed on Africans were so wide and stringent that any rights enjoyed at common law were taken away. Pieters' case is a judicial reflection of this view. Secondly, in view of the wide administrative discretion in the hands of the authorities to grant or refuse blacks permission to stay in the area, their presence there was a privilege that could be granted or withdrawn at will.

Conceptually the idea of a right involves the possessor's powers to claim and insist on acting in a particular way. It, necessarily, imposes a duty on the other person or body to behave in a particular way where the possessor of the right so decides.[135] Clearly the fact that the authorities could, at their pleasure, deny the black the permission to stay in an urban area fundamentally derogates from the idea of a right as understood here.

This legal position of Africans namely, in relation to land in urban areas meant that every African was a potential victim of eviction or dispossession.

[130] Corder op cit at 47.
[131] Corder op cit at 48.
[132] Dean op cit at 107.
[133] (1973) 1 SA 850 (A).
[134] Dean op cit at 10 and 111.
[135] The notion of right necessarily places a correlative duty on the party. See Dean op cit at 107.

This would apply to Africans (including their families) that were born and bred in a particular urban area. Dean[136] describes the legal position in the following terms:

> *"Although permanent residents may enter into and remain for more than 72 hours in the prescribed area in which they are so resident without the permission of the authorities, doubts have been expressed as to whether they can be regarded as having the right to be there and if they can be so regarded. What the nature of that right is…this doubts arise from the formulation of section 10 as a general prohibition from which permanent residents are exempted. This makes it possible to construe section 10 as the court did in R v Tushawe[137] not as conferring a right to remain in the area but simply a right not to be proceeded against… it would be possible to regard their presence in the urban area as unlawful."*

The exceptions created by s 10 (a)-(d) permitting this category of blacks to enter and stay in urban areas did not, in theory, confer on them any right to stay. Their presence in urban areas was in practice made very precarious because their ability to access the basic necessity for minimum human development was limited. The freedom to education, work, worship and recreation were badly curtailed.[138] These were subject to the approval of the administrative authorities.

2.4.3 RESIDENCE IN LOCATIONS

The distinctions between urban area (prescribed) and the locations did not significantly change the African's status nor did it protect him from eviction. In Ex Parte Minister of Justice: in Re v Anderjas,[139] it was held that Africans stay in a location would be subject to their continuous entitlement to stay in terms of the regulations governing residence therein. In substance, however, the African's stay in the location was subject to good conduct. White

[136] Dean op cit at 108.
[137] (1970) Law and Society Review 161.
[138] Dean op cit at 106.
[139] 1938 AD 411.

administrative officials had wide discretion to define what amounted to undeserving conduct.

The general rubric "idle and disorderly person" was frequently used to support eviction of Africans in the locations, even when such Africans had permits to live in the location. In Shesha v Vereeniging Municipality,[140] the court indicated that a permit operates like a mere licence. The court held that where an African forfeited his right of occupation, he was ejected not merely from the dwelling, but from the location.

Under the influx control regime, the authorities were given very wide discretionary powers for the forced removal of Africans from urban areas. By this practice the authorities developed and implemented policies, which did not emanate from the enabling statutes. These officials (except in rare situations) were not obliged[141] to give reasons for their decisions to evict a black person. Indeed, the administrators were under a strict duty to pursue the policies hence failure to do so attracted disciplinary sanctions under the Public Service Act. This, as Dean has observed, resulted in a secret system of law known only to the public authorities.[142]

The author referred to a 1971 memorandum which described the psychological effect of forced removals as follows:[143]

> *"The lack of security and the fear engendered by the threat of having one's home taken away; of having one's children endorsed out… the fear of arrest and of being sent to prison for a technical infringement of some law or regulation causes the most acute mental anxiety and suffering. The application of these laws results in all urban Africans living in a constant state of terror, always fearful that they will be unable to comply with some regulation or directive."*

General J M B Hertzog[144] is considered as one of the principal architects of the use of legislation as a tool for the removal of Africans from land. In a

[140] (1951) 3 SA 66I (A).
[141] Dean op cit at 118.
[142] Ibid.
[143] Dean op cit at 129.

debate in the House of Assembly in April 1927 he praised s 5 of Act 38 of 1927 which read thus:[145]

> *"The state president may, whenever, he deems it expedient in the general public interest without prior notice to any person concerned order that, subject to such conditions as he may determine after consultation by the minister with the Black Government concerned, any tribe, portion of a tribe, black community or black shall withdraw form any place to any other place or to any other district or province within the republic."*

This writer agrees with Marcus's viewpoint that the exercise of these powers, by their very nature hindered the courts in the discharge of their functions. The author has described this provision as conferring the most notorious powers on government to carry out forced removal of blacks in South Africa.[146]

2.4.4 DISPOSSESSION OF THE BAKWENA BA MOGOPA PEOPLE

The impact of this law on the dispossession of Africans was illustrated by the Mogopa case.[147] The Bakwena Ba Mogopa people had resided on their farms in the Versterdorp area from the earliest times where they had built a stable existence complete with schools, hospitals and places of worship. They had an advanced agricultural economy. They reared cattle and farmed with sophisticated tools like tractors and plough. The people achieved all this through a lifetime of immense sacrifice.

During 1983 the government started a systematic destruction of the community's amenities with the aim of compelling them to leave

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[144] G. Marcus "Section 5 of the Black Administration Act: The Case of the Bakwena ba Mogopa" in Murray No Place to Rest : Forced Removals and the Law in South Africa Cape town Oxford University Press (eds) (1990) 13, hereinafter referred to as Marcus.

[145] Marcus op cit at 18.

[146] Marcus op cit at 13.

[147] This case although not reported has been discussed in detail because it illustrate the extreme brutality and sufferings caused by forced removals After it, the government made a dramatic announcement indicating that it had suspended all forced removal of blacks until it reviewed the whole policy. Marcus has, however, aptly observed that amidst the fanfare of this announcement by government, the grave injustice perpetrated on the Mogopa people remained un-redressed and the removal, in fact, confirmed. Both old and new devices were adopted to achieve subsequent removals. The facts are, however, analysed by Marcus. Marcus op cit at 20-21.

"voluntarily".[148] The government then destroyed the schools, water supply channels and Churches. Transport to and from the community as well as payment of pension entitlement dues were all suspended for the residents of the community. However, the people tenaciously stayed on in spite of all these disruptions by government officials.

The government then served them an order pursuant to s 5 of the Black Administration Act. The case is thus one relating to influx control although it looks like a simple issue of forced removal. The tribe was ordered to move to Pachsdraai in another district. The Pachsdraai district was a desolate place totally unsuitable for both cattle rearing and arable farming. The community pleaded with government officials (appealing to the latter's Christian conscience) to allow them to remain in their land to no avail. As a last resort, the community engaged lawyers to mount a legal challenge to the order in court.

In court it was argued on behalf of the community that the removal order was invalid for non-compliance with the penultimate provision of s 5 of the Act. This provision in s 5(1) (b) gave the tribe the right to refuse to move until the resolution asking them to do so has been approved by Parliament. Their application cited the Minister for Cooperation and Development (who co-signed the order with the State President) and the District Commissioner of Ventersdorp as parties. The community prayed for an order directing these parties to comply with the provision of s 5 (1) (b) and an interdict restraining the government from forcefully removing them. The government's counter-argument was that the resolution had been passed contemporaneously with the signing of the order. The government had no answer to the tribe's contention that the resolution did not comply with s 5(1) (b) for two reasons, viz:[149]

i) *It authorised the withdrawal of the tribe from the place without indicating where they were to be relocated.*

ii) *The resolution deprived parliament from appraising the reasons for which the tribe had declined to move.*

[148] Marcus op cit at 20.
[149] Ibid.

In spite of these sound submissions, Van Dyk J dismissed the tribe's application and refused to grant the interdict. He held that the entire question of moving a tribe was in the unfettered powers of the President. He further dismissed the tribe's application for leave to appeal against his judgment thus giving the government the liberty to take matters into its own hands.

The tribe filed another application for leave to appeal before the Chief Judge and their attorneys appealed to government officials not to enforce the order of moving the tribe until the determination of their application. This fell on deaf ears. The government removed the tribe using immense violence. The whole village was sealed off. No attorney, priest, diplomat or journalist was allowed in while a convoy of heavily armed policemen executed the order.[150]

The people suffered heavy losses in the ensuing panic. Even their cattle were forcibly sold at ridiculous prices to white farmers. Meanwhile, both their petition for leave to appeal and their appeal itself were successful. In his judgment, the chief judge held that the withdrawal order did not comply with s 5(1)(b) of the Act as contended by the tribe. In passing the judgment, the court stated the position thus:[151]

> *"If the two houses had the right…to approve of the withdrawal without due regards to the terms of the order and the reason for the tribe's attitude, the whole purpose of the proviso would be thwarted. The whole safeguard provided to a tribe against consequences of the exercise by the state president conferred upon him would in effect be bypassed."*

Looking at the Mogopa dispossession in retrospect, it is difficult to resist the temptation that the Appellate Court ruled the way it did only because it knew the objective of the government had already been attained. The legal victory was academic because the people had been dispossessed and their cattle sold to white farmers. The judgment of the court of appeal in the circumstances may have meant some kind of moral victory but what does it translate into for a poor black people forcefully removed from their ancestral home and dumped over 150km away? Not much.

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[150] Ibid.
[151] Ibid.

2.5 THE HOMELANDS AND DISPOSSESSIONS

Two important factors in the late seventies made the South African government to revise its political policies. Owing to the surplus of black labour and the pressure from abroad, the government embarked on a denationalisation of its African population.[152] Those deprived of citizenship were forcefully relocated into the former reserves that had by legislation been transformed into self-governing homelands.[153] Thus from the onset the homelands were conceived as part and parcel of the strategy of manipulating the land distribution policy.[154]

The government of South Africa pursued this policy in which it purported to grant the homelands independence. Transkei was the first to be accorded this independence in 1976. This policy of homeland independence resulted in three major citizenship categories amongst blacks in South Africa. These were:[155]

i) *South African citizens in the strict legal sense (this involved those whose home states had not had constitutional independence).*

ii) *New foreigners: blacks whose home states had become constitutionally independent from South African citizenship with incidental consequences.*

iii) *Non-nationals or aliens in the strict legal sense. Blacks from other countries; Mozambique, Zimbabwe etc. Blacks from states formerly in South African, but who were born after the so-called constitutional independence of their home states.*

The policy of homeland independence was used as a powerful instrument of influx control; hence it led to the removal of Africans from white

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[152] There was a distinction between the self-governing territories that were on their way to independence and national states which were technically "independent". Both were however used as dumping ground for Africans.
[153] Letsoalo op cit at 43.
[154] Ibid.
[155] G Budlender "Urban Land Issues in the 1980s: The View from Weiler's Farm" C Murray No Place to Rest Forced Removal and the Law in South Africa Cape Town Oxford University Press (eds) (1990) 160, hereinafter referred to as Budlender.

urban areas. Section 10(1)(a)(b) or (c) of the Black (Urban Areas) Consolidation Act of 1945, it may be recalled, exempted some Africans from the prohibition not to stay in an urban area for not more than 72 hours without the requisite administrative permission. These were in the main (a) Africans who have since birth resided continuously in the area (b) who have been in lengthy employment in the area or (c) those that were dependants of those in categories (a) and (b) above.[156] These included the wife and children less than 18 years of those in category (a) and (b) above. The combined effect of these exemptions translated to the presence of some sizable pockets of Africans in white urban areas. They were those exclusively to provide cheap labour for the jobs, which whites would not do by reason of their high status and superiority.

However, by s 12(1) of the Black Urban Areas Consolidation Act, any African residing in an urban area pursuant to the above exemptions lost the right to do so where he/she becomes an "alien" in terms of any of the classifications made in (a), (b) and (c) above.[157] The loss of the right to residence would, under these exemptions apply irrespective of where the 'alien" was born. Budlender has encapsulated the effect of homeland independence on the s 10 residence right as follows: "children born today of Xhosa speakers, for example, are now not permitted to be in a prescribed area without permission irrespective of where they may be born."[158] This result is obtained as a consequence of Transkei and Ciskei attaining constitutional independence.

The Governor-General had wide discretionary powers to order the removal of this category of aliens from urban areas. He was not accountable to anyone in discharging his responsibilities under the Act. Nor was he obliged to give reasons for his decision to remove aliens. Moreover, all citizens of homelands were aliens regardless of their former status and could be deported from an urban area under s 40 of the Admissions of Persons to the Republic Regulation Act 59 1972.[159]

Budlender says that thousands were arrested in regular raids (particularly in the late 70s and early 80s), put in buses and deported. In his view, the effect of homeland independence was that it enabled the officials to bypass the courts

[156] Corder op cit at 49-53.
[157] Budlender op cit at 161.
[158] Ibid.
[159] Ibid.

and apply influx control[160] using administrative processes. The dispossession caused by the denationalisation of Africans was extensive although it is difficult to put an accurate figure on it. According to Letsoalo[161] the forced removals occasioned by the bantustaniasation policy rendered more than half the Black population homeless. She also notes that it introduced the tribalisation of Black people as it tried to create tribally pure communities. Using a process of consolidation, the government of white South Africa, in certain situations, simply incorporated black residential areas into the independent homelands.

2.6 LABOUR POLICY AND DISPOSSESSION

2.6.1 INTRODUCTION

The pieces of legislation dealing with dispossessions were vast and interlocking. The removal of blacks from white South Africa was such a central philosophy of apartheid that it was reflected in almost every significant aspect of life. African's entry and continuous residence in urban areas was, for long, linked to the predominant labour policy of the state. This labour policy, since the promulgation of the Black labour Regulations (Black Areas) Proclamation in 1968, was based on the use of the migrant labour. This system was premised on the idea that "black people will reside in the white areas only when their labour is required, and will be resident in the national states at all other times."[162] This meant that very detailed regulations and wide administrative discretions had to be adopted to accomplish this objective.

The strict regulation and the restriction of black access to housing became the twin pillars upon which the attainment of the exclusion of Africans from urban areas was built. By regulation 74 of the 1968 Proclamation all employment of blacks had to be for a fixed term of one year. The worker was after the expiration of his contract, expected to go back to his indigenous homeland. Failure to do so was criminally sanctioned.[163]

The state introduced a housing administrative policy during this period that it used as an effective weapon of forced removal and influx control.

[160] Budlender op cit at 160.
[161] Letsoalo op cit at 43.
[162] Budlender op cit at 159.
[163] Ibid.

According to Budlender,[164] the government, in 1958 decided that no further funds should be made available to local authorities to subsidise the building of houses for Africans. Since these local authorities were short of funds, there was a large shortfall of accommodations for migrant workers. This problem was further compounded by the natural increase resulting from population growth.[165]

By 1978 comprehensive regulations had been put in place, which severely limited the number of Africans who could be provided housing in urban areas. It was a criminal offence for a migrant black worker to live in an urban area without appropriate housing.[166] These policies were very successful in removing blacks from white urban areas. Budlender observed that from 1960 to 1980 the national population of blacks in urban areas fell from 29.6 percent to 26.7 percent. This occurred at a period of industrial boom when the opposite effect ought to have been the case.

The drive towards removing Africans from urban areas through the use of a housing policy received a boost when the Riekert Commission recommended a bill, which was to take away the popular "section 10" rights which enabled Africans to reside in urban areas. The Commission proposed that urban residence for blacks be based on what it called "bona fide employment" and accommodation.[167] This meant that an urban black who lost his work or house should be evicted from the area. A bill based on this proposal was withdrawn because of the outcry it caused.[168]

Nevertheless, in 1984, s 10(1)(a) was introduced through an amendment to the Blacks (Urban Areas) Consolidation Act of 1945. The Act incorporated the proposal of the Rieket Commission by making urban family life for migrant workers dependent on the availability of approved housing. The Aliens and Immigration Laws Amendment Act 1984 was also enacted. This law made the unlawful employment of aliens (blacks from the homelands) and the harbouring of an alien (as defined above) a criminal offence attracting severe penalties.[169]

2.6.2 ILLEGAL SQUATTING AND EMPLOYMENT

[164] Ibid.
[165] Budlender op cit at 160.
[166] Budlender op cit at 166.
[167] Ibid.
[168] Budlender op cit at 167.
[169] Ibid.

Although the Prevention of Illegal Squatting Act of 1951 did not expressly deal with employment issues, it has been discussed under this heading for one reason. It deals with "squatters" (a peculiarly South African term), which, in the main, refers to persons who entered or remained in land in the course of employment either for the government, local authority or an individual. In R v Phiri,[170] De Wet J explained the broad objective of the Act. When he observed that the Act "goes further than to control squatting." He held that it also penalises persons who enter into or stay on land without a lawful reason even if there is no squatting in issue at all.[171] This Act like most others was designed to cover a wide scope with the goal of ensuring effectiveness.

This Act manifested the state's intention to shift the enforcement of some of its draconian laws, which dispossessed Africans of their land from the government to local authorities and private persons.[172] Employers of farm workers were to play an important role in this respect. It is necessary to undertake a detailed analysis of this legislation because it was the source of great anguish.

This Act (hereafter referred to simply as the Squatting Act) conferred two types of powers for the removal of persons on land . Affected persons may be removed after a criminal conviction or through the adoption of administrative procedure[173]. It also vested powers for the demolition of the evictee's house by the local authority or landlord, as the case may be.[174] The true targets of the Squatting Act can be gleaned from the decision of Schreiner A CJ in R v Zulu[175] when he said:

> *"The mischief of squatting, though it became acute, no doubt, as a result of movements of large numbers and housing*

[170] 1954 (4) SA 708 (T).
[171] Ibid.
[172] Alan Dodson " The Group Areas Act: Changing Patterns of enforcements" in C Murray and C O 'Regan No Place to Rest Forced Removal and the Law in South Africa Cape Town Oxford University Press (ed) (1990) 154 hereinafter referred to as Dodson.
[173] C.O'Regan "The Prevention of Illegal Squatting Act" C Murray and C O 'Regan No Place to Rest Forced Removal and the Law in South Africa Cape Town Oxford University Press (eds) (1990) 162 hereinafter referred to as O'Regan.
[174] However, it is imperative to comment on those against whom the powers were to be used. There appears to be an attempt in s 1, a key provision of the Squatting Act which states "save employees of the government of any local authority no person…" to suggest a non-racial innocuous legislation. Nothing in fact can be further from the truth. See R v Zulu 1959 (1) SA 263 (A).
[175] 1959 (1) SA 263 (A).

shortages after the last war, will to some extent exist even where the squatter had lived all his life on the property or had been there before Act 52 of 1951 came into operation or had previously been allowed to enter and stay there."

It is apparent from the history of South Africa that the phrase "movement of large numbers" definitely referred to blacks that were compelled by state influx control policies to move. Although land was scarce for whites after the Anglo-Boer war this did not reach proportions that squatting became a phenomena or significant feature of white South Africans. It has to be recalled here that the white made up 13 percent of the population of the country, but owned and controlled 80 percent of the land surface of South Africa.

The Squatting Act from Schreiner ACJ's judgment simply converted indigenous peoples who have been on their land all their lives into squatters. The reference to those who have "lived all their life on the property" and "who have been there before Act 52 of 1951 came into operation" was particularly instructive. These were Africans whose land was granted to white farmers by the colonialists. Having nowhere else to go they were compelled to remain on the land as labour tenants at the mercy of the farmer. The mechanisation of agricultural methods meant that their labour and presence became unprofitable hence the Squatting Act was conceived to help white farmers remove them from the land.

At the core of the policy of managing Africans was two contradicting goals viz the drive to clean the urban areas up by excluding blacks from them and the need to ensure that black labour reserve was preserved for white use. The various pieces of legislation of apartheid, including the Squatting Act were made to balance these delicate policy interests.

2.6.3 CRIMINAL PROVISIONS RELATING TO FORCED EVICTIONS

The principal provision of the 1951 Squatting Act, which criminalised a person's entry or remaining on land, was s 1, although it has to be stated that there were multiple other criminal provisions. Section 1 created two offences. These were the offence of entry upon land without a lawful reason and

remaining upon land without permission.[176] Section 3 gave magistrates the discretion to order the eviction of anyone convicted for either or both of the offences. The latter offence had the sinister objective of seeking to drive out blacks that had been on the land even before the enactment of the Act.[177]

The legislature was prepared to ignore all civilised standards in the making of laws aimed at dispossessing Africans of land. Thus, the fundamental rule that prohibits the making of retroactive criminal legislation was conveniently bypassed. O'Regan[178] has, however, said that in spite of its unusual nature, this provision did not prove as successful (as its authors had hoped) in removing people from land. She identifies a variety of reasons why the provision failed in this respect. Firstly, it relied on the provision of s 1 to effect the removal of entire communities, which required that massive prosecutions had to be undertaken. This was not feasible because of the human and institutional cost involved.[179]

Secondly, it was not easy to obtain a successful conviction under s 1 of the Squatting Act. Three elements were particularly difficult to establish. These were the requirement that the land was occupied without the land owner's consent, the proof of the unlawfulness of the accused entry and the requirement to proof that the land fell within the ambit of the Act[180] The requirement to establish that the occupation of the land was without the consent of the landlord was particularly fraught with many problems.[181] In S v Peter,[182] for instance, it was not even possible to establish the real owner of the land. The most difficult obstacle to removals under the Act was that presented by s 3 which gave magistrates the discretion to order the eviction of a convict.

This provision was similar to that in s 5 of the Groups Areas Act of 1950 that was construed in S v Govena.[183] Mr. Justice Goldstone held that a magistrate must consider many factors before ordering the removal of a person convicted under the Act. These factors, amongst others, included importantly

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[176] O'Regan op cit at 160.
[177] R v Zulu 1959 (1) SA 263 (A).
[178] O'Regan op cit at 164.
[179] R v Zulu 1954 (1) SA 263 (A).
[180] O' Regan op cit at 165.
[181] O'Regan notes that proof that the land fell within the ambit was also difficult to establish. O'Regan loc cit.
[182] 1976 (2) SA 263 (A).
[183] 1986 (3) SA 969 (T).

the prospects of a permit being issued for continued lawful occupation of the premises; the personal hardship that such an order may cause and the availability of alternative accommodation.[184] Furthermore, even where the magistrate was so satisfied, the institution of an appeal scuttled the whole process because it operated to stay all action until the determination of the appeal that often took over a year.[185]

It was for this reason that the Squatting Act was amended in 1988 even as South Africa had publicly embarked on a reform process.[186] The amendment was clearly designed to obviate all the obstacles identified above. The effect of this amendment, according to O'Regan, was more removal from the land than previously, for the technical difficulties faced by the state in obtaining convictions have been greatly reduced. It was now easier to evict a labour tenant.

The 1988 amendment introduced measures, which facilitated the removal of squatters through administrative mechanisms. The amendment had the following broad effects:[187]

i) *The magistrate's authority to remove persons from land was broadened. The requirement that he has to be satisfied that the health and safety of the public was threatened was removed so was the circumscribing effect of the principles in S v Govena.*[188]

ii) *The decision of the magistrate was not appeallable. A wrong exercise of his powers was subject to an administrative review. However, by the new provision of s.11(b), such a review did not operate to stay a removal order, as was the situation under the previous Act.*

iii) *A new s 6(f) gave the magistrate powers to order the removal of persons living on land even with the consent of the owner. The magistrate's powers were extended to*

[184] S v Govena 1986 (3) SA 969 (T).
[185] O'Regan loc cit.
[186] Miller and Pope op cit at 41.
[187] O'Regan op cit at 167-169.
[188] 1986 (3) SA 969 (T).

include areas outside the scope of his territorial jurisdiction.

iv) *Another new power was conferred on local committees made up of white farmers in areas outside the jurisdiction of local authorities in s 6(e). These committees had large powers of investigations and could order the removal of persons from land if in their opinion such persons are not working for the owner of the land. Their decision was not subject to appeal and a breach of it was a criminal offence.*

O'Regan, after highlighting the problems encountered in the implementation of the provision of the amended Act, argues that it was difficult to remove squatters under it. For example, the failure by Kraaifontein Municipality to remove 125 squatters under the amended provisions was cited as a specific example justifying this conclusion.[189]

Her conclusion is difficult to accept because the power to demolish a squatter's dwellings without a court order made it easy for landowners, local authorities and provincial officials to forcefully evict black people from their land. The distinction drawn by O'Regan from s 3(b) that it gave land officials

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[189] It seems plain that her conclusion is neither reflective of the real impact of the amendment nor the general effect of the Squatting Acts. The case of Paul Chetty reveals, on the contrary, that the amendments were rather very effective in causing the dispossession of Africans from land. Mr. Chetty, a businessman owned vacant land in the Durban area. A group of desperate homeless Africans moved quietly into parts of this land and constructed humble shacks to reside in. Mr Chetty was quite happy to have these "squatter friends of his on the land and sometimes offered them free food." However, Health Department officials in collision with his neighbours insisted that these squatters had to be removed because they were a health hazard. He was taken before the magistrate court and given a suspended fine of R300 and a month to demolish the shacks of his friends on his land. Expressing his dilemma, Mr Chetty said:

> *"What am I suppose to do? If Mr Chetty refuses to demolish the shacks he fears he could be arrested, fined and maybe even sent to prison. But if I do demolish them, I destroy the homes of my friends, who are good law abiding people and cause no trouble."*

The dilemma was resolved in favour of driving the squatters off his land. Their shacks were demolished under s 3b of the 1988 amendment of the squatting Act. The new provision gave landowners, local authorities and provincial officials sweeping powers to summarily destroy the homes of squatters. It is difficult to accept O'Regan's conclusion in the face of such compelling evidence of the capacity to remove squatters.

The local committees devised very efficient methods of pressuring white farmers (who would otherwise permit retired workers and members of farm workers family to remain on their farms) to remove unwanted black persons from their land. The landowners were given limited time (14 days) to respond to their notice. Besides, a landowner who failed to comply with an order to remove squatters was exposed to a hefty fine of R10, 000. See Case Study: Sunday Tribune 26 June, 1988. See also O'Regan op cit at 170.

powers only to demolish houses not to evict them from the land[190] is of little moment. A squatter whose shack has been demolished could not survive in the open where the battering of the elements could be unbearable during certain periods of the year. The Squatting Acts were clearly a central tool in the systematic scheme to drive Africans out of their land. It resulted in the removal of close to five million blacks that were statutorily called squatters. Its effectiveness in this regard cannot be doubted.

2.6.4 CRIMINAL TRESSPASS AND DISPOSSESSION

Trespass may be defined as the unauthorised entry into land in the lawful possession of another. It is a traditional common law crime of some antiquity. Under English law, the tort of trespass is one of a broad body of common law doctrines and principles regulating land use. These regulations were considered beneficial and thus acceptable even though some of them, like nuisance, impinged on a landowner's absolute right of ownership.[191]

They were considered necessary to achieve greater efficiency of land use and thus seen to be in the general public interest.[192]In South Africa where about 87% of the land was reserved for white people trespass assumed greater significance because it helped to curb the unwanted presence of black people on white property[193]. While in England trespass was and still is a manifestation of the despotic dominion which one man claims and exercises over external things of the world in total exclusion of others[194]in South Africa it was during this period a tool for the exclusion of non-whites from the land.

The laws of trespass generally can be used for a multitude of purposes. In South Africa, the criminalisation of trespass by the Trespass Act of 1959 was meant to achieve one important purpose, which was the forced removal of blacks from land. Despite the non-political formal nature of the Act, there is no

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[190] O'Regan op cit at 172.
[191] J R L Milton 'Planning and property' (1985) Acta Juridica 274
[192] Ibid.
[193] R Keightley "The Tresspass Act" in C Murray and C O 'Regan No Place to Rest Forced Removal and the Law in South Africa Cape Town Oxford University Press (eds) (1990)180, hereinafter referred to as Keightley.
[194] Milton op cit at 275.

doubt, as portrayed by Keightley, that it was used for political purposes. She continued by asserting that:[195]

> *"Many unreported cases reveal its extensive use in rural areas. In these cases, the Act has not been used to prevent people from gaining access to land for criminal purposes. Instead it has secured the removal of people from land where their presence has, for one reason or the another, become inconvenient to the owner or lawful occupier of the land or to the state."*

Section 1 of the Act was the main provision used to achieve this purpose. It refers to (a) any person who without the permission of the lawful occupier of any land or any building or part of building or (b) "of the owner or person in charge of any land or any building or part of building that is not lawfully occupied by any person." The Act's principal target has been identified as the removal of black people from land, although it appears to outlaw the presence in buildings without consent as well.[196]

It was also to be used to resolve disputes over land rights, which were prevalent in the 70s and 80s. The Act in this regard tilted the balance substantially in favour of the white farmer with its consent provisions. It created two offences, which were almost identical to those established by s 1 of the Squatting Acts. In practice, people were often prosecuted under both acts since in substance their provisions both criminalized anyone who "enters or remains" upon land.

The proof of the offences created by this provision required the prosecution to establish that the accused entered or has remained on land without the approval of the lawful occupier or owner. Judicial constructions of occupier in S v David[197] were strict. It was held that the control exercisable to make one an occupier should be greater than that of a mere tenant or labourer on the farm. Many squatters were either direct family members of labourers or had some family affinity with the labourer. It was and still remains customary for

[195] Ibid.
[196] Keightley op cit at 182.
[197] (1966) 1 PH H26 (N).

Africans to extend hospitality to a kinsman even where this is done at great expense to himself.

The previous regime had realised the great disparity in the ratio of blacks to white on farmlands across the country and wanted to curb it, using statutes like the Trespass Act. This, in turn, elicited a great deal of resistance from the so-called unlawful occupiers to keep the occupation of land, which they considered as their historical home, but which "legally" belonged to the white sojourner.[198] Prosecutions for trespass became a veritable channel for the expression of the contending positions of these two forces.

In an unreported trial in the Wakkertroom Magistrate's Court, [199]Joseph Nhlabathi, illustrates the issues and difficulties associated with the Trespass Act. Joseph Nhlabathi, who was born on a farm, lived and worked for its owner, a white farmer. He was paid R45 a month and permitted to keep his cattle, sheep and goats on the farm. However, the farm was conveyed to another white farmer who changed the terms of Nhlabathi's employment. Under this new term, Nhlabathi was to get R80 a month, but prohibited from keeping his own stock. Nhlabathi ignored the new contract, but employed someone else on a pay of R100 to work in his stead for the new farmer. This new worker worked for several months for the farmer.

However, the new farmer, in spite of this served Nhlabathi notice to quit the land and remove his livestock. While this new man was working for the new farmer, Nhlabathi was arrested and charged with trespass. In court, Nhlabathi argued that he was still providing services for the farmer through the man he employed. He contended that he was for this reason entitled to remain on the land. Although the magistrate and the prosecutors were furious at what they saw as Nhlabathi's stupidity,[200] Nhlabathi insisted that the farm was his home, pointing out that his parents were buried there and there was no where else he knew.

This case shows quite clearly that white farmers believed that the Act gave them the liberty to remove undesirable blacks from their land. Nhlabathi's

[198] A Claassens "Rural Land Struggles in the Transvaal in the 1980s" in C Murray and C O'Regan No Place to Rest Forced Removal and the Law in South Africa Cape Town Oxford University Press (eds) (1990) 44, hereinafter referred to as Claassens.
[199] This is a magistrate court case which not being a court of record was not reported. The facts were taken from Claassen's article above. Claassens op cit at 45-46.
[200] Claassens op cit at 45.

case reveals that the Trespass Act and the Squatting Acts were pieces of legislation enacted to assist the white farmer in his struggle with the blacks over land in the country though the legislations were made to look like ordinary criminal statutes because government wanted to avoid the negative publicity it would have otherwise attracted (locally and internationally) if there were allowed to reflect their true political character.

Section 2 of the Trespass Act imposed a fine of R2000 or an imprisonment term of not exceeding two years for anyone convicted of an offence under the Act. In R v Mcunu[201] the accused was on conviction sentenced to two months in prison without an option of fine. Although on appeal the court conceded that the sentence was harsh, it nevertheless refrained from changing it.[202] According to Keightley[203] such sentences were designed to make it easy to remove the convict from the land.

The strategy generally was to secure his removal while in prison since he will not be in a position to oppose removal during this period. Even in situations where the convict escapes imprisonment, he could eventually be removed from the land through the adoption of other tactics. In S v Brown,[204] the convict's prison sentence was suspended on condition that he demolished his home and leaves the land.

Suspended sentences proved particularly devastating to the black in his struggle to maintain the land. Thus Keightley states:[205]

> *"In an unreported case involving Hout Bay squatters, the sentences…were suspended on condition that the accused vacated the land by a given date. Such sentences placed people in a no win situation: either they obey the conditions of the suspension of the sentence and lose their struggle to stay on the land, or they refuse to obey the conditions of the suspension in which case, sooner or later, they are likely to end up in prison, thus losing the struggle in any event."*

[201] 1960 (4) SA 544 (N).
[202] Ibid.
[203] Claassens op cit at 188.
[204] 1978 (1) SA 305 (NC).
[205] Claassens op cit at 188.

2.7 CONCLUSION

As has already been noted, the country's land policy resulted in a profound inequality in land ownership in South Africa. A class perspective in the land distribution within the white community further compounded the resulting land and wealth disparity. Thus white farmers who account for less than 17 percent of the population of the country controlled the majority of the land.[206] Dispossession placed the human rights issues of the protection from arbitrary interference with property, gross inequality and non discrimination at the centre stage of South Africa's development.

The philosophy of racial segregation was not content with the expropriation of the land. It used land as an instrument to control the economic and political development of South African blacks. South Africa under apartheid had to dislocate the pre-colonial land tenure systems of the indigenous peoples to achieve this goal. Though the indigenous systems of tenure varied slightly from place to place, a common feature of all Bantu tenure in pre-colonial South Africa was that land was seen as a common possession of the tribe. This explains why it is said that land belongs to the past, present and future members of the family.

The indigenous tenure of Africans was inseparably tied to the above perception of land. Thus, membership of a tribe was and still is the primary qualification to hold land. The chief is the highest authority and technically holds the land for distribution to tribe members.[207] It is typical of African tenure to contain both elements of communal ownership and individual control. Land is communally owned in the sense that it belongs to the tribe as a whole but individually owned and used by virtue of an allotment made by the chief. The chief's powers were to allot undistributed land. He neither owned unalloted land nor did he control the manner in which an allottee may manage his land.[208] This

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[206] B Kinsey and H Binswanger " Characteristics and performance of settlement programmes: a review" in J Van Zyl et al Agricultural Land Reform In South Africa: :Policies, Markets and Mechanisms Cape Town Oxford University Press (eds) (1996) 105, hereinafter referred to as Kinsey and Binswanger.

[207] Letsoalo op cit at 21.

[208] C Cross "Informal tenures against the state: Landholding systems in African rural areas" M de Klerk A Harvest of Discontent: The land Question in South Africa Cape Town Institute for Democratic Alternative for South Africa (ed) (1991) 21, hereinafter referred to as Cross.

system of tenure guaranteed both access and security to land by individual members of a tribe or community on the basis of need.

The white South African restricted customary system in order to create favourable conditions for its policy of dispossession. It instituted a so-called traditional communal tenure in which the state using chiefs as instruments sought to control the management of land. This control took away the Africans' capacity for independent action. The chiefs in traditional settings did not grant land as loans to members of their community, nor did they by it sought to make landholders subservient. The apartheid system of traditional ownership introduced both limited access to land and weakened the security of grants. This incident of tenure insecurity was prevalent across the various tenures introduced by the state viz trust tenure, quitrent and freehold in the reserves.[209]

The individual or family allottee of land under an indigenous grant held rights roughly corresponding to those of the European freeholder. The idea that such a landholder held as a serf of the chief in the sense understood in Europe was a misconception. The relationship between land and the landholder has been described as follows:[210]

> *"…the man given the land owned it, because the link between the land and the individual tribesman was stronger than the link between the land and the chief. …Those who asked for land received it forever, it was a transfer not a loan. The land could be inherited from one generation to the next."*

This is indeed a common feature of land tenure in most indigenous African systems. It is in the light of the penultimate sentence above that the idea of land as owned by a family of past, present and future members should be understood.[211] African freehold had two sources in South Africa. The majority are lands bought by African tribes and held collectively through the chief.

Although State control over them is minimal, blacks through mortgage defaults and non-payment of taxes have lost some. A good number of them were also lost through direct state action aimed at removing what became

[209] Cross op cit at 70. This was the thinking that informed the betterment land planning system. It created what has been called the landless surplus.
[210] Letsoalo op cit at 21.
[211] Ibid.

known as black spots. The tenurial system introduced by the apartheid state for holding what little lands were available to Africans was potentially liable to being dispossessed through the manipulation of the system.

The dispossession of the indigenous South African as reviewed in this chapter marks the most important feature of the country's history. It is also the event which significally defined the people's struggle. It demonstrates that the human right of the indigenous people to protection from arbitrary interference with property and their right to freedom from discrimination on the grounds of race were systematically breached. This conceptualisation of dispossession as a human rights breach explains why access to land for the landless in the post independent constitutions has been dealt with as a human right.

The De Klerk's reforms resulted in the initiation of the following pieces of legislation: the Abolition of the Influx Control Act No 68 1986, the Free Settlement Areas Act No 103 1988, and the Abolition of the Racially Based Land Measures Act 108 1991 etc. Although the latter legislation was described as an important first step in the process of restitution of dispossessed land,[212] it apparently failed because it was not conceptually structured as a response to the breach of the indigenous people's human right. The Commission on Land Allocation established under it to consider how to use State land for restitution received only 300 claims in the three years before democratic elections.

[212] De Villiers op cit at 47.

CHAPTER THREE

3.1 RIGHTS TO LAND AS A HUMAN RIGHT

It will seem at first sight that land law and human rights are not natural bedfellows.[1] Gray[2] has identified some reasons for their apparent differences. Firstly, he states that human rights is based on the idea of the intrinsic worth or dignity of the individual. This idea stresses concern for the other person and is therefore antithetical to popular ideas of property. The latter has as a key element the idea of personal appropriation with its inherent tendency of the exclusion of the other.

Secondly, human rights belong to the public law domain while property law belongs to the private law domain. This divide appears to make each seem distinct with distinct intellectual incidents. Finally, He observes that because in most societies the distribution of land is clearly settled, disputes over land are seldom seen as raising human rights issues. Gray, however, notes that claims on the basis of original title, systematic ethnic displacement and dispossession raises human rights considerations[3].

It has been observed in the preceding chapter that the dispossession of black South Africans from land by discriminatory laws and practices brought the South African land question within a human rights context.[4] It was thus logical for access to land to be dealt with as human rights in post apartheid democratic constitutions. It is for this reason necessary to discuss the conceptualisation of land rights as a human right.

This approach is important because the complex idea of rights in land can best be understood from its derivative attribute. The conceptualisation of "interest in land" from the perspective that such interest derives its content from other notions such as municipal bills of right,[5] international law, indigenous customary norms etc. is a common trend in property law analysis. This chapter deals with an analysis of access to land as a human right and begins with an attempt to situate land ownership within its human rights theoretical parameters.

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[1] K Gray "Land Law and Human Rights" in L Tee Land Law: Issues, Debates, Policy Devon William Publishing (2002) 211.
[2] Ibid
[3] Gray op cit at 212.
[4] See page 87 of Chapter 2.
[5] J D Van der Vyver "Property in International Human Rights Law" in G E Van Maneen et al Property Law on the Threshold of the 21st Century Tilburg MAKLU Uitgevers Antwerpen- Apeldoorn (ed) (1996) 451, hereinafter referred to as Van der Vyver (1996).

The earliest western discussions of an individual's right or entitlement to private ownership are attributed to an incidental comment by Plato in the Republic.[6] Plato's view that "a man may neither take what is another's, nor be deprived of what is his own"[7] has been identified as the foundation of western speculations on private ownership.[8] Plato also told a story of a warrior whose corpse was taken from the battlefield to his home for burial thus implying a clear belief in private property.[9]

Plato maintained that justice is "having and doing what is a man's own and belongs to him."[10] Because the Platonian view regards justice and righteousness as synonymous,[11] it situates the question of an individual's claim to property within the context of the wider theoretical concept of rights. Although Aristotle was more concerned with distributive justice, his theory of distributive justice also has a bearing on the subject of man's entitlement to property ownership. This is because Aristotle's theory of distributive justice raises the formidable philosophical moral claim to an equal share in the distribution of goods,[12] including land.

Western philosophical notions of justice revolved around the idea of granting to everyone his due and the resultant right of retaining what has been so granted.[13] Cicero stressed that it is natural for people to acquire, by various ways, things (including land) and to retain them.[14] A direct reference to a right to own property as a human right is attributed to John Locke. Locke contended that natural law recognised a man's entitlement to seize as much property as is required to satisfy one's needs. He stated that governments emerged as a result of a compact amongst men in nature and it is the primary responsibility of government to protect man's natural rights.[15]

The right to own property is a very ancient one and speculations on its nature goes beyond Plato's philosophical views. Africans for instance, customarily regard land as a gift from God or a bequest by the ancestors.[16] Its possession and control is

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[6] Van der Vyver (1996) op cit at 452.
[7] Plato The Republic translation by D Lee Middlesex Penguin Books (1974) 205.
[8] Van der Vyver (1996) loc cit.
[9] Plato "The Republic Book 9" in P Shorey Plato in Twelve Volumes V1: The Republic London William Heinemann Ltd (1970) 493, hereinafter referred to as Plato (1970).
[10] Ibid.
[11] Plato (1970) op cit at 487.
[12] Van der Vyver (1996) op cit at 453.
[13] Van der Vyver (1996) op cit at 454.
[14] Ibid.
[15] Ibid.
[16] See J S Mbiti Introduction to African Religion London Heinemann (1997) 37. See also page 15 of Chapter 1 dealing with the African relationship between the living and ancestors.

inextricably linked to the identity of the community such that it is impossible to construe the people without it.[17] A poem by chief Maqoma graphically illustrates the link between land and the people thus:[18]

"We cannot give up, we cannot rest;
without land we cannot be
from our ancestors we got the land."

Relations to land were not determined from an isolated individualised dimension as articulated by the European classical theory of ownership. The indigenous community is seen as a world of ordered relationships with the group assuming prominence.[19] Land as the most vital resource is considered as belonging to the group with each individual member having access to it according to need. The chief is referred to as the owner of the land and is, in this role, responsible for its equitable distribution.[20]

Although considered as owner, the chief does not take actual possession of the land. Since distribution is based on need, every family is entitled to land for building and cultivation. Clearly where land is available, the chief cannot deny access to a family because this will be contrary to the custom which governs the exercise of his authority.[21] It is contended that this indigenous management of land led to the creation of rights of access to land corresponding to the present human rights conceptualisation of property.

The basis of the protection of communal interest to land from the chief who mismanages it was not limited to a fear of ancestral spiritual sanctions, although this played an important role. Thus the claim that respect for human right was foreign to pre-colonial Africa is not correct. It is evident from the beliefs, attitudes and institutions of indigenous peoples that in the context of land, the chief's decision and actions were contingent on various factors. He had to proffer convincing justification

[17] The Australian aborigines had a similar view of land. Michael Dodson expressed aboriginal view thus "To understand our law, our culture and our relationship to the physical and spiritual world, you must begin with the land…. Culture is the land, the land and spirituality of Aboriginal people, our cultural beliefs or reason for existence is the land. You take that away and you take away our reason for existence." See M. Dodson "Land Rights and Social Justice" in G Yunupingu Our Land is Our Life: Land Rights-Past, Present and Future (1997) 41, hereinafter referred to as Dodson (1997).
[18] AT Moleah Colonialism, Apartheid and Dispossession Welmington Disa Press (1993) 152.
[19] Moleah op cit at 85.
[20] Ibid.
[21] Ibid.

for his actions to his subjects who had practical methods of dealing with a deviant chief.

The chief was and still is under an obligation to rule in a sensitive and responsible manner. It is not uncommon among certain African communities for a chief to take an oath during his investiture to rule in accordance with the advice of the people. Some pre-colonial African societies reserved in the people the right to dethrone a dictatorial chief.[22] The management of land with particular reference to access to it by members of the community was one area of sensitivity for which his actions were carefully watched. Land was tied to the family identity and dignity because of its ritualistic significance.

Besides outright dethronement, respect of the chief's obligations was secured through a variety of mechanisms. A chief, who disregarded customary rites, including those associated with land, would be checked by members of his own family or clan. Unlike the present confrontational methods of enforcing modern rights, the traditional African society had a preference for resolving these problems in a manner that would not result in public opinion building up against the chief.[23]

J Singer argues that a classical view of property in which land is regarded exclusively in terms of the relationship between it and the individual owner is flawed.[24] Property, according to this theory should be understood as a social system. A social relations perspective to property has important theoretical and practical implications. Theoretically, it provides a vital foundation for conceptualising property as a human right. According to Jeremy Waldron,[25] land has historically had a distributive element. This explains why there is no legal culture anywhere in the world that does not have rules defining how land may be accessed and protected.

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[22] Ibid.

[23] Ibid. The African conception of land rights was similar to the Islamic theory on land rights. In Islamic jurisprudence, God is the owner of land and grants the right to use it to men. A principal element of this theory of land is the implication that an individual should only hold as much land as his actual needs prescribes. Central to Islamic theology on land is the need for moderation. This requirement for moderation makes it mandatory for the State to manage land so as to ensure that all have access on the basis of their needs. See A Said "Human Rights in Islamic Perspective" in Admantia Pollis et al (eds) Human Rights: Cultural and Idealogical Perspective New York Praegar Publishers (1979) 88.

[24] J Singer "Property and Social Relations: From Title to Entitlement" in Property Law on the Threshold of the 21st Century Tilburg MAKLU Uitgevers Antwerpen-Apeldoorn (ed) 1(996) 77, hereinafter referred to as Singer.

[25] Singer op cit at 82.

A view of property from a social relations model has definite practical implications. Under this model, property rights can be disaggregated. Thus an owner of land has rights which are clearly distinguishable from those of a tenant who is in possession. It is this perception of land as consisting of a bundle of rights that can be used to understand the multiple and sometimes conflicting interests in land. As an ingredient in human relations land assumes identifiable incidents both at the macro and micro level in society.[26]

Scriptural conceptions of property (land inclusive) has also been analysed as having a human rights roots. God's creation of Adam and subsequent declaration that he should have dominion over the earth and its resources is the origin of man's right to land.[27] St Augustine's theological theory that the world belongs to God, who has given it to the sons of men, has been cited as providing the foundation of all rights.[28] Land, according to this view, is a grant from God and its possession by all is in line with the divine will. Being a divine injunction, it is natural and cannot be contradicted by contrary practice or law.[29]

St Augustine[30] further contended that the right to own property was a human right. He, however, attributed the source of this right to the kings who, in his view, received it from God. Although he went about it in a rather circuitous manner, St Augustine ultimately arrived at the same conclusion that the right to access land is a fundamental right. It may be assumed that the Scriptural conception of rights relates to the idea of men using the world as a common heritage. The early Church in the New Testament thus pulled its resources together for common usage. To this extent, land rights may not neatly fit into our conceptions of human rights even when seen from the perspective of second-generation economic rights.[31]

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[26] Ibid.
[27] See Genesis Chapter 1 verse 17 and 18.
[28] R Schlatter Private Property: The History of an Idea London George Atlens and Unwia Ltd (1951) 62.
[29] Ibid.
[30] Ibid.
[31] Such a view will be untenable. Schlatter used the Biblical story of Naboth whose land King Ahab coveted to demonstrate that men owned land in their individual capacity. God recognised and protected this form of ownership. Jesus Christ in a parable in the book of Matthew chapter 24 seemingly supported the notion of individual rights to land when he asked "is it not lawful to do what I will with my own?" Reference is made to the fact that Jesus was asserting a man's liberty to pay what he has contracted with workers to work on his land, regardless of what the others thought. This New Testament parable has been credited with having immense theoretical and practical implications for property law even in these modern days. Shlatter op cit at 109. See also E.J.H Schrage "Ius in corporali perfecte disponendi: Property from Bartolus to the New Dutch Code of 1992" in G E Maneen

There is a controversial relationship between the theological basis of property and natural law and how these affect human rights. Ordinarily, it must be logically supposed that natural law is a product of the author of nature, God himself. From this viewpoint, it makes no difference whether the human rights foundation of land is attributed to God or natural law. Indeed amongst protestant theological scholars like John Ponet, natural law is identified with the law of God in the Bible. Thus the law of God and nature inevitably supply answers to cure the defect of positive laws.[32]

Calvin has, however, argued that the law of nature is unknowable. He maintains that it is not applicable to men because after the fall of man, due to sin, natural law was untenable. By this view it is irrelevant to adopt natural law to support or defend institutions particularly where such an institution is based on God's law. This view was taken further by Canonist philosophers[33] who argued that it was not good to own property. Seen from this perspective, the right to property is not a human right.

Hobbes and Rousseau developed a theoretical construct which when applied to land, leads to the conclusion that land is not a human right. Reference has already been made to Rousseau's view that the desire for private property is at the root of societal evil.[34] It is sufficient to add here that Rousseau's thinking is not consistent with the idea that an individual's access to land is a fundamental right. This conclusion is a logical one, although Rousseau did not explicitly address the issue of land in his analysis.

Hobbes was absolutist in his notions about property. He asserted a post social contract view of property. He regarded all property as divided by the state which had unlimited powers of control over it after the social contract.[35] With regards to land, Hobbes wrote in the Leviathan that the first function of the State is to arbitrarily distribute "land among the subjects thereby create property rights".[36] Civil law in his view was a mechanism for the creation and maintenance of this distribution.

It is obvious that access to land cannot be regarded as a fundamental right from the perspective of this Hobbsian autocratic conception. Hobbes in fact propounded a

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et al Property Law on the Threshold of the 21st Century Tilburg MAKLU Uitgevers Antwerpen-Apeldoorn (ed) (1996) 35, hereinafter referred to as Shrage.

[32] Shlatter op cit at 107.

[33] Shlatter op cit at 101.

[34] See Chapter 1.

[35] I Shapiro The evolution of rights in liberal theory Cambridge Cambridge University Press (1986) 29.

theory of commutative justice as the foundation of property rights. According to this theory, property rights, including rights in land, are mainly a function of contract. Commutative justice "is the justice of the contractor" and concerns performance of covenants mutually undertaken.[37] Shapiro explains the values of commutative justice thus:[38]

> *In such transactions, the value of things contracted for is measured by the appetite of the contractor: and therefore the just value is that which they be contended to give."*

Clearly, interests deriving from transactions which have such an absurd value rating cannot conceivably be seen as coming within the contemplations of human rights, which has as its core value the maintenance of the dignity of man. Hobbes' refusal to recognise property rights against the State further serves to confirm this candidate's conclusion. However, it will be ill advised to condemn Hobbes for insisting on a strong state because he was writing in a volatile political and legal context. There is an obvious difference in the perception of land between philosophers like Rousseau, Hobbes etc., on the one hand and Plato, Locke, St Augustine, St Thomas Aquinas, on the other. The divergent themes that emerge are that the former regard access to land as a basic right while the latter philosophers contend that no right to private ownership of land is tenable. The latter philosophers assert that no right to private ownership of land existed in a natural state of affairs.[39]

Although it is difficult to resolve this controversy decisively in favour of one side or the other, it is necessary to make certain comments about the controversy here. Generally, most property theories on human rights represent an attempt to synthesise these contending arguments. The synthesis seeks to establish a balance between protecting individual property and the need to ensure geometric equality in the distribution of property.[40] The Property Clause of the 1996 Constitution reflects this attempt at synthesising the contending theoretical positions.

From whatever angle the land issue is approached, at the analytical plain, it must necessarily be conceded that land is a common heritage of humanity. Both proponents of man's natural right to property and those who see the accumulation of

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[36] Shapiro op cit at 80.
[37] Ibid.
[38] Ibid.
[39] Van der Vyver (1996) op cit at 460.
[40] Ibid.

property as at the root of societal evil believe in land as a common heritage of humanity. The former argue that it was granted by nature, hence an individual's right to access land is a natural right. For the latter, land is distributed by the State. This distribution must be regulated to ensure that an individual's propensity to accumulate without regard for the entitlements of others is eliminated. The idea that such an insensitive propensity to acquire private property is the root of societal evil rests on the assumption that land is the common heritage of humanity, although not expressly articulated.

The present submission that land is a common heritage of humanity is a conclusion arrived at because all the theories of property rights in one form or another point to the idea of an individual's entitlement to land. This view enjoys similarities to the international doctrine of property regime according to which certain regions of the universe have been demarcated as no man's land.[41] It is, however, distinguished from it. The international law doctrine envisages the exclusion of national jurisdictions over such demarcated regions e.g. open seas, outer space, Antarctic regions etc. Control and access to the resources of these demarcated regions is by conventions vested in mankind as a whole.[42]

Access to land is seen from an individual and community perspective. Land as a heritage of mankind relates to the notion of the resources being available for the individual and the community in which it situates. The issue of how it is accessed is a different question.

3.2 LAND IN THE BILL OF RIGHTS

The pre-independence debate on the Bill of Rights was thematically limited and out of date because of its undue concentration on first generation rights.[43] One of the reasons why this was so is the fact that those involved in the debate were, in the main, beneficiaries of apartheid policy who unconsciously found themselves seeking to protect the privileges of apartheid. These people believed that the extension of the vote was fundamental because it would lead to majority rule and the elimination of oppression implying thereby that it was unnecessary to specifically protect socio-economic rights such as the right to land.

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[41] Van der Vyver (1996) op cit at 481.
[42] Ibid.
[43] A Sachs 'Towards A Bill of Rights in South Africa' SAJHR 6 (1990) 4.

Albie Sachs has said that the vote would be devoid of meaning if it did not lead to "the achievement of second and third generations rights".[44] The victory of the vote would certainly have been a hollow one if it did not address seriously the issue of land from a human rights perspective by incorporating it into the constitutional Bill of Rights. A comparative study of the development of bills of rights show that they usually evolve under certain peculiar circumstances, most of which were present in South Africa.

The *Magna Carta*, the US and French Bills of Rights were adopted as a direct response to gross human rights abuses.[45] They were all in one way or another the result of a reaction by the victims of arbitrariness and oppression. Indeed, the United Nations Declaration of Human Rights of 1948 was itself a product of the profound shock which characterised the barbarity of Second World War abuses. Another significant element of bills of rights is that they were invariably adopted by the victorious party and had, as their principal goal, the rooting out of the abuses perpetrated by the defeated regime.[46]

A true bill of rights in the South African context had perforce to deal with the land issue. Although the land inequality has been dealt with previously, it seems apt to quote the following comments by Albie Sachs:

> *"In the past three decades more than three million South Africans have been forcibly removed from their homes and farms. Apartheid law then conferred legal titles on owners whose main legal merit was that of having a white skin. Whom would the proposed bill of rights protect: the victim of the unjust conduct which had been condemned by all mankind as a crime against humanity, or the beneficiaries?"*

That land raised a human right question was unquestionable. The new South Africa had to root out a land policy in which the minority white government had reserved for themselves about 80 percent of the land. As noted earlier, land has always had a distributive element, making it a human right question. This is why from a human rights point of view, the starting point of post apartheid democratic constitutionalism was the idea that the country belong to all who live in it. This

[44] Sachs op cit at 5.
[45] Ibid.
[46] Ibid.

realisation made it imperative for the Constitution to lay the framework for a just and equitable redistribution of land amongst the dispossessed.

Sachs argued[47] that such redistribution should not be subject to the payment of compensation for those from whom land may be expropriated for the purpose. He felt that to do so would be requiring the impoverished victims of dispossession to pay their oppressors for dispossessing them. He also argued that it would be necessary to introduce affirmative action to adequately deal with the abuses of the past. Constitutionalising access to land was, in Sachs' view, a crucial first step to the elimination of the inequalities of the past.

During the debates preceding democratic rule, it became clear that issues of access to land and housing were going to be at the heart of the new South African society after apartheid. A primary argument of human rights, development NGOs and other coalition of civil society organisations was the claim that making access to land a human right would give the rural disadvantaged communities the tools to protect their interests.[48] Such interests included the removal of the indignities which indigenous people felt because of the mass dispossessions of their ancestral lands. The land issue was in conception firmly structured in a human rights foundation.

It may be stressed that the current affirmative regime is structured in a human rights programme, conceived as a corrective strategy. The Bill of Rights would be devoid of real meaning if it did not develop a mechanism for redressing the accumulated problems of homelessness.[49] Human freedom, as indeed human rights as a whole, was in the debates portrayed by these NGOs as concerned with ensuring that the homelessness of black people be redressed through the Bill of Rights.[50]

Admittedly some were suspicious of the incorporation of issues of access to land and housing into the Bill of Rights during the debate. Their misgivings were based on a variety of disturbing phenomena. One of this was the apparently strange fact that amongst those calling for a Bill of Rights were people associated with the abuses of the past who had nothing to do with the costly struggle for liberation. It was

[47] Sachs op cit at 7.
[48] S Liebenberg 'South African evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty? (2002) 6 Law, Democracy and Development 1-2.
[49] Ibid.
[50] Sachs op cit at 15.

felt that the objective of these people was the ignoble drive to protect the land which they obtained through dispossessions.[51]

This suspicion (whether misconceived or not) does not affect the present writer's contention that access to land has historically been structured into a human rights framework and was so expressed in the pre-independence debate. Even Brooks,[52] who supported the arguments of these opportunistic campaigners driven by selfish motives, admitted that the suspicions were legitimate in so far as they related to rights in property. He conceded that things like property rights could be unjustly acquired. This author went further and asserted that socio-economic rights such as those relating to land were inappropriate to be declared as justiceable rights.[53] He was seemingly providing a theoretical defence for private property. His contribution was a response to the uncompromising critical views against land dispossessions by Albie Sachs.[54]

The earliest instruments to proclaim inherent right of the individual were the Virginia Declaration of Rights of 1776. This declaration demonstrated the fact that the foundation of the American Independent Constitution was based upon a human rights foundation. France, a country with immense international prestige, has a constitutional superstructure predicated on a human rights foundation.[55] According to Van der Vyver,[56] property rights featured prominently in these declarations which he describes as early freedom charters. The Fifth Amendment to the American Constitution protects property while the French declaration regards rights to property as inviolable.

3.3 LAND AS A HUMAN RIGHT

The preamble of the South Africa Constitution speaks volumes for its motivation. It reveals that it is primarily concerned with dealing with the effects of colonialism and apartheid. It recognises the injustices of the past and a belief that South Africa belongs to all who live in it. A similar preambular provision in the

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[51] Liebenberg op cit at 2.
[52] D Brook ' Abie Sachs on Human Rights in South Africa' (1990) 6 SAJHR 28.
[53] Ibid.
[54] Brooks op cit at 25. The worldwide trend from the later part of the 18th century was to introduce a bill of rights in the constitution to check the arbitrariness of absolutist regimes. The prestige of states that constitutinalised natural rights theories in a bill of rights in the international domain made the idea fashionable and irresistible. See also Van der Vyver (1996) op cit at 462.
[55] Ibid.
[56] Van der Vyver (1996) op cit at 463.

Namibian Constitution was identified as setting the tone for the entire constitution. The tone was described as being of a purely legal, political and democratic nature.[57]

After making reference to the basic ingredients of (a) the concept of human dignity with regards to the rights of all to freedom (b) the denial of the right to liberty and pursuit of happiness by apartheid, and (c) the resolution to maintain a democratic country in the Namibian Constitution, Fourie[58] still concluded that these freedoms only set a political, legal and democratic orientation. He argued that economic sentiments such as poverty alleviation as a philosophy of government were left out. Although the South African preamble has striking similarity to that of Namibia, a similar conclusion would be inappropriate in the country's context. The preamble sets the tone for the entire Constitution in South Africa but this tone is as much political and democratic as it is socio-economic, since it contemplates dealing with landlessness and homelessness.

Fourie[59] has also observed that socio-economic rights (right to land inclusive) need not find expression in the core of a constitution. He was, however, prepared to consider their inclusion in the Namibian Constitution as appropriate because of the government's socialist orientation. It is submitted that the incorporation of socio-economic rights (e.g. rights to land and housing) was imperative in both Namibia and South Africa because these were issues around which the decolonialisation and anti-apartheid struggles revolved. These are still topical even at the time of the writing of this thesis some ten years after South Africa's formal independence.

South Africa's socio-economic rights in the Bill of Rights follow three broad drafting styles.[60] According to Liebenberg,[61] these include: (a) that which entrenches basic socio-economic rights such as the right to education; (b) the rights which guarantee to everyone the right to have access to housing, adequate water, health care, sufficient food, water and social security; and (c) the rights which provide that no one may be evicted from his home or have their home demolished without due process. Although the right to land will fall within (c) above, a detailed discussion of these socio economic rights in the way presented above is outside the scope of this thesis.

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[57] F.C.N. Fourie 'The Namibian constitution and economic rights' (1990) 6 SAJHR 364.
[58] Ibid.
[59] Ibid.
[60] Liebenberg op cit at 163.
[61] Ibid.

Section 25 of the Constitution is the foundation of South African property model. It makes both private property and the right of the dispossessed to access land fundamental rights by incorporating them in the Bill of Rights. This conclusion is strengthened by the fact that the Constitution places an obligation on the State in s 7(2)[62] to respect, promote and fulfil the Bill of Rights. This means that the State must refrain from interfering with the land rights protected in s 25(1) and (4). The word promote, when applied with reference to these interest, raises the human rights value of these right to a higher level because it demands a proactive approach towards their protection. These entitlements derived from s 25 are further strengthened as human rights when viewed in relation to the right to human dignity, equality and freedom in s 7(1) of the Constitution.[63]

This candidate, however, believes that it is not right to equate private property with the right to access land through the restitutionary and redistributive mechanism. The emphasis on a right to private property seems to reflect the view that its protection gives expression to the personal freedom of the owner. German constitutional lawyers have criticised this view of property as inappropriate.[64] It is argued that such a conception of property is responsible for the emergence of forces leading to the exploitation of both human beings and natural resources. This view of property, it is alleged, has increasingly made it assume the status of a social symbol[65] of wealth and class. This criticism appears to have some merit and was articulated in the debates preceding the constitutionalisation of property in South Africa, including the ANC. Technically, the iniquitous acquisition of land by the white minority makes the protection of resultant land rights deeply unconscionable and clearly inappropriate for a human rights categorisation.

The interest or right of the dispossessed to access land is conceptually different from that of private property. The former relates to the dispossessed potential interest in land pursuant to the nation's commitment to bring about equitable access to natural resources. Although both are cast as human rights, the issue of access for the previously dispossessed is, in the opinion of this candidate, comparatively more

[62] Constitution of the Republic of South Africa Act 108 of 1996.
[63] Kleyn op cit at 417.
[64] Resort to a link between s 7(1) rights and the individual entitlement to property has been made by German scholars in comparable situations. Ibid.
[65] D Kleyn ' The Constitutional Protection of Property: A Comparison between the German and the South African Approach' (1996) 11 SA Public Law 411.

important. It is acknowledged that access to this right is however limited by the provisions of s 25 (5) which require the State[66] to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of these rights and by its prospective character.

The former makes the right to access[67] land under the restitution and redistribution scheme a qualified one. From this analytical perspective, it would seem obvious that the question of access to land for the majority of the dispossessed during apartheid though a human right is inferior to private property rights. If this analysis is right, beneficiaries of land from apartheid policies enjoy a stronger protection of their property rights, thus making their interests more consistent with a human rights conceptualisation.

This conceptualisation is in the present writer's view incorrect because such a perception ignores the historical realities, which informed s 25. A careful study of the tenor of s 25[68] reveals the following salient features: (a) it permits expropriation of property for public purposes (b) it defines this public interest in terms of a commitment to land reforms aimed at improving access (c) makes express reference to those who suffered as a result of past discriminatory practices as intended beneficiaries of the new land regime.[69] All these clearly demonstrate that the priority lies with promoting and protecting rights derived from the improved access under s 25(4).[70] Any other conclusion would clearly be unsound in the face of the above compelling features.

Historically, as a human right, the right to property, i.e. land was developed as a response to despotism and its concomitant effects in land holdings during feudalism. Essentially feudalism used land as a weapon for the domination of the peasants.[71] White South Africans appropriated land and political power during apartheid in much the same way as feudal land barons did during feudalism. The conception of land rights as human rights has thus followed the same trend in the country as it did in 18th

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[66] Liebenberg op cit at 163.
[67] It is acknowledged that nowhere in the Constitution where it is expressly stated that everyone has a right to land. However, it is plain from a reading of the Grootboom case that access to land is a socio economic right. The Constitutional Court's statement in this case that the state should foster conditions to make citizens gain access to land on an equitable basis means that citizens have rights to land which evolve out this duty.
[68] The Property Clause is discussed in detail in Chapter 4.
[69] See s 25(5) of the Constitution.
[70] See s 25(2), (4) and (7) of the Constitution.
[71] Kleyn op cit at 409.

century Europe. A redistribution of land in terms of s 25(4) of the 1996 Constitution would serve to counteract the political and economic power flowing from the past property configuration. Just like property obtained[72] the same status like the right to freedom and life, as a consequence of the revolution in France[73] so too is the issue of access to land in terms of s 25(4) in South Africa. This is because the incorporation of the right to increased access is a direct result of the struggle to free the black majority from dispossessions caused by racist land policies.

3.4 LAND IN INTERNATIONAL HUMAN RIGHTS LAW

The issue of land in international law is treated here only to the extent that it provides a comprehensive picture of access to land as a human right. The South African property law model, which regards access to land as a human right, is consistent with what obtains under international law. This conceptualisation of access to land as a human right is also logical because the dispossession of Africans from the land was initially justified by the international law concept of *terra nullius*. It is, however, recognised that international law has been criticised for not showing much interest in property law.[74] Property rights, according to this view, are no big deal in international law.[75]

In spite of the above criticisms, a careful analysis of the International Covenant on Economic, Social and Cultural Rights of 1996 (ICESCR) reveals that international law is interested in the creation of a universal humane property regime. Article 11.1 of the ICESCR provides that "the state parties to the present covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing."

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[72] While regarding the limitation in s 26(2) of the 1996 Constitution as unusual, Van Bueren has stated that the provision serves to emphasis the centrality of the right of housing in the present constitutional dispensation. G van Bueren " Housing" in Cheadle et al South African Constitutional Law: The Bill of Rights Durban Butterworths (eds) (2002) 481.

[73] Kleyn op cit at 410.

[74] Van der Vyver (1996) op cit at 468.

[75] The non-binding Universal Declaration of Human Rights of 1948 made reference in article 17 to the right of all to own property either individually or collectively. It also proscribed arbitrary deprivation of property rights. It is instructive that the United Nations binding treaties that evolved out of this declaration (the International Covenant of Economic, Social and Cultural Rights 1966 and the International Covenant of Civil and Political Rights 1966) conspicuously omitted any reference to property rights. This omission (except for the later which made an incidental reference to a prohibition against discrimination against children on the basis of property or birth) may be said to demonstrate the international community's lukewarm attitude to land rights. Van der Vyver (1996) op cit at 486.

In the writer's view, two important issues stand out from this provision. The first is the endorsement of a universal right to adequate housing in the member states of the United Nations. This right is considered as interconnected to the broader aspiration of the universal attainment of a humane living standard in the world. There can hardly be any rational basis for denying that this right to housing inevitably includes access to land on which houses are built and that the covenant specifically intended this interpretation.

Moreover, the penultimate provision of Article 11.1 imposes an obligation on state parties "to take appropriate steps to ensure the realisation of this right". This reveals that the provision was not intended as serving merely to exhort state parties and provide international legitimacy for socio-economic policies. It was meant to lay down a duty under international law which may be enforceable through the municipal courts of member states in appropriate circumstances.[76] That Article 11.1 of the Covenant was meant to operate beyond the realm of beatitudes and declarations is evident from the fact that provisions were made for its realisation.[77]

The value of the property right above may be deduced from the comments of the United Nation's Committee on Economic, Social and Cultural rights, which is a significant interpretational guide to the provisions of the covenant.[78] By comment 3 in paragraph 10 of the Committee's general comment of 1990, it is apparent that socio-economic rights (e.g. Article 11.1) contain a minimum core below which no state will be permitted to ordinarily fall. The Committee describes this core thus:[79]

> *"On the basis of the extensive experience gained…the committee is of the view that minimum core obligation to ensure the satisfaction of , at the very least, minimum essential levels of each of the rights is incumbent upon every state party. Thus, for example, a state party in which any significant number of individuals is deprived of… basic shelter and housing …is prima-facie failing to discharge its obligation under the covenant. If the covenant were to be read in such a*

[76] The *Amici* in Grootboom's case relied on Article 11.1 of the Covenant in his arguments.
[77] Article 2.1 of the ICESCR which is customarily read with Article 1.2 requires individual and collective steps to be taken in the enforcement of the right to housing. It specifically expects states to take all appropriate means including particularly the adoption of legislative measures to discharge the obligations created by the covenant.
[78] See the Grootboom case, Supra.

way as not to establish such a minimum core obligation it will be largely deprived of its raison d'etre."

In Government of South Africa v Grootboom[80] Yacoob J recognised the idea of a minimum core in international law which should be determined by "having regards to the needs of the most vulnerable group that is entitled to the protection of the right in question." Although the covenant was during arguments in the Grootboom's case yet to be ratified, Yacoob J was prepared to adhere to the minimum core notion as applying to South Africa.[81] It is not only with reference to the idea of minimum core that the South African courts have tended to stress the human rights nature of access to land they have also done so through the contention that every child is entitled to shelter.

Although the High Court dismissed the application of the applicants holding that their right to housing under s 26 was not violated, it decided that the applicants who had children were entitled to be provided with housing. This decision for all practical purposes meant they were entitled to land from the State. The right was in the court's view a derivative of s 28 (1) of the 1996 Constitution giving every child an unqualified right to shelter. It rationalised the success of the parents on the grounds that to do otherwise would "penalise the children and indeed their parents, who, to a considerable extent owing to the ravages of apartheid, are unable to provide adequate shelter for their own children."[82] The problems of homelessness that led to the invasion of the land the subject of the Grootboom case was loosely traced to dispossessions caused under apartheid.

The right to access housing in s 26 (1) is an important element of the post independent property framework. This right is a constituent element of the right to access land. There is no conceivable way of providing housing without first securing access to the land on which the houses are built. Indeed, the court in the Grootboom case contextualised the human rights significance of access to land by noting that the land invasion in the case raised issues relating to the constitutional values of human dignity which cannot be separated from the idea of a humane property regime that

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[79] See paragraph 29.
[80] 2001 (1) SA 277 (CC).
[81] He, however, argued that this could not be done because unlike the Committee, which is ideally suited to collect and analyse facts from state parties, the court lacked the appropriate mechanism to do so. This was the basis for the decision that the responsibility to ascertain what this minimum core is should be left with the appropriate sphere of government.

state parties are expected to create. Although there is a symbiotic link between housing and land both at international and municipal law, the right to housing has not been dealt with in detail in this thesis.

It may be observed that s 26 (1) secures to everyone the right to have adequate housing. The section, however, does not have provisos similar to s 25 (6) and (7) which grant access provided on the basis of past racially discriminatory laws and practices. While the scope of the access covered in this thesis is circumscribed by the fact that it is a response to dispossession, the access in s 26 is constitutionally open to everyone. Admittedly s 26 (1) will deal with issues of housing for those whose capacity to continue to access it was affected by evictions carried out by white land owners pending the coming into force of Land Reform (Labour Tenants) Act 1996[83] because the Act addressed racially discriminatory laws and practices[84].

Admittedly, access to housing as broadly provided in s26 (1) could also be achieved by measures to open up the rents market yet there is the danger that this might be problematic in the sense of impacting negatively on land reform. Following the broad construction of arbitrary deprivation to property under s25 in the FNB[85] case, it is plain that any profound restriction on rentals for property will lead to a flood of litigation. In a recent article[86] it was noted that the reason why there has not been to date any serious challenges to land reform legislative measures is the strong sympathy the programme enjoys because of its popular ring of legitimacy. The same legitimacy cannot be enjoyed by an attempt to facilitate access to adequate housing for everyone through the opening up of the rent market.

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[82] Grootboom Case Supra at paragraph 30.
[83] Miller and Pope op cit at 528.
[84] See chapter 5 pages 168-173 for a discussion of the impact of the Act on access.
[85] 2002 (7) BCLR 702 (CC).
[86] A J van der Walt 'An overview of developments in constitutional law since the introduction of property clause in 1993' (2004) 19 SA Public Law 83-84. See also page 130.

CHAPTER FOUR

4.1 THE CONSTITUTIONAL PROPERTY CLAUSE

4.1.1 PROPERTY IN THE INTERIM CONSTITUTION

4.1.2 INTRODUCTION

The interim constitution that became operational in April 1994 officially introduced democratic governance, a bill of rights and other guarantees. Section 28 of this constitution was novel in so far as it made reference to rights in property thereby heralding a new land regime in the country. This new land normative structure is commendable as it marks a radical break with the shameful past.

In commenting on this section, hereafter referred to as the Property Clause, the writer will make a brief comment on the events leading up to the adoption of the interim constitution. A combination of factors, including an armed struggle, intense international and internal non-violent pressures amongst others made it possible for the white minority government to release political prisoners and initiate talks which culminated in CODESA and the historic World Trade Centre multiparty negotiations. The latter resulted in the adoption of the constitutional principles that formed the basis of both the interim and final constitutions.[1]

The multiparty negotiation process (MPNP) was characterised by a great deal of horse-trading. In order to allay the fears of the white minority regime, some of the constitutional principles agreed upon at these negotiations had to be cast in stone.[2] The compromises made during the negotiations raised concerns about the legitimacy of the constitution itself.[3] The minority government and the parties supporting it, for instance, insisted that the MPNP should enact the constitution instead of it being promulgated by a democratically elected constituent assembly.

On the whole s 28 of the interim constitution, which creates "rights in property," can be better understood when seen in the context of the above manoeuvres. The protection of the rights entrenched in this provision was bound to raise problems, particularly when the dispossessed start demanding access to land. It

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[1]T Roux "Property" in Cheadle et al South African Constitutional Law: The Bill of Rights Durban Butterworths (eds) (2002) 432, hereinafter referred to as Roux (2002).

[22] D Basson South African Interim Constitution Text and Notes Kenwyn Juta and Co Ltd (1994) xxiii. It has been suggested that members of the minority government's technical committee pulled the wool over the eyes of the negotiating teams. According to this view, the property owner friendly clause in the interim constitution was the result of the naivety of the ANC team. See Roux (2002) op cit at 432.

[3] Basson op cit at xxii.

is necessary to begin the review of this provision by indicating that the phrase "rights in property." clearly imports something much wider than land.[4]

The review is prefaced by a brief definition of property. Generally, the concept of property as used both in the interim and 1996 constitutions must extend beyond a single corporeal thing. It covers "a bundle of rights that the law, at a given time, recognises as belonging to persons who own, possess or use things capable of having proprietary interest attached to them."[5] The learned author has observed that the European Court of Human Rights has also adopted a wide definition of property.[6] The Constitutional Court at an early stage in the country's constitutional jurisprudence equally adopted an expansive definition of property in First National Bank of SA Ltd t/a Westbank & Anor v Minister of Finance & Anor.[7]

In this case, Ackermann J held that the ownership of a corporeal moveable and land lay at the heart of the constitutional concept of property.[8] The court stressed that the present approach to understanding property requires a move away from a static typically private law view of property which stresses the maintenance of the status quo to that which views it as an instrument for social transformation.[9] The court's conclusion in this respect is apparently based on the academic opinion expressed by Van der Walt.[10] The same court recently broadened the concept of constitutional property in the Alexkor case[11] by extending it to cover the right to prospect for minerals found on the land.

The manner in which s 28 is formulated prompted I Kroeze's[12] conclusion that it was adopted to avoid the pitfalls of the known property phrases. According to the author, s 28 had the effect of displacing ownership from its traditional place of primacy in South Africa.

From this perspective, Kroeze expresses the view that s 28(1) could be interpreted so widely as to result in an extremely wide entrenchment of existing rights

[4] It has in the United States, for instance, been construed to incorporate interest in social security. A Cachalia et al Fundamental Rights in the New Constitution Kenwyn Juta and Co Ltd (1994) 92.
[5] Ibid.
[6] Relying on Wiggins v United Kingdom (7456/76) DR 13 Cachalia et al show how property has been construed to include both moveable and immovable corporeal by the European Court of Human Rights. The FNB case adopts an expansive definition of property to include both physical and intangible things. This approach has been described by Van der Walt as the concept of the dephysicalisation of property. See Cachalia et al op cit at 92. See also Van der Walt (2004) op cit 51-52.
[7] 2002 (4) SA 768.
[8] See Van der Walt's concept of the dephysicalisation of property. Van der Walt (2004) op cit at 51-51.
[9] See FNB case at 794 paragraph E-F.
[10] Ibid
[11] Alexkor Ltd & Anor v The Richterveld Community & Others (2003) 12 BCLR 1301 (CC).
[12] I J Kroeze 'The impact of the Bill of Rights on Property law' (1994) SA Public Law 326.

in property that was never contemplated by the negotiating parties. In his view, a reactionary judiciary intent on frustrating the reconstruction of society to redress the land related injustices of the past could easily exploit such a formulation. It does seem conceivable that some of the negotiating parties had clearly foreseen both possibilities during the negotiations. Naturally, those who benefited from the inequality of the property distribution of the past would consider such a result a worthwhile negotiating aim.

During the negotiating process, two viewpoints emerged with regards to the property issue, namely, the libertarian and the liberationist view of fundamental rights. The former who were white liberals (supported by government and the Inkatha Freedom Party) believed that there should be a comprehensive bill of rights in the interim constitution.[13] In point of substance, they stressed the question of the dignity of the human being. They argued for the protection of land in the constitution in very clear terms.

The liberationists, on the other hand, were the ANC delegates who believed that the interim constitution should contain only minimal rights. They argued that the protection of property in the constitution would serve to fossilize the existing land distribution in the country. Although ordinarily liberationists would advocate for a fuller bill of rights in a constitution,[14] it seems that the ANC took this unusual course in order to counteract the constitutionalisation of property in such a manner as to act as a stumbling block to the envisaged land redistribution.

Lourens du Plessis has shown[15] how liberationists were joined by newcomers who previously helped uphold apartheid but who for pragmatic reasons now saw that the entrenchment of a property clause would help preserve the land acquired through dispossession. After pointing out that these groups included politicians, businessmen, members of the professions and the judiciary, he expressed the view that the South African white government's proposals on a charter of fundamental rights was a most telling example of a bill of rights in this tradition.

4.1.3 SECTION 28 OF THE 1993 CONSTITUTION

An acknowledgment that a literal interpretation of the provisions of s 28 whatever its merits, would be inappropriate because it would not reflect the entrenched interest of its authors is a starting point for a proper appreciation of the

[13] Lourens du Plessis Re Interpretation of Statutes Durban Butterworths (2003) 24.
[14] Du Plessis op cit at 3.
[15] Du Plessis op cit at 2.

interim constitution. This view is inspired by the Namibian case of S v Acheson,[16] where Mohammed A J said that the constitution was a mirror reflecting the national soul- the identification of the ideals and aspirations of a nation and the articulation of the values bonding its people. It will be clearly impossible for a literal reading of the constitution to give content to all of the above values. Section 28 reads thus:

(1) *"Every person shall have the right to acquire and hold rights in property and to the extent that the nature of the right permits, to dispose of such right.*

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

(3) *"Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of 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."*

It would seem that s 28(1) positively identifies or creates a right in property. The problem relates to the content of this right. According to Carpenter,[17] s 28(1) deals with two separate rights. In his opinion the section protects existing rights in property and access to such rights. In the context of the current land distribution in South Africa, this would mean the entrenchment of the existing property privileges. This is evident from the author's further argument that the provision does not expressly constitutionalise any claim on the part of those who wish to acquire a right in property.

The view that existing rights and access to them are protected by s 28 makes some sense, particularly when seen in the light of subsections 28(2) and (3). These provisos plainly refer to existing rights which are individual in character. In the absence of a provision similar to that of s 25(4) of the 1996 Constitution, the

[16] 1991 2 SA 805 (NM).
[17] G Carpenter 'Internal modifiers and other qualifications in bill of right: some problems of interpretation' (1995) 10 SA Public Law 273.

conclusion that s 28 did not contemplate any substantial post independence redistribution of land is irresistible. It may, however, be observed that the phrase "every person has the right to acquire land and hold rights in property" in s 28(1) is futuristic in nature. It could be construed as referring to the rights of the dispossessed to acquire land and to this extent, it may be considered as a vital redistributive element. Were this the case (which is doubtful), it would indeed have been a rather curious and oblique way of dealing with what is certainly the one of the most pressing problems of the new South Africa.

The phrase "rights in property" should not altogether be interpreted as maintaining land rights status quo to the detriment of the perceived interest of the dispossessed. This writer on the contrary contends that it was meant to give constitutional force to an expansive meaning of property as consisting of a bundle of rights. In the South African context, such an interpretation would have a positive impact in facilitating access to land. This is so because rights in property extend beyond ownership to incorporate other rights such as labour tenancy and possession.[18] To this will be added customary tenures, all of which constituted the primary link Africans had to land under apartheid.[19]

It has, however, been observed that the transitory character of the interim constitution made it impossible for these issues to be judicially addressed.[20] Van der Walt[21] has identified three possible approaches in dealing with the definitional difficulties in s 28. From the author's illuminating analysis the section may be characterised into (a) a positive guarantee of property, (b) negative guarantee of property and (c) a positive guarantee of the institution of property. Van der Walt argues that approaching the definition of property from the positive guarantee perspective is problematic because it can hardly lead to a positive claim to a right in property against the State. Such a guarantee as Van der Walt has observed, can result in a purely fruitless exercise. Van der Walt is in agreement with Carpenter that the positive guarantee in s 28 did not create a formidable property right. In the present writer's view, s 28 in its entirety goes a long way in both guaranteeing and protecting existing property rights.

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[18] J Murphy 'Property Right and Judicial Restraint: A Reply to Chaskalson' (1994) SAJHR 113.
[19] Ibid.
[20] There were very few serious issues touching on the provisions of s 28 which went to the courts. The courts were not called upon to pronounce on its content and scope. It would have been interesting to see how South African courts would have dealt with the construction of this provision.
[21] A J Van der Walt 'The Impact of the Bill of Right on Property Law' (1993) 8 SA Public Law 302.

The negative guarantee, on the other hand, is regarded as the classical mode of property protection.[22] This method of constitutionalising property is called negative because it is always couched in negative terms -"the state shall not take property" or some words to a similar effect.[23] Section 28(2) is a typical negative formulation of a private property right under the interim constitution.

Van der Walt's third formulation is said to create an economic model of property ownership which establishes private property. This interpretation was probably not anticipated by the drafters of the interim constitution. It is a major feature of the German constitutional theory. It would seem Van der Walt's analysis of s 28 is based on the German model. The author makes the following observations:[24]

> *"…the right which is guaranteed in s 28(1) is not property itself, nor even rights in property as is generally accepted, but the right to acquire, hold and dispose of rights in property. Put differently, this means that s 28(1) creates an obligation in terms of which the circumstances must be maintained within which it is possible for individuals to acquire, hold and dispose of rights in property."*

The immediate consequence of this definition was that an individual could not bring an action against the state where private property rights were involved under s 28(1). Such an action could only have been possible where the State takes a positive action such as the abolition of the institution of private property by means of legislation. It is debatable whether this interpretation is correct. Indeed the learned author himself opines that the implication of such interpretation would be that a market system model was created in terms of the government's declared policy of a mixed economy. Such an interpretation is, in the writer's view, objectionable because of its potential for impairing access to land for the dispossessed rural and urban poor.

Section 28 rights are subject to State limitation through deprivation under subsections 2 and 3. It should, of course be noted that the State limitations should be in accordance with the law, while expropriation would be subject to the payment of compensation. One would, of course, also take into account the provisions of s 33 of the 1993 constitution.

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[22] Ibid.
[23] The Fifth Amendment to the American Constitution is a good example of a negative guarantee of property.
[24] Van der Walt (1993) op cit at 303. See also Carpenter op cit at 276.

In the light of the short lifespan of the 1993 constitution, there is no way anyone can conclusively say which of the possible meanings ascribed to s 28 is the correct one because besides the textual interpretation on which there is unanimous acceptance, various other models are regarded as providing modalities of interpretation used by Constitutional Court.[25]

From the analysis of the various interpretations discussed so far, one feature which has come out clearly is the fact that there are two contrasting positions on s 28 of the interim constitution, namely, that it may be construed as protecting private land rights of whites or that it was a very weak Property Clause that did not protect existing land rights. In the light of the strong opposition to the entrenchment of private property privileges, even amongst some judges prior to the enactment of the 1993 constitution, it would seem that the suggestion of a weak Property Clause is plausible.[26]

4.2 SECTION 25 OF THE 1996 CONSTITUTION

4.2.1 INTRODUCTION

This aspect of the discourse is concerned with an analysis of the structures contained in s 25 of the 1996 Constitution. Admittedly, land is the most contentious issue in South Africa as can be seen from the different views referred to in this and the preceding chapters. It is for this reason necessary to preface this analysis with a brief discussion of the purpose for the constitutionalisation of property.

Drawing inspiration from the German approach to the constitutional protection of property, D Kleyn[27] expresses the view that the purpose for constitutionalising property is to ensure the balancing of private and societal interests over land. He, however, concedes that this responsibility would be particularly taxing "in the light of the gross inequalities regarding the distribution of property."[28] The

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[25] Philip Bobbit, a leading constitutional scholar in the United States has labelled these modalities as historical, doctrinal, structural, prudential and ethical. Murphy op cit at 10.

[26] M Chaskalson has cited Mr Justice Didcott's serious disapproval of the protection of property in the constitution in the following words:"What a bill of rights cannot afford to do here, I put it to you, is to protect private property with such zeal that it entrenches privilege. A major problem which any future South African government is bound to face will be the problem of poverty, of its alleviation and of the need for the country's wealth to be shared more equitably…should a bill of rights obstruct the government of the day when that direction is taken…we shall have on our hands a crisis of the first order, endangering the bill of rights itself as a whole and the survival of the constitutional government itself." M Chaskalson: ''The Problem with Property: Thoughts on the Constitutional Protection in the United States and the Commonwealth' (1993) 9 SAJHR. 389.

[27] D Kleyn 'The Constitutional Protection of Property: A Comparison of the German and the South Africa Approach' (1996) 11 SA Public Law 413.

[28] Ibid.

conceptualisation of the Property Clause in this fashion is persuasive and has much to commend it.

There is an obvious dichotomy (even from a most casual observation of s 25) between the individual freedom to hold property (land) and the social function of property. Although couched in negative terms, s 25(1) recognises that the individual is the holder of a proprietary right. This is further enhanced by the express provision in s 25(5) guaranteeing the individual's access to land. Kleyn[29] has seen in these provisions a "clear manifestation of the worth of private property for the realisation of individual freedom and above all human dignity." It would seem that Kleyn's analysis supports the idea that constitutionalising property was imperative to accomplish human dignity. It is for this reason that it has been argued in this thesis that creating access to land for the dispossessed should be prioritized because it falls within the human rights domain.

4.2.2 PRIVATE PROPERTY AND THE PUBLIC PURPOSE TO FACILITATE ACCESS TO LAND FOR THE DISPOSSESSED.

Implicit in the provisions of s 25 is the concern to maintain a delicate balance between individual rights to property and public interest. Just like the German constitutional approach, these clear manifestations of individual rights in property exist alongside an equally clear constitutional limitation of private property in the interest of the public. According to Kleyn, the function of the Property Clause in Article 14 of the German Basic Law of 1949 was described by the German Federal Constitutional Court as maintaining a delicate balance between the tensions of personal freedom to own property and the social function of the property.[30] The country's courts thus interpret the Property Clause within this context.

The German court in the Deichordrung case[31] noted below had no difficulty in holding that the public interest which led to the taking of private land (the prevention of floods) justified a shift in the balance between private ownership of the land and the public control of it. This case was subsequently followed by later decisions, which widened the scope of the interference with property for public

[29] Ibid.
[30] Kleyn op cit at 414. See also Van der Walt (1997) op cit at 9 who seems to echo this German approach. He also refers to the Diechordrung Case BverfGE 24 1968 367 noted in his book. The case dealt with legislation which transformed some private land in Hamburg into public land. It also limited the use of private land in a dyke.
[31] BverfGE 24 1968 367.

interest.[32] Kleyn has applauded the public context influence in the interpretation of the Property Clause as necessary to harmonise the conflicting values in Article 14 of the German law. The view that the Property Clause solely functions to ensure a material basis for personal freedom is criticised as resting on a one-dimensional historical premise that has been stripped of its validity in modern times.[33]

A similar tendency towards this functional or purposive approach is discernable in the American law. The principal exponent of this interpretative approach to the Constitution in America is Frank Michelman.[34] He argues for the abandonment of the assumption that a case-by-case interpretation of the Constitution should be the prime method to be adopted.[35] He contends for a return to what he characterises as the first principles, this being the adoption of a method whereby a clear understanding of the purpose behind the provision in the Constitution. Michelman's approach emphasises a movement away from a private law conception of the constitutional property provision as guarantying the status quo to a dynamic public law ethos that regards the Property Clause as a vehicle for social change and transformation.[36]

Van der Walt has argued for a South African adoption of the German constitutional interpretation approach. According to the author, the German constitutional approach has the added advantage of adopting a holistic view of the entire Constitution.[37] This style of constitutional construction demands that none of the provisions of the Bill of Right be construed in isolation. Each has to be construed relative to other provisions in the Constitution. The following comments by Van der Walt are worth noting:[38]

> *"The point is that the functional or purposive approach explains many of the otherwise perhaps bewildering elements of current constitutional jurisprudence, that is it has some advantages compared to some old style formation…it is very likely that this approach will be followed by the South African courts…it is taken for granted that a purposive approach of*

[32] Kleyn op cit at 411.
[33] Ibid.
[34] Van der Walt (1997) op cit at 11.
[35] Ibid
[36] Ibid.
[37] See also Kleyn op cit at 409 who seems to support the German approach. In this context, Kleyn also notes that one of the most important contributions of the German statutory interpretations is the interpretation of the Constitution as a whole.
[38] Van der Walt (1997) op cit at 15.

sort will form the basis of any analysis and interpretation of section 25 of the South African constitution."

An approach of a constitutional interpretation of the Property Clause, which seeks as its basic objective the maintenance of the balance between private and public interest, has much to commend it. Yet, this does not justify regarding the German approach as providing the main inspirational basis for understanding the South African Property Clause. It is perhaps for this reason that Johan de Waal has cautioned against treating the German Basic Law (and decisions based on it) as a tree from which one can pluck little BMWs, which could happily be driven on South African roads.[39]

Some[40] have described this type of arguments as fanciful and artificial, intended for subjective reasons to avoid a particular foreign legal system. This clearly is not the case. The German Constitution, with the greatest respect to these eminent scholars, should not be the yardstick for construing the Property Clause of the South African Constitution. The history of South African land dispossession, stretching through centuries of a despicable and ruthless exploitation of the black majority, has no comparable feature in German history. Clearly, the German Basic Law could not conceivably have had as its objective the redressing of a problem of the magnitude existing in South Africa. It is in this candidate's opinion fanciful to see in the two common features warranting an over reliance on the German precedent by the South African courts.

Although one is mindful of the provisions of s 39(1) (b) and (c),[41] one nevertheless, feels that in interpreting the Constitution, the courts should not be overtly concerned about the balancing of interests between the conflicting private and public forces over land. The present writer is in favour of the approach adopted by the Canadian courts because in matters of land, the country shares a lot with South Africa. T Allen notes in this regard that "there is little doubt that the crown made similar undertakings with, and assumed similar powers over aboriginal peoples throughout the empire."[42]

Reference is made to the fact that the Canadian Supreme Court [43] in R v Big M Drug Mart Ltd[44] construed a guaranteed right in the country's Bill of Rights in the

[39] Kleyn op cit at 411.
[40] Kleyn op cit at 401 and Van Der Walt (1997) op cit at 10-11.
[41] This provision enjoins the courts to consider international and foreign law when interpreting the Bill of Rights.
[42] Allens op cit at 202.
[43] G Marcus 'Interpreting the Chapter on Fundamental Rights' (1994) 10 SAJHR 93.

context of "the historical origins of the concept enshrined" in the Charter. The same court held in Hunter v Southan in Co[45] that constitutional interpretation must be undertaken with the deliberate purpose of attaining the "political and historical realities" of the state even if its framers did not contemplate these realities.[46] The court said that the task of expounding a constitution is crucial and considered different from that of construing an ordinary statute.

It is not difficult to see why the emphasis on a historical context features in the constitutional interpretation of the Canadian Supreme Court. The Canadians have a comparable historical experience where an emigrant European administration dispossessed indigenous inhabitants of land. This candidate draws attention to the fact that the Constitutional Court had clearly stressed the importance of the historical approach to the construction of the Property Clause in the FNB[47] case. Ackermann J preferred an interpretation which will take the specific historical context of the country into account. He also observed that this was consistent with s 25(4)-(9) which enjoins the need to redress "one of the most enduring legacies of racial discrimination in the past, namely the gross unequal distribution of land in South Africa."[48]

Marcus[49] has identified a discernable preference for the Canadian constitutional interpretational approach by Southern African countries just emerging from colonial rule. The courts[50] in Namibia, Zimbabwe and Botswana (though with slightly different histories) have tended to stress the need to address the difficulties arising from their history by embracing a purposive approach. This approach is instructive and peculiarly suited to the South African scenario which would be in line with the approach of the ANC and that of the South African Law Commission on the issue of distributive justice.[51]

This writer feels that the ratio in R v Big M Drug Mart Ltd[52] provides sufficient rationale for the approach advocated here. The peculiar land history of South Africa strengthens the argument that the extent to which the object of s 25 will be achieved can only be evaluated by the impact that its operation will have on access

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[44] 1985 18 DLR (4th) 321 (SCC).
[45] 1985 18 DLR (4th) 641 (SCC).
[46] Ibid.
[47] Supra
[48] Ibid at page 793 paragraph C-D.
[49] Marcus op cit at 95.
[50] See Mwandinghi v Minister of Defence, Namibia (1991) (1) SA 851 (NM). See also Marcus op cit 94.
[51] See Lewis op cit at 390.
[52] Supra.

to land by the ordinary South African homeless. It is only when this is done that the consensus expressed at the World Trade Centre would be given effect to.

An undue stress on balancing the contending rights of the public interest in ensuring access to land for millions and the protection of private property of a few is flawed because it creates the untenable idea that both have proportional worth in the context of South Africa. This type of interpretation of the Constitution is, with respect, not in line with the broad principles indicated in the FNB case. It is conceded that the Property Clause in s 25 must be construed as a whole and that this demands the need to strike a balance between existing rights and the public interest.[53] The writer nevertheless argues that if this has to be done in a spirit that views property as an instrument of transformation and change[54]an access facilitating interpretation will be preferred.

The present writer is not criticising the purposive approach or the reliance on German precedent as such, but is concerned with the apparent overly concern with the balancing of interest. The Constitutional Court has, in S v Zuma[55] and S v Makwanyane,[56] already made its preference for a purposive interpretation of the Bill of Rights clear. In doing this, the Court borrowed from the articulation of Dickson J of the Canadian Supreme Court in R v Big M Drug Mart Ltd.[57] From a careful reading of the FNB judgment, it would seem that "purpose" refers more to the interest which a particular provision and the Bill of Rights as a whole was enacted to protect. The Court quite correctly stated that this interest has been specifically identified by s 25(4)-(9).[58]

In dealing with the s 25 rights, one should not be unmindful of the provisions of s 39. Scott et al think that s 39 provides the animating values that must inform the interpretation of the Constitution. It specifically requires international law to be considered in the adjudicative process.[59] This provision, however, stops short of indicating what principles may or may not be followed. The courts are thus given the discretion to decide on how to proceed on this point. In S v Makwanyane,[60] the

[53] First National Bank of SA v Minister of Finance Supra at 794.
[54] See note 9.
[55] 1995 (2) SA 642 (CC).
[56] 1995 (3) SA 391 (CC).
[57] Supra.
[58] This writer believes that the First National Bank & Anor v Minister of Finance Supra implies an interpretation that is generous, consistent with the purpose of the provision as well as meant to achieve such a purpose. See C Scott et al 'Adjudicating Constitutional Priorities in a Transnational Context: A Comment on Soobramoney's and Grootboom's Promise' (2001) SAJHR 218.
[59] Scott et al op cit at 221.
[60] Supra.

Constitutional Court held that the international human rights law provides a framework within which Chapter 3 of the interim constitution had to be understood and construed. The President of the Court indicated that judicial acts of relevant international human rights bodies, such as reports and decisions might provide guidance for the construction of the Bill of Rights.[61]

The courts are enjoined by s 233[62] to be guided by two rules when construing pieces of legislation, namely, that the interpretation be consistent with international law as well as be reasonable. The word "reasonable" has not been defined, but it must be construed to imply an interpretation that will serve to achieve the purpose for which the particular provision was designed. "Reasonable," as defined here is consistent with the view expressed in the FNB[63] case because the court noted that context (legacy of dispossession) was crucial in construing s 25. Thus a particular interpretation may be consistent with international law, yet unreasonable in the unique historical context of South Africa.

It is submitted that by s 233 and s 39(1)(c) of the 1996 Constitution, the courts in South Africa are ultimately to be guided by the peculiar and unique circumstances of South African land history when interpreting s 25. The present writer contends that because of the peculiar land history of the country, international human rights law and foreign law cannot be the all-important guide for the interpretation of s 25, although they help to avoid the mistakes that others have fallen into.

4.3 NATURE OF PROPERTY CLAUSE IN SECTION 25

Although this provision has been the subject of controversy, covering a wide range of sentiments and sometimes even ideological biases, the discussion here is not intended to cover the extensive range of issues associated with these arguments. The focus of this aspect of the thesis is on the structures created by s 25 with reference to how these have affected access to land by the dispossessed. The section reads thus:

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

[61] Scott et al op cit at 221.
[62] Constitution of the Republic of South Africa Act 108 of 1996.
[63] See note 48.

(2) Property may be expropriated only in terms of law of general application-

(a) for a public purpose or in the public interest, and

(b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to those affected or decided or approved by a court.

(3)The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances, including-

(a) the current use of the property;

(b) the history of the acquisition and use of the property;

(c) the market value of the property;

(d) the extent of direct state of investment and subsidy in the acquisition and beneficial capital improvement of the property; and

(e) the purpose of the expropriation.

(4)For the purposes of this section-

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources, and

(b) property is not limited to land.

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

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

(7)A person or community dispossessed of property after 19 June 1913 as a result of past discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

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

from the provisions of this section is in accordance with the provisions of section 36(1).

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

The present writer has divided the section into two distinct parts. The first part (subsections 1-3) protects and delimits existing property rights, while the second part defines a land reform policy.[64] Another illuminating categorisation of this section would divide it into rights created by s 25 and the limitations to these rights. Neither of this compartmentalisation should be seen as setting watertight boundaries. In the discussion that follows, the writer will comment on the rights created by s 25 and the limitations to the rights in Section 25.

4.3.1 RIGHTS CREATED BY SECTION 25

It is significant that s 25(1) is couched in negative terms. Why did the framers choose to cast this very vital provision by saying "no one may be deprived of property except in terms of …"?[65] The choice of this negative formulation is relevant for two reasons. Firstly, the rest of chapter two of the Constitution (with the exception of s 13 and s 20) are positively drafted. Secondly, s 28 of the 1993 interim constitution was positively phrased.

It has been strenuously contended that this negative formulation shows that s 25 neither created nor guaranteed property. Section 25, according to this view, conferred a comparatively limited right called "the right not to be deprived of property" except in the circumstances specifically prescribed in s 25(1)-(3).[66] This right not to be deprived it is argued is definitely narrower than the rights in property under s 28(1) of the 1993 constitution.[67]

Moreover, it is further contended that the difference between s 25, which is negatively formulated, and the other provisions in chapter two, which are positively drafted, suggest strongly the conclusion that the drafters deliberately intended to confer something less than an express property guarantee. These arguments are persuasive. There can be no conceivable reason for this obvious change in formulation in the same chapter dealing broadly with similar issues except that the

[64] Lahiff op cit at 280.
[65] Section 25 (1) of the 1996 Constitution contrasts with s 28(1) of the interim Constitution.
[66] Van der Walt (1997) op cit at 295.
[67] These arguments were rejected in the First Certification Case (Supra) as untenable.

drafters intended a truncated right to property. It has to be remembered that almost all the other provisions in chapter two commence with a positive affirmation of rights.

There is yet a more nuanced variation of this contention, which is to the effect that the grammatical structuring of s 25(1) supports the idea of a less than property guarantee.[68] According to this view, had s 25(1) been drafted with two negative phrases, namely, "Nobody may be deprived of property except as provided for by the constitution," and "No law may provide for arbitrary deprivation of property," this would have indicated a general negative guarantee of property. It is argued that the present formulation of s 25 means the Constitution intended the protection of a truncated version of the right to property.[69]

The present writer is in agreement with the above interpretation of s 25(1) of the 1996 Constitution. It is consistent with an interpretation which takes into account the unique history of South Africa. The final Constitution appears to have deliberately shifted away from a strong positive protection of rights in property with particular reference to land. This is to avoid a situation where the privileges of a small white elite, which took control of over 80 percent of the land in the entire country, would be entrenched. Such an interpretation is also potentially sensitive to the problem of homelessness and spiralling poverty amongst the black majority.[70] The drafters of the Constitution must have been wary of positively protecting property rights for fear that it would by fossilising the existing imbalance make access to land for the dispossessed difficult.

In the First Certification case,[71] the court accepted that there is no fundamental difference between a negative and positive formulation of the Property Clause. The court said that neither of those formulations should be considered as the universal property formulation and noted that even a negative formulation is an appropriate formulation that provides implicit protection for property. The same court affirmed this view in the FNB[72] case. According to Van der Walt[73] this view is sound because

> *"a negative property clause does provide implicit protection for the positive entitlements that are usually associated with property,… it is not necessary for a*

[68] Van der Walt (1997) op cit at 297.
[69] Ibid.
[70] This judicial attitude was reflected in the Grootbom case Supra when the Constitutional Court spelt out in details the state responsibilities to homeless people.
[71] Supra.
[72] Supra at 793.
[73] Van der Walt (1997) op cit at 297.

property clause to be phrased in positive terms to be regarded as a property guarantee."

There are admittedly many canons of interpretation, which should help in construing the Property Clause, but these are not cast in stone and should not enslave the courts. However, the historical approach has apparently enjoyed prominence in the country. Although Qozeleni v Minister of Law and Order[74] dealt with the interim Constitution it is safe to assume that it signalled a preference for the historical approach because it described the interim Constitution as the remedy to a fundamental mischief in South Africa. This was followed in the specific case of s 25 in First National Bank of SA Ltd / West Bank v Commissioner for the South African Revenue Services and First National Bank of SA Ltd t/a West Bank v Minister of Finance.[75] The Constitutional Court stressed the historical approach by focusing on the genesis behind the enactment of s 25 which relates indisputably to the systematic dispossession of black people[76].

According to Lourens du Plessis,[77] constitutional interpretations in the country since 1994 seem to have been accompanied by a realisation of the court's unavoidable political involvements in the broad sense of the word.

The Constitutional Court in a series of judgments[78] has expressed its preparedness to adopt an activist political role when construing provisions dealing with socio-economic rights. In the Premier Mpumalanga case, the court expressed its reluctance to impose obligations upon government, which would inhibit its ability to make and implement policy effectively. When called upon to interpret a provision like s 25(1), it is not unreasonable to assume that it would adopt a construction that would disfavour a freezing or consolidation of private ownership.

Ackermann J reiterated the court's policy in First National Bank of SA Ltd / West Bank v Commissioner for the South African Revenue Services and First National Bank of SA Ltd t/a West Bank v Minister of Finance.[79] The judge warned that in construing s 25 "one should never lose sight of the historical context in which

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[74] 1994 (1) BCLR 75 (E) 81 G-H.
[75] 2002 (7) BCLR 702 (CC).
[76] See page 122.
[77] Du Plesssis (2002) op cit at 137. The unprecedented pronouncement in S v Zuma (Supra) by Kentridge J that it is not easy for a judge to avoid the influence of one's personal intellectual and moral preconceptions is illustrative of the role of political consciousness in the construction of the Constitution.
[78] Soohramoney v Minister of Health Kwazulu Natal 1981 SA 765 (CC) and Government of RSA v Grootboom and Premier Mpumalanga v Executive Committee Association of the State Aided Schools Eastern Transvaal 1999 (2) SA 91 (CC).
[79] (Supra).

the Property Clause came into existence." He went further to identify the background of the Property Clause as one of the conquest and "the taking of land in circumstances that to this day are a source of pain and tension."[80]

It is the writer's contention that an access facilitating interpretation of the Property Clause is to be preferred and should not be seen as unusual. Universally constitutional property clauses are no longer used as devices to control[81] the abuse of state powers, as was the case in the 20th century. Two reasons account for this shift in theory. Firstly, constitution making has benefited from the tempestuous relations between the judiciary and the executive, following the former's activism in India and America over the property clause. The American and Indian Supreme Courts repeatedly invalidated legislations, which in their opinion, interfered with private property rights.[82]

Secondly, and more importantly, there is an ongoing development of a liberal constitutional theory in the world.[83] T Roux is of the view that an important feature of this recent constitutional evolution is the decline in the status given to the property clause as a bulwark of protection against state power.[84] The author state that the present constitutional approach gives pre-eminence to the right of equality and dignity. Both contentions are relevant to the South African scenario. The second resonates very strongly in the country because a strong pro property disposition in the construction of s 25 would perpetuate the social and economic[85] interest of those who already own vast property.

It is argued that the dismissal on technical grounds of the challenge in Transvaal Agricultural Union v Minister of Land Affairs and Another [86] did much to discourage challenges of land reform legislations.[87] While some may consider this development noteworthy as implying success in facilitating access to land, there is equally the disturbing possibility that the lack of property rights challenges is

[80] Paragraph 64 of the FBN case.
[81] Roux (2002) op cit at 430.
[82] Roux (2002) op cit at 431.
[83] Ibid.
[84] According to Roux in 2002 only one property challenge reached the courts. He argues that the Supreme Court and High courts did not pay much attention to the development of profound property law jurisprudence. Roux (2002) op cit at 453.
[85] The case in question is Henson v NO and Others Supra.
[86] 1996 (12) BCLR 1573 (CC).
[87] The Constitutional Court had dismissed a direct application challenging certain provisions of the Restitution Act 1994 for inconsistency with the interim Constitution with cost The court took the view that the issues were not significant enough to warrant direct access to it. See Paragraph 46 and 47 of the case. T Roux asserts that this judgement discouraged further challenges of reform legislations. Roux (2002) op cit at 433.

indicative of the State's negative records in improving access to land for the majority. The following comment by T Roux is instructive in this regard:[88]

> *"The absence of any significant property right cases in South Africa may simply be further proof of the general rule that, where a government is inclined to respect property rights for economic reasons, it will not test the boundaries of the constitutional property clause."*

4.3.2 LIMITATIONS TO RIGHTS IN SECTION 25

The right to land guaranteed in s 25(1), even though rather truncated, is not absolute. Like every other right in the Bill of Rights, an existing right in land needs to be read with reference to the multiple limitations to which it has been made subject to.[89] Some legal commentators[90] have classified the limitations affecting the right to land into two broad headings, namely, internal modifiers and limitations properly so-called. Although this classification is fluid and appears to turn on a question of semantics, it is, nevertheless, a useful guide; hence it has been adopted as a basis for further analysis on this subject.

Internal modifiers are distinguishable from limitation provisions. The former are contained in or laid down by the Constitution itself. This is done when the Constitution itself, in defining a particular right indicates what elements are excluded from the right in question. When seen from this perspective, the exclusion of entitlements forms part of the definition of the guarantee in issue. Such an entitlement cannot be amended or even affected by normal legislation.[91] Sections 25(2) and 25(5) in terms of the above approach regarded as internal modifiers to the definition of property in s 25(1) because the constitution itself has, in defining property made property right subject to these provisions.

Property may be legitimately regulated or controlled (deprivation) or expropriated for public purpose subject to the payment of compensation. Section 25(6)-(9) declares the reform agenda of the 1996 Constitution with the aim of redressing injustice of past discriminatory legislation. In a broad sense, these provisions affect the right to property as guaranteed by s 25(1). Measures which will enable citizens to gain access to land (particularly that demanding restitution of

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[88] Roux (2002) op cit at 434.
89 D L C Miller and A Pope Land Title in South Africa Kenwyn Juta & Co Ltd (2000) 290.
[90] Van der Walt (1997) op cit at 279.
[91] Van der Walt (1997) op cit at 307.

property) must necessarily impact negatively on existing land ownership in the country. Subsections 25(b)–(g) of the 1996 Constitution are internal modifiers because it is the Constitution itself that has provided for them. The restitution machinery was enacted pursuant to and derives its authority from s 125 of the interim constitution.

Limitations of the Bill of Rights are different from internal modifiers. Unlike the latter, limitations are not contained in the Constitution. Nor are they laid down by it. The Constitution makes reference to limitations and thereafter makes provisions for their application. The actual limitation invariably appears in a different law (statute), common law or customary law. The Constitution provides authority for their application and control but the laws themselves remain distinct from the Constitution.[92] There are various provisions which provide for limitations of the Bill of Rights in the 1996 Constitution.

Section 36(1) is an important limitation provision in this context. It authorises the enactment of a law of general application limiting the Bill of Rights, including s 25(1). This limitation is both elastic and extensive hence it is subject to what is "reasonable and justifiable" in an open-end democratic society. This phrase can be construed to justify wide varieties of interference with proprietary rights in land. Another important limitation is provided in s 39 of the 1996 Constitution. This provision requires that the courts, tribunals or fora consider international law and may consider foreign law when construing the Bill of Rights. The implication is that courts should decline to take decisions which may be inconsistent with the country's obligations under international law or deriving from her membership of international organisations such as the United Nations and the African Union.

As has been noted, it is unlikely that foreign law will be of much assistance in interpreting the Property Clause. This is because the specific history and needs of South Africa are peculiar. The Constitutional Court was therefore anxious to point out its duty to "construe the South African Constitution and not an international instrument or the constitution of some foreign country, and this has to be done with the due regard of our legal system, our history and circumstances."[93]

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[92] Ibid.

[93] In Re Certification of the Amended Text of the Constitution of RSA (1997) (2) SA 97 (39). Roux argues that the massive structural inequalities that the South African government is expected to redress makes the country's situation quite different from that of countries like the United States of America. implying the unsuitability of foreign cases in the interpretation of South African property provisions. See T Roux "Property" in D Davis et al Fundamental Rights in the Constitution: Commentaries and Cases Kenwyn Juta and Co (1997) 249.

Expropriation of land for purpose of redistribution or restitution has a dual character. It is both a legal and an administrative act and must be subject to s 33 of the 1996 Constitution. In terms of the above section administrative actions have to be lawful, reasonable and procedurally fair. As an administrative action, expropriation must comply with the provisions of the Expropriation Act of 1975.[94]

Generally, every administrative action that affects the right of an individual (e.g. the right in s 25) must be consistent with the due process requirements for it to be valid. Where, however, deprivation of property is affected directly by legislation, it is necessary for due process to be relaxed. This conclusion is supported by the tenor of the judgment in Park v Director, Office of Economic Offences.[95] Rights derived from chapter three may also be limited during periods of emergency under s 37 of the Constitution. The popular affirmative action measures pursuant to s 9(2) also limit the provisions guaranteeing the Bill of Rights in the Constitution.[96]

The Property Clause has been circumscribed very seriously. It is thus unlikely for any violation of it not to be capable of justification by reference to a valid limitation. In dealing with chapter three of the interim constitution, the Constitutional Court indicated in S v Makwanyane[97] that the Canadian pattern of resolving questions of constitutional validity has to be utilised. This involves conducting a two staged enquiry; the first requiring the applicant to show that a right under the Bill of Rights has been infringed, while the second demands that the respondent shows that the breach is justified by the provisions of s 36 of the Constitution.

The important thing to highlight is the fact that the two staged approaches in the construction of fundamental rights have a significant effect on the onus of proof in constitutional property litigations.[98] In terms of procedure, it is obvious that the claimant has to bear the initial onus to establish that his/her property right has been impugned. This is a fairly straightforward procedural issue because he/she who alleges has to prove the allegation. The second stage is for the party relying on the impugned legislation to justify the infringement by reference to valid limitations.[99]

This apparent straightforward analysis has been complicated in the case of s 25 by the internal modifiers in subsections 2 and 3. T Roux has asserted that it is possible to construe these internal modifiers as rendering the general limitation clause

[94] Miller and Pope op cit at 292. See also s 42 E of the Restitution Act as amended.
[95] 1995 (2) SA 148 (C).
[96] Miller and Pope loc cit.
[97] Supra.
[98] Roux (2002) op cit at 437.
[99] Roux (2002) op cit at 438.

in s.36 redundant.[100] These modifiers have also raised the issue of the stage at which limitations should be considered. There is a distinction between the views of de Waal, Curie, on the one hand, and Van der Walt on the other. The former argue that the question of limitation should be dealt with cumulatively at the first stage, while the latter argue that it ought to be addressed during the second stage.

It has been suggested that regardless of the merits in the different approaches, there is no substantial difference between the two. Thus it is said that which ever approach is adopted, the constitutional enquiry essentially breaks down to ascertaining whether the interests at stake is constitutionally protected and to what extent is the violation permissible either under the modifiers or under the express limitations which overlaps with the modifiers.[101] The quality of evidence at both stages remains the same.

The point is expressly made in s 25(4) that property is not limited to land and by s 25(6) that it extends to tenurial rights, which are less than ownership. So wide is the scope of property in s 25 that Pickering J stated in Transkei Public Servants Association v Government of RSA & Others[102] it could cover interests such as employment subsidies from the State, including housing subsidy. This may appear startling to those schooled in the traditional notion of property, yet it is consistent with the current trend which recognises the emergence of a new form of property.[103]

This new form of property has been recognised in Zimbabwe, a country with a land history similar to South Africa. However, the Zimbabwean Supreme Court in Chairman of the Public Commission v Zimbabwe Teachers Association[104] restricts property rights to interest, which have already been vested in a claimant. It excludes rights or interests, which are predicated on a contingency. The South African Constitutional Court is likely to adopt this Zimbabwean approach.[105]

To do otherwise would encourage undue and unhealthy speculation in this area of the law. It is possible for the courts to treat the two forms of property differently. In such a situation, the courts restrict the possibility of interference with the new property form, while adopting a more liberal approach, which will allow

[100] Roux (2002) loc cit.
[101] Roux (2002) op cit at 440-442.
[102] 1995 (9) BCLR 1235 (TK).
[103] Miller and Pope op cit at 297.
[104] 1997 (1) SA 228 (ZSC).
[105] A J van der Walt has in a recent article cited the constitutional court decision in the FNB case as supporting a liberal definition of property. Revering to this as the dephysicalisation of property he applauds it as appropriate because of its incorporation of ownership rights over land and intangible property. Van der Walt (2004) op cit at 51-52.

greater latitude for interference with land related rights. Such a differential attitude is in the opinion of this writer consistent with the underlying spirit of facilitating access to land by the dispossessed.

CHAPTER FIVE

5.1 ACCESSING LAND IN POST-APARTHEID SOUTH AFRICA

5.1.1 INTRODUCTION

By 1994, when the first democratic constitution became operational, South Africa was faced with two pressing and potentially explosive problems, namely: landlessness and the problem of redress. The formulation of a comprehensive policy to deal with these problems was thus one of the principal objectives of the new ANC government. This can be seen in the ANC's inspired Reconstruction and Development Programme (RDP). It contains an ambitious mission statement and the Party's vision to address the issue of access to land as well as the concomitant issue of the improvement of the quality of life for all.[1]

The government's policy on land was defined in the RDP as involving the strategies of the redistribution of both residential and agricultural land to those who need it but cannot afford it, and restitution for those who lost land as a consequence of past discriminatory laws and practices.[2] Redistribution was conceived as a response to landlessness and poverty, while restitution was meant to redress dispossessions. Besides ensuring that their land policy was incorporated in both the interim and final constitutions, the ANC wasted no time in introducing the relevant legislation[3] to address the problems of land as it saw it.

This chapter deals with restitution because it was conceived as a mechanism to restore land lost through dispossession. Subsection 8(3) (b) of the interim constitution recognises the right to the restitution of dispossessed land, while sections 121-123 identified the framework for establishing the mechanism to attain the restitution. Schedule 6 of the interim constitution in item 2 defines the criteria for the continued validity of pre-1993 legislation including the Restitution of Land Rights Act 22 1994. This Act, which is the driving force for restitution was enacted during the period when the interim constitution was in force.

The vexing question was: is this legislation valid? The Constitutional Court had to deal with this problem in Transvaal Agricultural Union v Minster of Land Affairs.[4] The Court, after relying on provisions of the interim constitution as a test for

[1] African National Congress's (ANC) Reconstruction and Development Programme 1994:20.
[2] Ibid.
[3] The ANC government enacted the Restitution of Land Rights Act 22 of 1994 as a response to the dispossession of lands by the previous administrations.
[4] 1997 (2) SA 621 (CC).

ascertaining the validity of the impugned provisions of the Act, held, inter alia, that existing rights of ownership do not have precedence over claims to restitution. Although the Court declined to expressly pronounce on the validity of the Act, it is safe to assume that it considered the legislation valid.

It is significant that the right to restitution for dispossessed land is incorporated in s 8(3) (b) of the interim constitution which was the equality clause. It is thus directly linked to the concept of affirmative action,[5] which has played an important role in addressing a legacy of injustice in important sectors of the society. Most of the important principles of South African constitutionalism were established in the course of the construction of the interim constitution.[6] These principles have provided valuable inspiration in guarding the interpretation of the final Constitution.

Given the nature of landholdings in the country, it was plain that the government's aim to facilitate access to land would adversely affect the existing rights of ownership. Both s 28(3) and s 25(2) permitted the expropriation of land subject to the payment of compensation. Although the State had abundant reserves of land, the Constitution, nevertheless made provision for land to be expropriated for land reform purposes. The State's prerogative to expropriate private land is inevitable.

5.2 EXPROPRIATION

Given the imbalance resulting from dispossession in South Africa, there was no way judicial restitution of land could take place without the possibility of expropriation of privately owned land. A broad consensus had emerged across the political spectrum that expropriation of the new landowners must be an option.[7] It was thus natural for section 25(2) of the 1996 Constitution to provide for the expropriation of property (land). However, this was made subject to two constraints, namely- for a public purpose or in the public interest[8] and to the payment of compensation. The amount, time and manner of the compensation could either be agreed upon by the parties or arrived at by a court.[9]

Although specific reference was made to expropriation, the term was not expressly defined. The notion is, of course, of great antiquity as Grotius made

[5] H Klug "Historical claims and the right to restitution" in J Van Zyl et al al Agricultural Land Reform In South Africa: Policies, Markets and Mechanisms Cape Town Oxford University Press (eds) (1996) 394, hereinafter referred to as Klug. It also supports this candidate's view that access through the restitution scheme raises important human rights considerations.
[6] S v Makwanyane 1995 (3) SA 391 (CC), S v Zuma 1995 (2) SA 642 (CC).
[7] Binswanger op cit at 139.
[8] See s 25(2) (a) Constitution of the Republic of South Africa Act 108 of 1996.
[9] See s 25(2) (b) of the Constitution.

reference to expropriation in his writings in the 17th century. He recognised that the monarch could take private property for public purpose subject to the payment of compensation.[10] It may be observed that the Theme Committee Four advised the Constitutional Committee of the National Assembly that expropriation means compulsory acquisition on the payment of compensation.[11]

It was therefore not surprising that in Harksen v Lane NO,[12] the Constitutional Court interpreted expropriation to mean a compulsory acquisition of rights in property by a public authority. Compulsory is used in the context of an involuntary takeover through the operation of law. In this case, the Court emphasised that such an acquisition must permanently deprive the owner of the right in order to qualify as expropriation implying thereby that where the interference with rights in property is transient, it would amount to a deprivation only.[13]

Deprivation is a wider concept. It is in the context of South Africa possible for the exercise of regulatory powers *i.e.* deprivation to lead to an interference with all the ownership rights in privately owned property. The Themes Committee's advice also stated that regulation (deprivation) could lead to the suspension of all of a private owner's rights on land without the payment of compensation. The FNB[14] case described the term quite broadly as referring to any interference with the use of private property. The Court distinguished expropriation from deprivation by noting that the former is wider than expropriation and that the latter was a subset of the former.[15]

The FNB[16] case (hereinafter referred to as the FNB case) has to be praised for its activism in raising the issue of deprivation on its own motion and filling up the lacuna created by the Harkson decision.[17] K Hopkins and K Hofmeyr[18] have

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[10] J L Sax 'Takings and the Police Powers' (1964) Yale Law Review 93. See also the exploitation of Grotious and Huber's positions on the notion of "overriding ownership" in Port Elizabeth Municipality v Peoples Dialogue on Land and Shelter and Others 2001 SA 759 (E).

[11] Allen op cit at 79.

[12] 1998 SA 360 (LC).

[13] The court followed the Malasian and Zimbabwean decisions of Government of Malaysia v Selangor Pilot Association 1978 AC 337 (PC) and Hewlett v Minister of Finance 1982 SA 502 (ZSC) respectively. Both dealt with expropriation involving the compulsory acquisition or use of an individual's property by the state. These decisions dealt with the interpretation of s 13 and 16 of the Malaysian and Zimbabwean constitutions respectively. Both countries have expropriation provisions similar to s 25(2).

[14] Page 766.

[15] A J van der Walt in a recent article has indicated that this distinction weighs against the development of constructive expropriation in South African property law. A J van der Walt 'An overview of developments in constitutional property law since the introduction of the property clause in 1993' (2004) 19 SA Public Law 77.

[16] 2002 (4) SA 768 (CC).

[17] K Hopkins and K Hofmayer 'The New Perspective on Property' 120 SALJ (2003) 48.

described the FNB case as a very significant precedent and identified the immediate result of its description of expropriation as a subset of deprivation as broadening the criteria for enquiry in a constitutional challenge to property.

These scholars noted that under the Harkson's case, the determination of a property claim was subject to an enquiry to establish whether (a) the expropriating body carried out the expropriation in terms of a law of general application (b) did so for a public purpose or interest (c) the expropriation was subject to the payment of compensation. It was then demonstrated that by holding that expropriation is a subset of deprivation the FNB case added a fourth criteria. They identify this criteria as the non-arbitrary criteria which in substance means that even when item (a)-(b) were satisfied it has to be enquired whether the expropriation is arbitrary.[19]

The FNB case has been interpreted to imply that in property challenges it must first be established that all interference with property passes the test in s 25(1). This is said to have immense practical benefits for property challenges because a claimant is no longer required to make an election at the outset whether the claim is based on expropriation or deprivation.[20] The definition of non-arbitrariness in the same case does also have huge practical consequences for the protection of private property as well as the capacity of the dispossessed to access land.

Ackermann J, in the case under reference, opted for the use of the rationality test to determine whether a deprivation is non-arbitrary. The Court noted that this approach required a low level of judicial scrutiny so as to ensure that there is an absence of bad faith.[21] The Court refused to follow the opinions of some scholars who contended that a legislative measure is arbitrary when they bear no rational relationship with the legislative goal they are intended to achieve.[22] The court criticised the above view as based on an unwarranted generalisation of S v Lawrence: S v Negel v S v Solberg[23] The Court preferred a straightforward approach which regards deprivation as arbitrary if it breaches s 25 or it is procedurally unfair.

The approach in the FNB case though commended in certain respects has also been criticised by K Hopkins and K Hofmeyr.[24] They claim that the FNB adoption of the rationality test in determining arbitrariness will result in a truncated

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[18] Ibid at 54.
[19] Ibid
[20] Hopkins and Hofmeyr op cit at 55.
[21] FNB case at 796
[22] See the views of M Chaskalson and C Lewis. "The Constitutional Protection of Property Rights: An Overview" in G Budlender et al Juta New Land Law Kewyn Juta & Co (1998) at para 1-34.
[23] 1977 (4) BCLR 1348 (CC).
[24] Hopkins and Hofmeyr op cit at 55.

protection of property and leave government a free hand to act as it wishes. It is claimed that this will allow government to act unreasonably. These authors preferred the proportionality test[25] because of the latter's tendency to result in a greater protection of private property.

This candidate thinks that this criticism is not right. It seems diversionary to stress that the rationality test favours the state's liberty to interfere with private property. This candidate on the contrary believes that the test simply gives the state greater flexibility in managing the country's land reform regime. It is in this regard consistent with the same judgement's view that the history of land dispossession should be a primary consideration in the interpretation of s 25. Besides, the rationality test is a lot more practical because it stresses the practical impact of a deprivation on the land rights of individuals.

Expropriation is permissible in terms of law of general application for public purpose. Law of general application could be a statute, the common law or customary law, although in practice, expropriations are done in terms of legislation. Although public purpose can be construed either broadly or restrictively, the FNB case favours a broad interpretation of public purpose because of the country's land history.

However, an expropriation that is done specifically for the benefit of a private individual or State's commercial venture would be unconstitutional. This is to be distinguished from a situation where an expropriation was not intended for the benefit of an identifiable person but the public at large but effectively benefits a private individual like in the case of land redistribution. Although this latter expropriation is not for a public purpose, the transaction is, however, constitutional because it is in the public interest under s 25 (4).

The above conclusion is sound because s 25(4) requires the construction of public purpose to include the State's commitment to bring about equitable access to natural resources. Indeed, the new s 42 E of the Restitution Act[26] was clearly intended to broaden the meaning of public interest because it made expropriation of land for restoration to a claimant either in terms of the Act or for any other land reform come within the contemplation of public interest. By s 42 A of the same amendment, the transfer to the claimant must take place soon after the expropriation.

[25]Ibid. This test seeks to enquire whether the measure adopted is proportionate to the purpose sought to be achieved.

[26] Land Restitution and Reform Law Amendment Act 63 of 1997.

The government's power to expropriate land for redistribution as discussed above poses a real challenge in the new land policy. The new s 42 A of the Restitution Act however makes it difficult for the process to be opened to the type of abuses seen in Zimbabwe. The land reform policy in Zimbabwe has been subjected to debilitating criticism for many reasons, one of which is the fact that the beneficiaries appear to be close friends of the political leadership. If in implementing the expropriation and redistribution of land, the State does not curb fraudulent land transactions, the credibility of the process would be compromised. This would encourage land invasions.

Expropriation is subjected to the payment of compensation.[27] The amount, timing and manner of payment of compensation must either be agreed upon or decided/approved by a court. Such compensation must be just and equitable, taking into account a variety of factors.[28] The subject of compensation has been treated in detail in paragraph 5.5 herein.

5.3 RESTITUTION

The evolution of land policy in South Africa since the colonial period, as indicated in Chapter one, justifies the remedial steps that are envisaged in s 25 of the new constitution in general and restitution in particular. Restitution is broadly defined as the act of restoring or returning anything to its rightful owner.[29] The concept is clearly one of wide import and recognised as an independent subject of research, teaching and practice.[30] Restitution as defined above is essentially contract based.[31]

The definition of restitution of land can be best approached after a careful reading of three separate definitions in s 1 of the Restitution Act as amended, viz "right in land", "restitution of a right in land" and "the provision of equitable redress."[32] H Mostert defines the phrase as "the restoration of a right in land or the provision of equitable redress."[33] This definition is qualified by the fact that the rights in land to be restored relate to land dispossessed after 19 of June as a result of past racially discriminatory law or practices. Right in land has been used extensively to cover ownership, the interest of a labour tenant, customary law interest and the

[27] See s 25 (2) (b).
[28] See s 25 (3) (a)-(e).
[29] A J Kerr The Law of Contract Durban Butterworths Publishers (1998) 733.
[30] P Jeffrey The Nature and Scope of Restitution Oxford Hart Publishing (2000) 1.
[31] It is an equitable remedy used to restore the status quo ante. Kerr loc cit.
[32] H Mostert Land Restitution Social Justice and Development in South Africa (2002) 119 SALJ 406.
[33] Ibid.

interest of a beneficial occupier who was on the land for ten years preceding the dispossession.[34]

The new South African government recognised that a mammoth responsibility rests on it to give effect to restitution of land rights, but this was to be done in such a way as to provide support to the vital process of reconciliation, reconstruction and development.[35] This realisation of the need for reconciliation between the opposing political forces has played a crucial role in determining the basic structure of the restitution mechanism. Section 25(7) of the 1996 Constitution grants to persons and communities dispossessed of property after 19 June 1913 as a result of racially discriminatory laws or practices rights either to the restitution of that property or to equitable redress.

Before a detailed analysis of the restitution process, it will be necessary to briefly point out that there are distinctions between the provisions of the interim constitution, the Restitution Act and 25(7) of the 1996 Constitution on restitution. Section 28 of the interim constitution refers to rights in property s 25(7) to property while the Restitution of Land Act 22 of 1994 specifically restricted the restitution process to those dispossessed of rights in land.[36] A Eisenberg[37] has pointed out that the phrase "right in land" is clearly more limited than that of right to property. He argues that the latter is broader and has extended the restitution mechanism to both owners and holders of other land rights such as customary interest in land.[38] Although this author notes that the use of property in s 25(7) implies a narrower scope of restorable rights, he nevertheless points out that the restorable rights are still extensive because the Constitution has not prohibited the extension of the rights to restitution to holders of personal rights in land.[39]

5.3.1 THE 1913 CUT-OFF DATE FOR RESTITUTION

The cut off date of 19 June 1913 is significant because it is the date that the notorious Land Act 1913 came into effect. This Act had a devastating impact on the rights of South African blacks to land and has influenced land policy profoundly

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[34] See page 106 in Chapter 4. See also C G Van der Merwe and J M Pienaar 'Law of Property (including Mortgages & Pledge)' (1994) Annual Survey 308, hereinafter referred to as Van der Merwe and Pienaar (1994).
[35] White Paper on South African Land Reform Policy April 1997: 317.
[36] De Waal J The Bill of Rights Handbook Lansdown Juta and Co Ltd (2001) 428.
[37] A Eiseberg "Land" in M Chaslkalson et al Constitutional Law of South Africa Kewyn Juta & Co Ltd (1998) paragraph 40-4, hereinafter referred to as Eisenberg.
[38] De Waal loc cit.
[39] Eisenberg loc cit.

thereafter.[40] Miller and Pope[41] have described the limitation of restitution claims to 1913 as a critical aspect of the process, resulting from a pragmatic compromise. These authors identified the basis of this compromise as follows:

> *i)"Aboriginal title should not form the basis of restitutionary claims because the countries in which they have been applied are historically and demographically different from South Africa.*
>
> *ii) Aboriginal title is an inappropriate basis for land claims because (a) the ownership paradigm of ancient times is different from what it is now (b) some of the lands settled on by whites were terra nullius.*
>
> *iii) Fear that historical claims will create problems that will be impossible to solve as it may serve to awaken destructive tribal rivalries over land that have been possibly settled on by different ethnic groups."*

B de Villiers[42] equally agrees with the limitation of restitution as stated above. For him "it may be very difficult for many black tribes or ethnic group to demonstrate that their traditional title had not been extinguished through previous acts of government." This candidate concedes that the massive demographic shift, the absence of written record and the passage of time are formidable obstacles to any restitution claims.[43] He, in spite of this, contends that this should not have led to the dismissal of the different views on the recognition of aboriginal titles.[44] Bennet and Powell have indicated that aboriginal title can be a legitimate and working part of South African law.[45] Reilly similarly argues that on the basis of international and

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[40] Ibid.
[41] D L C Miller and A Pope Land Title in South Africa Kenwyn Juta & Co Ltd (2000) 428.
[42] De Villiers B Land Reform: Issues and Challenges; A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia Johannesburg Konrad-Adenauer-Stiftung (2003) 61-62. Although he accepts that native title may find fertile ground in South Africa, he believes that it can be made part of the country's law through a rule of customary international law, Roman Dutch law or as part of the English common law. The author believes none of this process has occurred.
[43] Ibid.
[44] J Van Wyk 'The Rocky Road to Restitution for the Ritchtervelders' (2004) 67 THRHR 485.
[45] Ibid. See also Reilly 'The Australian experience of aboriginal title: Lessons for South Africa' 9 (2000) SAJHR 512-534 and Bennett and Powell 'Aboriginal title in South Africa Revisited' (1999) 15 SAJHR 449-485.

common law jurisprudence and practice, there are good reasons for South African law to support claims of aboriginal title.[46]

With profound respect, it seems defeatist for the government to assume that fixing the cut off date on the 19 June 1913 and thereby eliminating aboriginal title was the best way to go in the circumstances of the land history of South Africa. The historical and demographic differences in societies like Canada and Australia have not prevented South African courts from relying on precedents in these countries in support of constitutional interpretations in major decisions touching on significant areas.[47] Moreover, one only needs to turn to the Australian case of Mabo v State of Queenland (No 2)[48] to challenge the above contentions of Miller and Pope and B du Villiers. Firstly, the Mabo decision recognised original titles in the Murray Islands,[49] in spite of the fact of the close similarities between the colonial history of land in both countries. The Australian High Court, quite rightly, rejected the self-seeking false contention that the lands in Australia were *terra nullius* before 1788.

The contention that some of the land occupied by settlers in South Africa was *terra nullius* and not appropriate for restitution as canvassed, is with respect, not convincing. It seemingly reflects the tendency to device exculpatory reminiscences by those who having unjustly enriched themselves with African lands seek to frustrate its restoration. Although the passage of time may have blurred evidence of some dispossessions, a functional restitution of historical claim is still perfectly possible in the country.

Klug[50] has shown that it is possible to identify land dispossession dating back to the 1880s. He gives three examples in which lands were dispossessed through a conscious process of corruption and fraud before 1913 and which are capable of forming the basis of claims for restitution. First in 1884, the Boers recognised two settlements and 95 farms as belonging, by their own admissions, to Africans in the Thaba'Nchu area of the Barolong region of the Orange Free State. However, by 1900 only 54 of these farms remained in the hands of the Barolong landowners; the rest having been lost to whites through forfeiture as a consequence of dubious mortgages which the natives allegedly could not pay back.[51]

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[46] Ibid.
[47] S v Makwanyane Supra, S v Zuma Supra.
[48] (1992) 175 CLR 1.
[49] Ibid.
[50] Klug op cit at 392.
[51] Ibid.

Second, the white settlers in Griqua land after the annexation of 1874 owned just 63 of the approximately existing 505 farms in the area. Subsequently these titles of the Griqua landowners passed into the hands of white merchants and speculators who insisted that debts be paid in land. This practice was so successful that the Griqua landowning community allied to the colonial administration became a community of landless people with a bitter grudge against their white allies.[52]

The third and Klug's[53] final example relates to lands lost to the lawyer and parliamentarian Va Fenner-Solomon. This lawyer claimed to have extended lavish loans including legal fees to the natives of the Kat River. Following the grant of titles to these natives after the Boedel Erven Act of 1905, he caused these natives to sign legal documents which made their properties expropriable by him for any default. The natives were later to lose their lands en masse to him because of so-called defaults in payment. It is obvious that had these victims been white, it would have been impossible for such fraudulent dispossessions of their property to occur.

Limiting the restitution process to 1913 has clearly defeated claims to any of the above clearly identifiable dispossessions. This is objectionable for two important reasons. The victims and their descendants are refused ownership of their land because ownership ought to include the right to reclaim one's thing from anyone who wrongfully retains it.[54] This right is not defeated by a mere passage of time[55].

The restitution process is based on the Aristotelian theory of corrective justice. Clearly, where as in the identified cases above, this could still be done; it would theoretically be unsound to foreclose it by an arbitrary limitation of time provision. It is for these reasons strongly recommended that the limitation of restitution process to 1913 be revisited. There are various ways in which proof of pre 1913 dispossessions may be established. Evidence from custom, oral traditions and historical records, including records of colonial officials, can be used to ascertain some of these claims.

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[52] Ibid.
[53] Ibid.
[54] W A Joubert The Law of South Africa Durban Butterworths (2002) 218. One is conscious of the fact that a major consideration in the whole process is the fact that restitution should take place without major social disruptions. It is, however, the present writer's view that owners of dispossessed land should be paid compensation in lieu of actual restitution in circumstances where actual restoration will be disruptive.
[55] M Barry has cited J Waldron's argument that it is possible that an unjust taking of land can because of changed circumstances become legitimate at a later stage in time as relevant to the South African situation. She, however, notes that such argument ignores the sheer importance of having past wrongs rectified for the victimised. See M Barry 'Now another thing must happen: Richterveld and the dilemma of land reform in post apartheid South Africa' (2004) 20 SAJHR 379-380.

The restitution claim through the LCC to the Constitutional Court in Alexkor Ltd & Anor v The Ritchterveld Community & Anor[56] has introduced interesting insights on this issue. Although on a claim based on the doctrine of aboriginal title, the LCC held that it did not have the powers to determine the issue of aboriginal title. It opined that the High Court could have the power to develop the common law to incorporate it. Equally interesting is the approach of the Supreme Court of Appeal which made reference to the doctrine but thought that it did not neatly fit into South African common law. It has, however, been argued that the SCA approach to the role of custom "and its focus on indirect discrimination, stress the importance of the decision with regards to recognising claims for aboriginal title and its incidences".[57]

The Constitutional Court deliberately used the language of aboriginal title and drew heavily from countries which have recognised the title. It held that it could competently assume jurisdiction on aboriginal title because this comes within the contemplation of issues bearing on or having a logical connection to the claim of the community.[58] The Court noted that its approach is justified because of the Court's broad jurisdiction to determine constitutional matters and the need to avoid an artificial fettering of its function when obliged to determine a constitutional matter.[59]

5.3.2 ELIGIBILITY TO CLAIM RESTITUTION

Land dispossessions under apartheid were profound and naturally generated a great deal of debate before the enactment of the restitution legislation. A major point of this debate centred on the definition of eligible claimants so as to ensure a just restitution process. H Klug[60] has identified categories of claimants who should be considered in the restitution process. The categories identified were those affected by:

i) "Rules dividing the land surface into race groups

ii) Removal provisions so as to implement resettlement in terms of apartheid legislative map under s 5(1) (b) and 46(2) of the Native Administrative Act of 1927 and Group Areas Act 1966 respectively.

[56] Supra.
[57] Wyke op cit at 486.
[58] See Paragraph 16. See also chapter 6.
[59] Alexkor case at paragraph 24 and 30. See also chapter 6.
[60] Klug op cit at 398-399.

iii) Other apartheid removals (e.g. under Prevention of Illegal Squatting and Trespassing Acts).

iv) Prohibitions, which were, directed at stopping persons to enter certain areas (e.g. areas under pass laws)."

It was contended that of these four types, only categories (ii) and (iii) were proper basis for claims for lost land.[61] Robert Christiansen[62] argues that it is possible to identify four broad categories of rural forced removals arising from within these two sets of categories for which restitution or restoration should apply. These are; black spot removals, homelands consolidation removals, labour tenants and squatters and betterment schemes.

5 3: 3 RACIALLY DISCRIMINATORY LAWS AND PRACTICES

The criteria for determining eligibility for restitution that finally emerged, is based on the Land Restitution and Reform Law Amendment Act 63 of 1997 hereinafter referred to as the Restitution Act. The Act combines the relevant provisions of the Interim Constitution and its own provisions so as to bring the restitution process into line with the provisions of the 1996 Constitution. Section 2(1) (a) of Act 63 of 1997 is almost identical with s 25(7) in substance. Entitlement to restitution in terms of the Restitution Act was based on whether the dispossession was the result of past racially discriminatory laws or practice.[63]

The crucial question to consider is the meaning of "past racially discriminatory law and practices" as used in s 2(1)(a) and s 25(7) of Act 66 of 1997 and the 1996 Constitution respectively. There is no direct definition of the phrase in any of the legislations that make reference to the phrase.[64] However, s 1 of the Restitution Act attempts instead to identify racially discriminatory laws without expressly defining the concept. This provision states that these are laws "made by a

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[61] Ibid.

[62] R Christiansen "Overview of land reform issues" in J Van Zyl et al al Agricultural Land Reform In South Africa: Policies, Markets and Mechanisms Cape Town Oxford University Press (eds) 1996 379, hereinafter referred to as Chritiansen.

[63] The machinery set up in s 2 of Act 63 of 1993 is distinguishable from s 25(7) on points of detail. Section 2 separated the claims of communities from natural persons and also makes provision for claimants for the estate of a deceased claimant dying in the course of the claim. The Act has made liberal provisions for claims in cases where a potential claimant dies before lodging a claim. Miller and Pope at 328.

[64] The 1991 White Paper on Land was the first public document to make reference to the range of laws which should give rise to restitution. It identified dispossession resulting from racially based measures as the basis for the claim of restitution but did not define the phrase. The document instead opted for naming the acts which qualify as racially based land measures. See Minister of Land v Slamdiem Supra.

sphere of government and subordinate legislations". This has, unfortunately, not advanced the search for a definition of the phrase much. It is thus necessary to commence this discourse with an analysis of judicial decisions and academic opinions on the issue.

The early decisions on the point apparently sent conflicting signals regarding the direction to take between a preference for a narrow and that of a broad definition of the phrase. The Constitutional Court in Pretoria City Council v Walker[65] held that a discriminatory enforcement of charges in one racial area when the same is not done in others amounted to a racially discriminatory practice. This decision did not, however, have a significant impact on the definition of the phrase because it did not relate directly to dispossession. A more relevant decision on this point was delivered by the Land Claim's Court in Minister of Land Affairs v Slamdiem.[66] The court reiterated that the interpretation would require a two-staged enquiry involving a factual and legal investigation. After stating that the phrase should be construed in accordance with the ordinary rules of interpretation,[67] the Court held that it covered all dispossessions resulting from laws and practices that discriminated against persons on a racial basis in respect of the occupation and ownership of land with a view to securing a racial zoning of the country.

Slamdien's case has been criticised for advocating a restrictive interpretation of what qualifies for a racially discriminatory law or practice in terms of the Restitution Act.[68] This restrictive and access limiting interpretation for the dispossessed results from the attempt in the case to link discriminatory law and practice with the State spatial apartheid policy. This interpretational approach reflects a failure to come to terms with the Act's intention to attempt a broader redress of the land rights abuses of the past. L A Hoq,[69] commenting on the issue, observed that the "Restitution Act consciously avoided language that restricted restitution claims to apartheid land law, though this was the body of law that was understood to be the focus of restitution."

Miller and Pope[70] on their part posit that the criteria for determining qualification for restitution should be based on a broad perception of dispossession on

[65] 1998 (2) SA 363 (CC).
[66] (1999) I All SA 608 (LCC).
[67] T Roux 'Constitutional Protection of Property and Land Reform' (2000) Annual Survey 413.
[68] L A Hoq 'Land Restitution and the Doctrine of Aboriginal Title: Ritchtersveld Community v Alexkor Ltd and Another' (2002) 18 SAJHR. 439-440.
[69] Hoq op cit at 440.
[70] D L C Miller and A Pope ' A South African Land Reform' (2000) 44 Journal of African Law 177, hereinafter referred to as Miller and Pope (No 2).

a racially discriminatory basis because the South African society was saturated with laws that directly and indirectly discriminated against persons. Such broad formulation of the criteria for accessing the restitution mechanism is commendable. The wisdom of this approach lies in the fact that many laws and expropriations, which might at first, appear innocuous did turn out to serve or promote racist interest.[71] Indeed some of the obnoxious racially discriminatory laws directed at forcefully removing blacks from land had comical long titles and provisions suggesting the improvement of the welfare of blacks as their objective.[72]

These academic opinions are, in this candidate view, well founded because the phrase is considered different and wider than that contained in s 121(2)(b) of interim constitution in two important respects. First s 25(7) was considered as including those claimants who might not be able to point to a particular racial statute under which they were dispossessed. Such persons could still succeed pursuant to s 25(7) if they could only show that their forced removal was meant to promote the object of a racially discriminatory statute. The provision in s 121(2b) of the interim constitution was considered inappropriate for inclusion in a final constitution because it was infinite while the restitution mechanism as defined by the current law has a limited time schedule.[73]

There has been a discernible trend towards a move away from a restrictive interpretation of the phrase racially discriminatory laws and practices in latter decisions of the Land Claims Court. In Re Kranspoort Community[74] the LCC departed from the Slamdien's decision when it stated that it might be unnecessary to adopt the two staged inquiry followed by the latter where the facts are incontrovertible.

The removal in this case was effected under the Group Areas Act one of the legislations that was used to build spatial apartheid. The landowner's ingenious defence that this law was, in this case, only used as a vehicle of convenience to remove the community members who had fallen out of favour with the church leaders was rejected. The LCC indicated its preference for a broad interpretation of this phrase when it noted that the involvement of the Native Department and the use of racial language in the correspondences brought the dispossession within the meaning

[71] Ibid.
[72] The long title to the Native Administration Act 38 of 1927 has as one its objectives the improvement of conditions of residence of natives near urban areas.
[73] Minister of Land and Ano v Slamdien and Ano Supra at 622.
[74] (2000) 2 All SA 26 (LCC).

of the phrase. This view seemingly reflects the Constitutional Court's preference for a contextual and generous interpretation of the provision of s 25 of the 1996 Constitution in the celebrated FNB[75] case.

The recent constitutional court decision of Alexkor & Ano v Richterveld & Ano[76] has put the issue of the scope of this phrase beyond doubts. The Court categorically rejected the restrictive interpretation, which the LCC followed in the Slamdien and Alexkor cases. It disagreed with the LCC's decision, which limited racially discriminatory laws or practices to acts or laws that "sought specifically to achieve the (then) ideal of spatial apartheid with, each racial and ethnic group being confined to its particular racial zone."[77] It was clear to the Court that the Restitution Act has a broader scope than that suggested in the Slamdien's case.

In doing this, the Court extended the scope of this phrase to cover not just the purpose of legislation, but also the impact of the legislation on a people's land rights. In the case under reference, the Court stated that the Precious Stones Act 44 of 1927 and its accompanying Proclamations were racially discriminatory although they had nothing to do with spatial apartheid policy. Their discrimination lay in the fact that they did not recognise indigenous people's rights over the subject land while recognising those of registered owners (who were mostly whites) over the same land. The court's compelling position was articulated thus:[78]

> "*….given that indigenous law ownership is the way in which black communities have held land in South Africa since time immemorial, the inevitable impact of the Precious Stones Act's failure to recognise indigenous law ownership was racially discriminatory against black people who were indigenous law owners. The laws and practices by which the Richterveld Community was dispossessed of the subject land accordingly discriminated against the community and its members on the ground of race."*

That the law contemplates this type of an extensive approach is borne out in s 1 of the Restitution Act which, as has already been observed, indicates that racially discriminatory laws include laws made by a sphere of government and subordinate

[75] Supra.
[76] Supra.
[77] See paragraph 97 of the case.
[78] See paragraph 96 of the case.

legislation. The Act has not defined subordinate legislation, but Southwood[79] argues that it includes all legislations not made by the central parliament. These pieces of legislation include statutes; proclamations, rules, town planning schemes or industrial agreements either made pursuant to statutorily vested legislative competence or delegated legislative powers.

Subordinate legislation for this purpose includes departmental circulars and notices issued to guide public officials on matters relating to the exercise of their function. These categories of "legislation" assumed the status of subordinate legislations when they were given legal status and enforced. Section 1 is wide enough to cover all discriminatory legislations prior to 1994, no matter how minor it would appear to have been,[80] so long as it led to the dispossession of land. The same section of the Act defines racially discriminatory practices as an act or omission direct or indirect by:

i) *"any department of state or administration in the national, provincial or local sphere of government;*

ii) *any other functionary or institution which exercised a public function in terms of any legislation."*

Thus where any act or practice directed at a racial group by any State institution or functionary in the course of its public function leads to dispossession or deprivation of interest in land, it would qualify as a racially discriminatory practice. If the practice complained of were not discriminatory on the face of it, it would nevertheless be considered racially discriminatory where its effect resulted in a discriminatory practice against a group.

It is worth noting here that in Ash v Department of Land Affairs[81] Gildenhuys J adopted a very high standard for the ancillary question of those wishing to claim restitution as an ascendant of a deceased person. The court's requirement of strict proof of an applicant's relationship with a deceased dispossessed is, with respect, inappropriate. Such a requirement unduly hampers the restitution process, bearing in mind the kind of witnesses that come to these courts as claimants.

It should be noted that the Ministry's objections on grounds of lack of proof of the relationship between an applicant and his supposed predecessor in title as happened in Ash's case may in fact be a pretext to shield the State from the cost of

[79] M D Southwood The Compulsory Acquisition of Rights Lansdowne Juta and Co Ltd (2000) 235.
[80] Ibid.
[81] (2002) 2 All SA 26 (LCC).

restitution. One would have expected that the court would not attach any significant weight to such objections, particularly when nobody in reality disputes the claimant's link to the deceased dispossessed.

The restitution scheme is not designed to seek vengeance or even a complete reversal of what had happened in the past. While aiming to restore land back to their rightful previous owners, restitution has to be done in a manner that will support reconciliation, reconstruction and development.[82] Restitution presents the State with an opportunity to acknowledge and redress past wrongs.

5.3.4 THE COMMISSION ON RESTITUTION OF LAND RIGHTS

Section 4 of Chapter 11 of the Restitution of Land Rights Act of 1994 makes provision for the establishment of the Land Claims Commission. This section defines the structure of the Commission as well as the modalities of its work. It provides the basis for the appointment of the chief and other subordinate commissioners. It attributes their respective functions by designating and assigning the commissioners to the head office and the regions respectively.

The responsibility for appointing land commissioners is a very onerous one. It lies with the Minister of Land Affairs who may designate an officer in her office to do it on his behalf. In view of the delicate nature of the restitution process the qualification for appointment into the commission is high. Section 4(4) of the Act specifies that the appointee should be a "fit and proper person to hold the office." He must also have the relevant skills and knowledge to work for the commission or such legal knowledge or qualifications, as the Minister may deem necessary. Because the minister has the powers to hire, he also can fire any commissioner whose performance leaves a lot to be desired.

The phrase "fit and proper person" has not been defined by the Restitution Act as amended. It must be taken to mean someone with demonstrable probity and a grasp of the dynamics of the history of land in the country. Reference to the phrase "such legal knowledge or qualification" would appear to suggest that lawyers would have preference.

This contention is not difficult to appreciate although the commissioners are not expected to be bound by legal technicalities. Lawyers by training and professional exposure are better equipped to handle disputes arising from claims sometimes dating back to over 80 years. Their appreciation of the concept of root of title, the various

[82] Government White Paper on land April 1997.

species of evidence and techniques for evaluating the veracity of a witness's testimony make them ideal for working as commissioners. It is thus not surprising that a good number of the commissioners were persons with legal exposure. The South African approach in this context must be applauded.

5:3:5 JURISDICTION OF THE COMMISSION

The South African Land Commission may either function as an entity or through an individual commissioner. When acting as an entity, a quorum is formed by a simple majority of members present. The provision to sit either as an entity or as a quorum is good. It will help to ensure that disgruntled members who may boycott sittings do not frustrate the process. The provisions of section 5(3) and (4) are also to be commended because they give the chairman a casting vote in event of a tie. This will definitely facilitate the process by preventing the process from getting bogged down in petty squabbles.[83]

From s 122(1) of the interim constitution and the Farjas case[84], the Commissioner's jurisdiction was, inter alia, to:

i) " investigate the merit of any claims;

ii) mediate and settle disputes arising from claims

iii) draw up report on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court

iv) exercise and perform any such other powers and functions as may be provided for in the said Act."

The commission may appoint mediators to perform the functions in item (ii) above. Where this is done, the practice tends to facilitate the process as it assists parties to settle their dispute out of court. However, the early panel of mediators were criticised as dominated by white experts,[85] thus creating a credibility problem for the process. Section 11 of the 1994 Act determines the rules governing admissibility of

[83] The same thing may not be said of the provision in s 5 which limits the Commission to sit for three times in a year. Given the enormity of the land issue, this parsimonious sitting formula is irrational and insensitive to the acute problems the homeless are faced with.
[84] Farjas (Pty) Ltd v Land Claims Commissioner Kwa Zulu Natal, (1998) (2) SA 900 (LCC).
[85] De Villiers op cit at 57.

claims in the restitution process. The claims must be lodged in the prescribed manner[86] and should not be frivolous or vexatious.[87] It should also not be the subject of an order under s 35 of the Act. Section 11 further makes reference to s 2(1) of the Act as a qualifying prerequisite to approach the Commissioner. Under the latter provision, a claimant must be a person or community as contemplated by s 121(2) of the interim constitution which is similar to s 25(7) of the 1996 Constitution.[88]

The Commission functions much in the same way as the sub commission on Human Rights do under the European Convention. The Land Restitution Commission basically screened the petitions received for the purpose of determining the *locus standi* of the claimant, the reasonableness of his/her case and the possibility of encouraging a successful amicable settlement between the parties. To do this it must investigate the claims and thereafter place itself at the service of the parties with a view to securing a friendly settlement if it is possible.[89]

The commission is obliged by s 6 (1) (b) of the Act to assist claimants in completing and filling of the relevant forms relating to their claims. The Act also makes provision in s 11 (2) for the commission to condone any irregularities relating to the claims filed. This is a well thought out power and was praised in Ndebele Ndzunza Community v Farms Kafferskraal No 181[90] as helping to facilitate the restituttionary process. The court held that the commission legitimately condoned the non-disclosure of the interest dispossessed though required by the Act. The Commission on Restitution of Land Rights is a very important organ of the restitution process and has extensive powers. It has an investigative and proactive role. In exercising these powers, the Commission may out rightly dismiss frivolous and vexatious claims.

This power of dismissal was criticised in Farjas' case as setting a high standard for approaching the commission. It would seem, however, that its inclusion is correct because it stops bogus claimants from using the process to harass others. It is thus only logical that where the claimants had been paid a just and equitable compensation, the Commissioner should dismiss the complaint at the level of the

[86] 11(1) (a) There are standard forms for filling restitution claims. Claims filled in the Commission of Land Allocation established in terms of s 89 of the Abolition of Racially Based Land Measures Act 108 of 1991 are deemed to have been filled in the Commission of the Restitution of Land rights See Van der Merwe and Pienaar (1994) op cit at 306.
[87] See s 11(1) c of the Land Restitution Act 1994.
[88] "Person" and "community" have been defined liberally by the penultimate provision of s 2 (b) of the Land Restitution Act of 1994.
[89] D W Bowett The Law of International Institutions London Stevens and Sons (4ed) (1982) 291.
[90] 2003 (5) SA 375 (LCC).

Commission.[91] The rationale is to avoid such frivolous claims from taking the Commission's and the Court's valuable time, which would otherwise be utilised in deserving cases.

The Commission advises the Minister of Land Affaires on a variety of restitution related issues, emphasising always on the need to ensure that claims with the potential of impacting on a lot of people or affecting people with pressing needs be given priority. On receiving claims, the Commission has substantial powers to investigate the claims, keep the subject of the claim free from past claims interference and subpoenaed the production of documents with the power to criminal sanction any recalcitrant person who refuses to comply with its orders.[92]

Miller and Pope[93] has noted the Commission's limited criminal powers to punish with a maximum of 3 months imprisonment for failure to produce a subpoenaed document but this does not appear serious enough to encourage the production of documents by a determined objector. It is hoped that people will cooperate not for fear of punishment, but for the fact that all South Africans, propertied and dispossessed alike have a stake in the new South Africa based on justice, reconciliation and development. The alternative of disorganised land invasions provides the stimulus to make the present system work.

5.4 THE LAND CLAIMS COURT

The Land Claims Court is a specialised tribunal set up by s 22(1) of the Restitution Act of 1994. The Court is composed of a judge, either sitting alone or with an assessor or headed by a president of the Court. The President of the Republic appoints the judges after consultation and advice from the Judicial Service Commission.[94] As a rule, judges of the Land Claims Court must be persons of good standing with the relevant professional legal qualifications.[95] Section 23(1) sets the professional standard for appointment as a president of the Lands Claims Court very high. To be president, one must be "a judge of the Supreme Court" or qualified to be an advocate or attorney who has been in practice for a cumulative period of at least

[91] Farjas (Pty) Ltd v Regional Claims Commissioner Kwa Zulu Natal. Supra.
[92] Klug op cit at 402. Contrast this with the very limited powers of the Advisory Commission on Land Allocation under Chapter 5 of the Abolition of Racially Based Land Measure Act. The present Commission's powers are acceptable because it makes the restitution process faster.
[93] Miller and Pope op cit at 363.
[94] See s 22(3) and (4) of Act 63 of 1997.
[95] See s 23(1) (b) of Act 63 of 1997.

ten years. Academics who have lectured in law at a university for the same period also qualify to be appointed president of the Court.

5.4.1 JURISDICTION OF THE COURT

The Court has the jurisdiction to hear and determine a right to restitution to any right to land and issues incidental thereto. Section 35 (1) of the 1997 Act is a very important jurisdictional provision because it sets out the powers of the court when making an order for restitution.[96] It gives the court sufficient discretion to determine what is just and equitable in the circumstances of the facts placed before it. The Court has the powers to order: for the expropriation of the land,[97] that the claimant be granted appropriate right in alternative State land,[98] that the claimant be paid compensation,[99] that the claimant be included in a State housing rural development scheme,[100] or, that the claimant be granted alternative relief.[101]

It has been rightly stated that in exercising this jurisdiction, the Court must keep the following factors in mind.[102] These factors, which reflect the main aim of the court, are:[103]

> *a) the desirability for providing restitution for dispossessed land rights or the payment of compensation therefore*
> *b) the desirability of remedying past human rights abuses*
> *c) the requirement of justice and equity*
> *d) the desirability of avoiding major social disruptions*
> *e) any existing provision relating to the land in dispute and*
> *f) any factor which the court may consider relevant and consistent with the object and spirit of the constitution.*

It is clear from the above that the Court has very wide jurisdiction. The previous provision of s 33 of the 1994 Act, which required that the Court should consider the feasibility of restoring land claimed by an applicant before making the order, has been repealed by s 11(1) of the 1997 Act. It is, however, safe to say that

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[96] T Roux 'Constitutional Protection of Property and Land Reform' (2000) Annual Survey 416.
[97] See s 35 (1) (a) of the Restitution and Reform Amendment Act 63 of 1997 hereinafter referred to as the Act.
[98] See s 35 (1) (b) of the Act.
[99] See s 35 (1) (c) of the Act.
[100] See s 35 (1) (d) of the Act.
[101] See s 35 (1) (e) of the Act.
[102] Van der Merwe & Pienaar (1994) op cit at 306.
[103] Ibid. See also s 38 of the Act.

the actual restoration of land can still be limited by feasibility concerns because s 23 of the 1997 Act retains the feasibility requirement.[104]

The Court has, in spite of its wide jurisdiction, not always dealt with jurisdictional issues consistently. It started off in the early case of Zulu and Others v Van Rensburg and Others,[105] with the tendency to construe jurisdictional issues liberally rather than technically. The case dealt with the question of whether the applicant's complaint that the respondent had impounded their stock was cognisable by the Court such that it could make an order requiring their stock to be released to them. It was argued that the Court ought not to assume jurisdiction because the applicant had not been evicted. The Court held that it had jurisdiction on the grounds, *inter alia*, that the seizure of stock was in the court's view an attempt to circumscribe the applicant's use of land.

The Court declined jurisdiction to develop the common law to take account of the indigenous title of the claimants in the Alexkor case preferring instead to suggest that such a jurisdiction will lie in the Cape High Court. Its approach in this respect has been correctly "criticised by Hoq who argues that there is probably no better body than the Land Claims Court to interpret this situation."[106] Such a construction of the Court's jurisdiction was seen as an appropriate contextual interpretation of the boundaries of the right of restitution.

This candidate's understanding of decision of the Constitutional Court in the Alexkor case is that the LCC has substantial incidental powers including the power to look at events or dispossessions that occurred prior to the 1913 limitation date. It was in the case noted that the Land Claims Court has implied powers to develop the common law in matters relating to aboriginal title otherwise the area will remain static and out of step with the ongoing jurisprudential transformation in the country.[107] After a careful review of various statutory provisions bearing on the powers of the Court, L A Hoq[108] graphically notes that:

> *" the wide powers set forth…. establish the intention of the legislature to grant the Land Claims Court an active role in interpreting the provisions of the Act using all necessary and*

[104] Roux (2000) loc cit.
[105] 1996 (4) SA 1236 (LCC).
[106] Van Wyk op cit at 486.
[107] Hoq op cit at 427.
[108] Ibid.

available means , not precluding the development of the common law."

Since the coming into effect of the Act, the majority of the cases handled by the Land Claims Court have been those relating to automatic reviews and the application of the Land Reform (Labour Tenants) Act 1996.[109] The court has had to deal with a substantial number of cases on the Extension of Security of Tenure Act 1997 (hereinafter referred to as the "Tenure Act"). Although the interpretation and application of the "Tenure Act" was not specifically ascribed to it in the jurisdictional provision in s 22, it could legitimately exercise jurisdiction with respect to this Act.

The Tenure Act in s 1(1) makes reference to the Land Claims Court and defines it as "the court established by s 22 of the Restitution of Land Rights Act, 1994." This seems to be an incorporation of the Court's jurisdiction by reference. Section 17 (1) of the Tenure Act explicitly enjoins a party in any dispute under the Act to institute proceedings either in the magistrate' court having jurisdiction over the land or to the Land Claims Court. Under s 19(2) of the Tenure Act, civil appeals from a magistrate's court go to the Land Claims Court. The preamble of the Restitution Act describes the objects of the Act as "measures designed to protect or advance persons" or categories of persons disadvantaged by past unfair discrimination.

The Security of Tenure Act 1997 provides solid protection for occupiers whose occupations of property in farms were made precarious by discriminating laws in the past. It is here that the impact of the court in protecting the disadvantaged is most pronounced. In Lategan v Koopman and Others,[110] the Land Claims Court set out formidable defences available to an occupier threatened with eviction (which often results from the worker's loss of productive value because of age). The Court noted that the occupier/tenant could only be evicted if all of his/her entitlements have been met, including the legal determination of his employment. The tenant's major line of defence was the fact that the tenant could only be evicted if reasonable efforts have been made to secure alternative accommodation for him/her. It is settled that the occupier must be given a two-month notice and permitted to harvest his crops and remove his structures on the land before eviction.

The case of Mlifi v Kligenberg[111] concerned a review by the LCC of a magistrate's eviction order against the plaintiff. The plaintiff also asked for an order that he and his family be reinstated and paid compensation for the demolition of their

[109] Hlatshwayo and Ano v Hein (1998) (1) BCLR 123 (LCC).
[110] 1998 (3) SA 457 (LCC).
[111] 1999 (2) SA 647 (LCC).

home. Although the Court held that the plaintiff be reinstated there was insufficient evidence to settle the question of compensation. Ordinarily where this is the case, a civil court will dismiss the claim or at best non-suit the plaintiff.

While noting that the procedure was somewhat unusual, the Court said that it was permissible for it to be actively involved in the determination of cases before it. The judge cited the Restitution of Land Rights Act as permitting it to conduct any part of its proceedings on an inquisitorial basis. The inquisitorial model of proceedings, which is a civil law approach, is different from the adversarial method, which has traditionally been followed in South Africa.[112] Based on this procedure, the Court instructed the plaintiff to provide a list of what it would cost to rebuild his home for consideration in a conference, which the Court would schedule to decide the issue of compensation.

The Court is required, in pursuance to s 33 (d) to be conscious of the need not to grant relief that could precipitate any social disruptions. In Karabo and Others v Kok and Others,[113] the Land Claims Court declined to make an order restoring the applicant's right of residence because this would have led to a clash between the applicants and the new workers who had been put in their residence by the respondent. The Court opted instead to order the respondent to pay compensation of R20 a day to the applicants so that they could live in a hostel. This was interestingly an open order; hence the respondents were to continue paying it until the Court ordered otherwise.

The payment of compensation as ordered in Kok's case forms an important ingredient of the Court's powers. Section 33 while enjoining the court to take account of the history of dispossession and the hardship caused, specifically requires the court to award compensation in s 33 (eA) and (eC). But the main aim of the Restitution of Land Act, it must be stressed is restoration of dispossessed land. The principal objective of the Act is graphically captured in s 35(1) (a) of the Act as follows:

> *"The court may order the restoration of land, a portion of land in respect of which the claim or any other claim is made to the claimant or award any land, a portion of a right in land in full or partial settlement of the claim."*

[112] It had been said that such an adjectival system is hardly suited to achieving that degree of understanding essential to reconciling deep historical divisions between indigenous and settler communities over land. See P Butt "The Mabo Case and its aftermath: Indiginous Land title in Australia" in G E Van Mannen et al (eds) Property Law on the Threshold of the 21st Century Tilburg MAKLU Uitgevers Anttwerpen- Apeldoorn (1996) 504, hereinafter referred to as Butt.
[113] 1998 (4) SA 1014 (LCC).

The provision continues by giving the Court the powers to order the expropriation of land to accomplish this objective wherever necessary.

It has, in conclusion, to be noted that the jurisdiction of the LCC exist alongside the minister's powers to settle claims through an administrative procedure. The power to settle uncontroversial land claims administratively has since 1998 been decentralized to the director general and the regional land claims commissioners.[114] Although this has led to an increase in land claims settlements, it has been criticized because of it's emphasise on the payment of compensation in lieu of actual land restoration. It is said that the payment of cash raises questions about the objective of the Act and whether such payments are "really an effective way of fulfilling such objective".[115] There is merit in these criticisms because to most people land reform (restitution) means giving land to the landless.[116]

5.5 COMPENSATION

Three different legislative provisions[117] deal with the issue of the payment of compensation for the expropriation of land. Section 25(2), read with s 25(3) of the 1996 Constitution makes the expropriation of property subject to the payment of compensation, the amount, time and manner of the payment which must be just and equitable. The phrase "just and equitable" compensation is, however, limited to cases where there has neither been an agreement between the parties or a court decision on the point.[118]

What is a just and equitable compensation? Unfortunately none of the three pieces of legislation under consideration, namely, the interim constitution, the 1996 Constitution and the Restitution of Land Rights Act as amended by Act 63 of 1997 which all make reference to this phrase directly defined it. It was thus left to the court to work out what the phrase means. This has proven to be a difficult task. The views on the definition of just and equitable compensation have been divergent, sometimes reflecting a bewildering array of ideological differences.

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[114] De Villiers op cit at 59.
[115] Ibid.
[116] M Brown "Private Efforts at Reforms" in P Doner Land Reform in America: Issues and Cases Madison University of Winsconsin (1971) (eds) 243, hereinafter referred to as Brown.
[117] See s 28 and s 25 of the interim and final Constitutions respectively make provisions for agreement on compensation payable. Where this happens, the matter is resolved; hence there is no need for a detailed analysis on the subject.
[118] Where there is a competent court decision on compensation the matter should also be considered as resolved, subject to either party's right of appeal.

Generally, compensation has been rendered in different formulae in various municipal and international instruments. Terms such as just, adequate, appropriate, fair equitable etc. have been used to qualify compensation. Although these formulae are not actually arbitrary, an analysis of both international case law and the literature shows that the meanings of these different formulae cannot be given with absolute certainty.[119] In Joubert's case,[120] the phrase was described as an unguided missile whose meaning would depend on the idiosyncrasy of a particular judge.

Against this backdrop it must be observed that the word "compensation" should ordinarily not be difficult to construe. Literarily the word has a strong connotation of equality between what is given and what is taken away. It connotes a fair proportionate recompense for what has been taken.[121]In South Africa, the controversy has revolved around the question of whether just and equitable compensation should be determined with reference to the market value of the expropriated land or not. It has been argued by H van Schalkwyk and J van Zyl that South African land reform process should as much as possible be land market driven.[122] It follows from this approach that a less than market value compensation is a non-market oriented approach, which in their view may be in conflict with the goals of a rapid restitution of land.

A similar argument was seemingly raised in the First Certification[123] case where objections were taken with regards to the phrasing of the compensation provision of the 1996 Constitution. It was argued that the provision was in conflict with the universally accepted fundamental rights in Constitutional Principles II. The contention was based on the view that for compensation to be just and equitable, it must be calculated on the basis of the market value of the land.

The Constitutional Court, interestingly, did not accede to these propositions. It held that there are no consistent means for formulating the criteria for determining the amount of compensation. Having noted the absence of universally accepted criteria for determining compensation the Court stressed that each state, by implication, is perfectly at liberty to determine its criteria for ascertaining what is just and equitable.

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[119] Eiseberg op cit at 412.
[120] Supra.
[121] Minister of Land v Slamdien Supra.
[122] H Van Schalkwyk and J Van Zyl "The land market" in J van Zyl et al (eds) Agricultural land reform in South Africa: Policies, Markets and Mechanisms Cape Town Oxford University Press (1996) 310, hereinafter referred to as Van Schalwyk and Van Zyl. The authors did, however, take account of the peculiar land history of South Africa covering centuries of the forced removal of blacks from their ancestral land by the ancestors of the current owners.
[123] (1997) 2 SA 97 (CC).

This in South Africa will mean that regard is to be had to peculiar socio-political question of recognising that what is being paid for is land dispossessed by the ancestors of South Africans of European extractions.

Van der Merwe et al[124] have supported the conclusions of the Constitutional Court in the First Certification case. These authors acknowledged that ordinarily just and equitable compensation should require market value compensation. They, however, conceded that South Africa was peculiar because of the inclusion of additional factors, which needed to be taken into account in ascertaining the compensation payable.

Although not so stated expressly the Constitutional Court's view reflects an inclination to grapple with the threshold question permeating the entire scope of constitutional jurisprudence in the new South Africa. This relates to the need to balance competing interest in the interpretative approach of the reform oriented provisions of the new constitution. This candidate, however, believes that the same court in the FNB's case[125] has rightly noted that the history of the massive dispossession of Africans should be a primary consideration in determining the construction of constitutional provisions.[126] The objective of this balancing should, in the opinion of this writer, be to ensure that the limited resources of the State for acquisition of land for restitution are not dissipated by the payment of exorbitant compensation.

Justification for this conclusion is to be found in the fact that at the heart of the land debate, both before and after the constitutionalisation of property, is conflict over land.[127] The primary feature of this conflict is the strong revulsion felt by millions of black South Africans for the injustice associated with their dispossession by a settler class who have no legitimate natural claim to the land.

This candidate agrees with the views expressed in the debates preceding the new constitution that compensation in terms of market value was going to have adverse consequences for the desire to build a stable post apartheid state. It was

[124] C G Van der Merwe and J M Pienaar 'Law of Property (including Real Security)' (1996) Annual Survey 336, hereinafter referred to as Van der Merwe and Pienaar (1996).
[125] Supra.
[126] See page 115 of chapter 4.
[127] G Budlender "Urban Land Issues in the 1980s: The View from Weiler's Farm" C Murray No Place to Rest Forced Removal and the Law in South Africa Cape Town Oxford University Press (eds) (1990) 300, hereinafter referred to as Budlender.

argued[128] that market value oriented compensation was inappropriate in South Africa for a variety of factors. Such a compensation paradigm spirals the cost of land redistribution and thereby making it unlikely that the State will prioritise it in the face of other pressing needs like education and health. Another of its weaknesses is its stress of an adversarial system in which the beneficiary gets the land while the expropriated landowner the compensation. The latter factor carries with it immense possibilities for tension and impact negatively on the critical need for reconciliation.[129]

Both the 1993 and 1996 constitutions specifically identified the factors which must be taken into account in assessing compensation in s 28(3) and s 25(3) (a) –(e) respectively. Section 25(3) (a) –(e) refers to the current use of the property, the extent of direct state investment in the acquisition and beneficial capital investment of the property and the reason for the expropriation. Section 25(3) of the Constitution widens the scope by including more factors which should be considered before the determination of compensation.

It is plain from a careful analysis of s 25(3) (a)-(e) that the idea of a just and equitable compensation is conditioned on a policy that considers the broader development interest of the state. Nevertheless, apart from my understanding of the FNB case, I strongly believe that there are distinctive new features in s 25 which reveal that the need for redistribution to enhance access to land by the dispossessed should be prioritised more than the right to compensation.

Firstly s 25(3) (b) raises the issue of the manner in which the property was dispossessed as a relevant factor to be considered in assessing compensation. It has been stated that where land was taken from individuals or communities and sold to new owners at ridiculous prices, this should be taken into consideration.[130] The case of the Mfengu dispossession in Tsitsikamma is an excellent representative example of these concerns.

These people were brutally removed in 1977 and their land was sold to white farmers at a third of their original value. These farmers were giving an additional 100 percent government bond under the Agricultural Credit Act 28 of 1966.[131] This point brings to the fore the critical issue of the legitimacy of the property rights of the

[128] A Claassens "Rural Land Struggle in the Transvaal in the 1980s" in C Murray and C O' Regan No Place to Rest: Forced Removals and the Law in South Africa Cape Town Oxford University Press (eds) 1993 425-426, hereinafter referred to as Claasssens.
[129] Ibid.
[130] Van der Merwe and Pienaar (1996) op cit at 336.
[131] Claassens op cit at 424.

present landowners and remains a profoundly vexing question with a potential to destabilise the restitution and redistribution mechanisms if not handled with sensitivity. Section 25(3) (e) which expressly states that the manner of acquisition be taken into account must be understood in the light of what has been contended above.

Secondly, whereas under s 28 of the 1993 constitution only the current use of the property was to be considered in determining just and equitable compensation, by s 25(3) (a) and (b) both the past and current use of the property are factors to be considered. Chaskalson and Lewis[132] as well as Van der Merwe and Pienaar stressed the relevance of this factor by observing that the keeping of land idle for speculative purposes must bear on the assessment of compensation.[133] The relevance of this contention may be seen from an observation of land holdings in South Africa, which reveal that huge acreages of land have been fenced up, sometimes for use as private game or recreational reserves in the face of massive landlessness.

This phrase puts a substantial discretion in the hands of the State in the course of determining when compensation is just and equitable. It may, for instance, decide to introduce the use of bonds for the payment of compensation and this could be considered as a manner of payment for purposes of the provision. This is arguably a positive element, because it reduces immediate financial pressure on State resources and has a potential for facilitating the restitution process.

The third new constitutional factor which determines the assessment of when compensation is considered just and equitable is the phrase "the amount of compensation and the time and manner of payment must" in s 25(3). It has been stated that this now means that the amount of compensation, the time and manner of payment are matters, which must be considered. This is in sharp contrast to the provisions of s 28 of the interim constitution which limited the factors to be taken into account only to the quantum of compensation.[134]

In view of the historical injustice of the past land distribution, the consideration of the history of acquisition as well as the use to which the land is put

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[132] M Chaskalson and C Lewis "Property" in Constitutional Law of South Africa Kenwyn Juta and Co (1996) para 31-24, hereinafter referred to as Chaskalson and Lewis.

[133] Van der Merwe and Pienaar (1996) op cit at 337. Black rural communities invariably received either grossly inadequate compensation or none at all for their land expropriated by the minority government. Various reasons accounted for this, including, as Jaichard has said, the idea that Africans were "foreigners" who must not send their claims to Pretoria. The Coloured did not fare any better either because the compensation paid for the expropriation of their properties under Group Areas Acts was always insufficient to purchase new ones from white land speculators who, because of their insider knowledge, benefited from the forced removal schemes. See V Jaichand Restitution of Land Rights The Forced Removal Schemes: A Workbook Johanesburg Res Patria (1997) 18-19.

[134] Van der Merwe and Pienaar (1996) op cit at 338.

are the most critical factors in the determination of just and equitable compensation. This view is correct because it results in calculating compensation in a manner which will avoid "windfalls for the landowners and make land more affordable for purpose of land reform."[135] The state has, however, been reluctant to exploit this approach, preferring instead the willing seller and willing buyer option which is predicated predominantly on market -related prices with its potential for inflated compensation.

This philosophy seemingly accounts for the Land Claims Court's holding in Farmer Highland Residents in Re Ash v Department of Land Affairs[136] that in matters of compensation for expropriation market value was only the starting point. The Court stated that the factors contained in s 25(3) could reduce or increase the actual compensation. This decision is unfortunate and objectionable because of the tendency by the Court to award more rather than less the market value compensation.[137]

The Land Claims Court appears to be giving conflicting signals, although generally suggesting a liberal interpretative direction. This is unfortunately contrary to the Constitutional Court's clear and categorical position in the First Certification case. In Ex Parte S. Duksh and R.T Dulabh,[138] the Court, in a preliminary application held that compensation should be given a broad and generous interpretation. It reasoned that this interpretative course is imperative because of the requirements of equity and justice. It is difficult to speculate on what broad and generous means in the context of the ruling since the substantive issue of compensation was not decided. It is, however, likely to imply a handsome payment which technically could be higher than market value. This conclusion appears compelling because the applicants sought the substantive compensation after they had repurchased the property themselves.

The same Court curiously took an entirely different approach on the issue of compensation which must always be read in the context of the just and equitable qualification. It held in Ex Parte Elandskloof Vereeniging[139] that it was not its role to investigate the validity of the claim or the reasonableness of the settlement. This is a startling preposition because it seemingly turns the court into an institution meant to

[135] E Lahiff and S Rugege A critical assessment of land redistribution policy in the light of the Grootboom jugdment (2002) 6 Law, Democracy and Development 283.
[136] 2000 (2) All SA 26 (LCC).
[137] Lahiff and Rugege op cit at 283. See also Farmerfield Community Property Trust In re1999 (1) SA 936 (LCC). Contrast with Khumoho & Others v Potgietier and Others 2000 (2) All SA 406 (LCC) where the Land Claims Court revised agreed value compensation downward because of the history of the acquisition of the land.
[138] (1997) (4) SA 1108 (LCC).
[139] (1999) (1) SA 176 (LCC).

rubber stamp the Claims Commissioner's view on issues, which are within the LCC's jurisdiction.

In the case under reference, the Court acceded to a compensation of R3,950,000,00 without any reference as to how this was arrived at. This cannot be right or justified on the basis of the mutual settlement of the parties. Section 25(3) places an onerous responsibility on the court to construe compensation in a manner reflecting a balance between the interest of those affected and that of the public at large. Where compensation is paid from limited state resources it is indefensible for a court to assume this type of hands off approach under the guise that it reflects the parties' agreement.

The Land Claims Court moved further on this part when it boldly took a position which is in conflict with the Constitutional Court's interpretative directive in the First Certification case in Ex Parte Farmerfield Communal Property Trust.[140] It held that compensation must be worked out according to market value at a specific date. It concluded that the date should be the date of the actual expropriation noting that the assessment should not be done subsequently for fear of the potential for change of market value with time.

The Land Claims Court's interpretation of just and equitable compensation is regrettably flawed.[141] Quite apart from the Constitutional Court's directive, just and equitable compensation has even from a comparative law perspective has not always been synonymous with full or market value compensation. Ntusi Mbodla,[142] relying on Grace Br. (Pty) Ltd v The Commonwealth[143] and Nehingaloo (Pty) Ltd v The Commonwealth,[144] demonstrates that just compensation is determined with reference to fairness in view of the interest of the parties and that of the public. According to him, this demands a careful consideration on a case-by-case basis.

Even from an analytical perspective scholars do not seem to have expressed consistent opinions on what just and equitable compensation entails either. Mostert,[145] for instance, assumes that compensation paid pursuant to the Expropriation Act 63 of 1975 qualifies as just and equitable compensation in the present dispensation. He sees

[140] Supra. Here the court used the services of surveyors to ascertain the market value of property.
[141] Such an interpretation will mean that both urban and rural poor non-whites most of whom are victims of apartheid land policies may, technically, be required to contribute through direct or indirect taxation to the budgetary appropriations to support the payment of compensation. This is definitely unjust.
[142] N Mbodla 'Compensation for pecuniary takings: Making sense out of nonsense' (2001)16 SA Public Law 430.
[143] (1946) 72 CLR 269.
[144] (1948) 75 CLR 495.
[145] H Moster ' Land Restitution, Social Justice and Development in South Africa (2002) 119 SALJ 411.

just and equitable compensation as reflecting a fair *quid pro quo* payment for the land expropriated. Miller and Pope[146] suggest that market value should be the point of departure in the assessment of a just and equitable compensation. They noted that the compensation could then be adjusted either upward or downward as the facts determine. Their argument that compensation, in theory, could even be above market value was based on the approach adopted in jurisdictions like Germany, Sweden, The United Kingdom, Ireland, Australia and Japan.

A similar preference for a higher than market value compensation was articulated by M Chaslkalson although the author also made reference to the less than market value approach.[147] Beginning from a premise that the expropriation statute will make provision for quantifying "just and equitable" compensation, they argue that where this happen, the court would be bound to follow such assessment if it is higher than that calculated under s 25(3). This contention is rationalised on grounds that though s 25 (3) is couched in imperative terms, as a bill of rights it sets minimum standards. They note that it is always open to the State to extend more protection than those prescribed in a bill of rights and suggest that it may be in the public interest to pay greater than market value compensation in exceptional cases.[148] They did not make any reference to the impact of a more than market value compensation preference on State resources and how this may affect the delivery of restitution to the previously dispossessed. Nor did they address the issue that access through the restitution process is a human right that should not be potentially impaired by the cost of compensation.

Badenhorst, Pienaar and Mostert's make reference to the Expropriation Act of 1975 as providing guidance for the calculation of just and equitable compensation.[149] These scholars contend that on the interpretation of the Expropriation Act of 1975, compensation should reflect market value plus the actual financial loss caused by the expropriation. They also observed that interest and solatium might also be added. They nevertheless pointed out that s 25 (3) of the 1996 Constitution has introduced new factors and thus have changed the basis for the calculation of compensation.[150]

This candidate is with respect, uncomfortable with the calculation of compensation on the bases of the Expropriation Act of 1975. The Act is an apartheid

[146] Miller and Pope op cit at 302.
[147] Chaslkalson and Lewis at paragraph 31-23.
[148] Ibid. They, however, observe that compensation should depend on the benefit that accrues to the state and therefore hence what is essential is not the loss to the owner. See paragraph 31-24.
[149] Badenhorst et al op cit at 103.
[150] Ibid at 105.

era legislation that did not contemplate the spirit of the new property regime of post independent South Africa. This spirit (in the opinion of this candidate) makes the restoration of dispossessed land the major perspective of the present property dispensation in ways that could not have been foreseen by the Expropriation Act. The Constitutional Court pointed at the correct direction on the issue of compensation in the First Certification case already alluded to above. This case must be accepted as reflecting the new property law spirit, which ought to have a profound influence on the matter of the assessment of compensation.

It is profoundly disturbing that the Constitutional Court's views have been largely ignored in practice. The High Court appears, regrettably, to have favoured the definition of a just and equitable compensation as determined by the Expropriation Act in Mooikloof Estate (EdMS) BPK v Premier Guateng.[151] The latter Court held that compensation should be ascertained with regards to s 12 of the Expropriation Act 63 of 1975. Under this provision, compensation should reflect the value or price that the land would have obtained if sold in the open market by a willing seller to a willing buyer. The Act technically permits compensation to include an additional amount to make good any financial loss caused in the process.

Even assuming that compensation based on the Expropriation Act of 1975 is correct, the Mooikloof Estate case will still not be an appropriate guidance in ascertaining just and equitable compensation. The expropriation of land for a road upon which this case is based cannot be equated with expropriation of land for restitution or redistribution. The latter objective with which s 25 of the 1996 Constitution is concerned weighs much more than the construction of a road to provide access to a few privileged people.[152]

It is contended that Corbett C J's decision in Davis and Another v Pietmermaritzburgburg City Council[153] rejecting the view that account should be taken of the land's potential for future development and other possible uses in assessing compensation under s 12(1) (a) (11) of the Expropriation Act is persuasive

[151] 2000 (3) SA 463 (T). In an earlier decision in Ex Parte Elandskloof Vereniging Supra the Court took an expansive view of just and equitable compensation. In the former it was held that it is not the court's role to investigate the fairness of compensation while in the latter it was stated that compensation was to be according to market value at a specific date. These cases may, however, be understood in the context in which they were given. The Court was at this early stage still getting to terms with the enormity of the post apartheid property changes.

[152] The High Courts have a pro compensation view and tend to insist on the award of compensation at the slightest interference with land rights. They are inclined to award compensation when public servitudes are acquired even where legislation is not categorical on the point. See Cheadle et al (eds) South African Constitutional Law: The Bills of Right Durban Butterworth (2002) 435.

[153] 1989 (3) SA 765 (A).

authority for the above views. This is so because although this candidate has expressed reservation on the reliance on the Expropriation Act, it is yet to be repealed.[154] Besides, the judge's reasoning that more than market value compensation is unreasonable, speculative and unrealistic appears objectively unassailable.

Such a view of compensation is unsound for the additional reason of blurring the distinction between it and the private law concept of damages. This distinction is important. In damages, the idea is to undo the result of an unlawful act. This requires the court to assess damages with a view to putting the victim in the position he/she would have been had the unlawful act not taken place. This has a strong moral ring and in practice involves the award of full damages which traditionally include loss of income and profit. Compensation for expropriation is in contrast different because it takes into account the public interest elements in the use of property.

Compensation is conceptually therefore not meant to fully redress a wrong or repay all possible losses. It is meant to replace the object with its value simpliciter.[155] In point of fact this distinction is of particular resonance in South Africa because of the perceived illegitimacy of the title of the majority of white landholders whose property may be required for expropriation. This view of compensation is reasonable because of its potential to strengthen the inevitable need for post apartheid redistribution of land and wealth.[156]

The idea of conditioning the assessment of compensation with the aims of redistribution is widespread. It determined the basis for the assessment of just compensation under the Fifth Amendment of the American Constitution. The American Supreme Court had, in large measure, adopted an approach, which is concerned more with the aim of redistribution and less with the issue of the relative inviolability of private property.[157] This would seem to be in conformity with the prevalent post revolutionary view and the original objective of the drafters of the

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[154] See page 158.

[155] D Kleyn 'The Constitutional Protection of Property: A Comparison of the German and the South Africa Approach' (1996) 11 SA Public Law 442.

[156] Compensation for victims of dispossession in lieu of the restoration of the actual land may be based on the market value criteria. This is justified because of the legitimacy factor in the titles of the natives who are the undisputed owners of lands in the country from time immemorial. The writer is of the view that it should be both unjust and inequitable to treat this specie of claimants in the same way with white landowners who simply took what did not in truth belong to them.

[157] R Bauman 'Property rights in the Canadian constitutional context' (1992) 8 SJHR 58. Contrast with cases indicating a heightened protection of property necessitating the payment of compensation. e.g. Keystone Bituminous Cool Association v De Benedictus 107 SCT 1232 (1987). See Bauman loc cit. See also the view that in the US compensation entitles the exppropree to the payment of prompt adequate and effective compensation which is interpreted to mean the full value of the property. See Eisenberg op cit at 415.

American Constitution. It may, in this respect, be pointed out that the US in the immediate post revolutionary years did not have safeguards in the Constitution against uncompensated takings of property from private persons by the government.[158]

There is a consensus among nations that compensation requires a consideration of all the relevant factors. Such an approach has increasingly led to a less than market value criteria in the determination of compensation both among nations and at international law.[159] In INA Corporation v Iran,[160] it was stated that appropriate compensation is now the correct standard and this was interpreted to mean a discount from the market value. The arbitrator in this case noted that there was widespread international practice of the refusal to equate appropriate compensation with full compensation. Indeed the tendency for a society coming out of major upheavals like Japan did after the Second World War is to pay less than market value for land expropriated for land reform purposes.[161]

The less than market value compensation may be said to be contained in the United Nations resolution 1803 of 1963 which prescribe for the payment of appropriate compensation. Although there have been conflicting views on what this standard entails, it is safe to rely on its definition in the INA Corporation[162] case herein. Eisenberg supports this view when he said that appropriate compensation might denote partial compensation.[163]

Compensation can, in the peculiar context of South African land history be loosely classified into compensation paid for expropriation and that paid in lieu of the restoration of land. The present discussion has so far been based on the former. It seems apt to deal with the latter in order to get a balanced view of the post-apartheid property dispensation. A correct view of the restoration of the right in land is important as it throws light on the present writer's preference of a less than market value assessment of compensation.

Section 2(2) of the Restitution Act precludes any person who had received a just and equitable compensation at the time of dispossession from claiming restitution under the Act. In order to determine whether this was received, the court is expected to have regard to the factors set out in s 25(3) of the 1996 Constitution. This criterion

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[158] Bauman loc cit.
[159] Eisenberg op cit at 417.
[160] 8 Iran-USCTR 373 (1965). See also Eisenberg op cit at 413.
[161] Eisenberg loc cit.
[162] Supra
[163] Eisenberg op cit at 418.

is different from that in s 33 of the Restitution Act, although some of them overlap. It is thought that s 33 of the Restitution Act ought to be the basis for assessing compensation payable for persons who cannot get their land restored to them under the Act. The Land Claims Court seemingly opted for this approach in Hermanus v Department of Land.[164]

The applicant claimed compensation instead of restoration for the sale of his property which had been a place declared as a white area. He called evidence of the traumatic psychological impact of the dispossession, including the death of his wife from mental trauma. The court rightly held that the assessment of compensation should in cases of this nature include non-financial loss such as that which the applicant and his family had been exposed to. It is worth observing that a distinction was drawn between these forms of compensation with that prescribed under s 25(3) of the Constitution. In stressing the need to incorporate this extra compensation Gildenhuy J stated that this was dictated by the ordinary principles of justice. This ordinary demand of justice includes not just the value of the land, but also the emotional distress of the event itself. It may, in fact, be possible that the court did not have the generalised deeply traumatic psychological effects of the forced removals of blacks in mind.

5.5.1 COMPARATIVE LAW ON COMPENSATION (INDIA)

Although the scope of this research does not contemplate a full-blown comparative study, it is for reasons stated below proposed to compare the judicial determination of a just and equitable compensation in South Africa with what obtained in India. The choice of India is not arbitrary. Firstly, the Indian constitutional property regime is like that of South Africa comparatively nascent vis-à-vis those of Germany, the United Kingdom, and the United States etc. Moreover, it is thought that India shares significant similarities with South Africa. At independence, the Indian society was characterised by deep social inequality[165] with a large oppressed majority deprived of land, while a privileged few had appropriated much of the country's land.

Another significant factor for the choice of India as a basis for a comparative analysis lies in the similarities in both countries' property provisions at independence. Article 31(1) and (11) of the Indian Independence Constitution permitted the

[164] (2000) 4 ALL SA 499 (LCC).
[165] S S Sharma "Property in Indian Law" in G E van Maneen et al (eds) Property Law on the Threshold of the 21st Century Tilburg MAKLU Uitgevers Antwerpen- Apeldoorrn (1996) 347, hereinafter referred to as Sharma.

deprivation of property with the authority of law for a public purpose subject to the payment of just compensation.[166] The compensation provision in s 25(2) has a striking resemblance to the above Indian provision.

At the core of the Indian constitutional provision was the land philosophy expounded by leaders like Mahatma Gandhi. He insisted that land should be surrendered for distribution to needy people.[167] This feature of Indian property law history is relevant because it reflects the South African land history in many important respects. Some of the Indian constitutional amendments that sparked a controversial clash between parliament and the judiciary were intended to protect land reform laws[168] from challenges most of which were over the scope of compensation. This makes Indian law on the point a rich source of comparative law for other commonwealth countries.[169]

It has to be stressed here that recent precedent from the United States of America will not altogether be appropriate in assisting South Africa chart a sensitive property law course with regards to compensation for expropriated land. The reason for this conclusion is the distinctive anti-people feature of property in the United States.[170] Those who won the contest over the new Republic were pre-occupied with the protection of private property. The federalists were focused on the idea that property rights had to be protected from democratic legislatures. It was thus inevitable that the American Constitution was formulated in a private property centred fashion. Nedelsky captures the pre-eminence given to property thus:[171]

> *"The original focus on property placed inequality at the center of American constitutionalism. For the framers, the protection of property meant the protection of unequal property and thus the insulation of both property and inequality from democratic transformation…. It also meant that the illegitimacy of redistribution defined the legitimate scope of the state. The inherent vulnerability of all individual rights became*

[166] Ibid.
[167] Ibid.
[168] The Ninth Schedule to the Forth Amendment of the Indian Constitution listed 13 land reform laws that were immuned from challenges under fundamental rights. See Allen op cit at 50.
[169] T Allen The Right to Property in Commonwealth Constitutions Cambridge Cambridge University Press (2000) 54.
[170] J Nedelsky "Should Property be constitutionalised? A relational and comparative approach" in G E van Maneen et al Property Law on the Threshold of the 21st Century Tilburg MAKLU Uitgevers Antwerpen- Apeldoorn (eds) (1996) 2, hereinafter referred to as Nedelsky.
[171] Ibid.

transformed into a fear of the people as a threatening propertyless mass whose powers must be contained."

A constitutional framework that was designed to protect a propertied minority from a "propertyless mass" appears to be diametrically opposed to the ideals that informed the constitutionalistion of property in South Africa. Compensation for the expropriation of land in South Africa had, as its objective, the country's commitment to facilitating access to land by the propertyless majority who were dispossessed of land. American constitutional property is historically antithetical to this ideal.

J Nedelsky further argues that the judiciary tipped the balance further in favour of the protection of property against a perceived threat from the people. She noted that the establishment of judicial review could be considered the culmination and consolidation of federalist conceptions[172]on property. It is thus necessary to be very circumspect when reviewing the United State's precedent dealing with important property law notions.

The question of the adequacy of compensation was the focus of a destabilising controversy between the executive supported by the legislature and the judiciary[173] in India. By article 31(2) of the Indian Constitution, the expropriation of property is subject to the payment of a just and fair compensation. The Indian courts defined a just and fair compensation (which is similar to just and equitable compensation under s 25) as market value of the property taken or equivalent money value of the property taken.[174]

But the Indian government was reluctant or unwilling to pay market value especially for expropriated land. It instead introduced the Constitution First Amendment Act, 1951 to accomplish its designs. The first Indian Prime Minister Pandit Jawahar Nehru rationalised his unwillingness to pay full compensation for expropriated property including land on grounds similar to those in South African land reform justifications. He contended that full compensation could not be given for two reasons, namely, the meagre resources of the State and the State's aim of creating a new social order where, *inter alia*, economic disparity should go.[175]

The First Amendment was challenged in The State of Bihar v Kameshwar Sing.[176] The Indian Supreme Court did not hesitate to describe its policy of taking of

[172] Nedelsky op cit at 7.
[173] Sharma op cit at 349.
[174] Ibid.
[175] Ibid.
[176] AIR 1952 SC 252.

the whole and returning of half as introducing naked confiscation of property. The Court declared it as amounting to a disguised fraud on the Constitution "no matter whatever specious form it may be clothed."[177]

Reacting to the Court's judgment, the legislative took a drastic decision to introduce the Fourth Amendment Act of 1955 which simply ousted the jurisdiction of the courts from enquiring into the adequacy or otherwise of compensation. This approach characterised a change of emphasis by the legislature. Sharma[178] describes this legislation as socialist in content because it prioritised the need for post independence reconstruction more than the right to be paid full money equivalent for expropriated property. Unfortunately for the legislature, the Supreme Court did not allow it to amend the Constitution to attain its objective. The Court in Karimbilhukoman v State of Karala[179]reiterated its position that no law may infringe the fundamental rights to property, not even when it constituted an attempt to give effect to goals set out in the directive principles of the same Constitution.

However, it has been shown that the Court did not consistently apply this view of the status of fundamental rights and its decisions in this area were difficult to reconcile.[180] For example, in Shankari Drasad Singh Deo v Union India[181] the Court rejected challenges to legislations providing for the expropriation of land for reform purposes, even though these were in conflict with the fundamental right to property.[182]

The legislature's intention to achieve a less than market value definition of just compensation was partially successful when it innovatively shifted the emphasis from compensation to the payment of an amount for taking private property in the 25th Amendment. The Supreme Court held that the amount need not necessarily be market value compensation.[183]

The present position on compensation in India derives from the legislature's apparent victory in successfully enacting the 44th Amendment[184]and the Supreme Court's positive approach to the creation of conducive conditions for the attainment of socio-economic rights such as accessing land and eradicating poverty. In Woman Rao

[177] Sharma op cit 349.
[178] Sharma op cit at 350.
[179] AIR 1962 SA 732.
[180] Perre de Vos 'The economic and social rights of children and South Africa's transitional constitution' (1995) SA Public Law 233 - 259.
[181] AIR 38 1951 SC 458.
[182] De Vos op cit at 87.
[183] See Keshvanand Bharti v State of Karala AIR 1973 SC 1461.
[184] Sharma op cit at 350.

v Union of India,[185] the Court stressed the need to create socio-economic conditions in which there can be social and political justice for everyone. It condemned as unacceptable a situation (akin to what obtains in South Africa) where many are steeped in poverty and destitution.[186] It is submitted that there are good reasons why South African law on the assessment of compensation should not follow the Indian example, particularly as the mode of the acquisition of private property by the present owners was largely unconscionable.

5.6 ACCESS THROUGH LAND REDISTRIBUTION AND TENURE REFORMS

5.6.1 LAND REDISTRIBUTION

The land redistribution policy received final constitutional expression in s 25(4) (a) and s 25(5) of the 1996 Constitution. Both provisions view the redistribution policy as relating to the creation of conditions that will enable citizens to gain access to land on an equitable basis. These provisions prioritise the implementation and promotion of an equitable, effective and successful programme of transformation and land reform.[187]

The land redistribution programme was conceived as a very broad land reform. To this extent, it was a response to the wider and more complex land holding imbalance dating back to colonial occupation. It reflects a recognition that the dispossession of indigenous inhabitants during the colonial period caused a deeply felt sense of injustice and a strong demand for redress which couldn't be satisfactorily dealt with by the restitution process. It was not meant to be a direct response to land dispossession and for this reason falls outside the scope of this thesis.

One has to however observe briefly that of the three aspects of post independence land structure viz restitution, redistribution and tenure reform it is the redistribution scheme which is perceived as giving better effect to s 25(5) of the Constitution.[188] This is because it places a direct obligation on the state to create

[185] The Supreme Court decision in Golak Nath v State of Punjab AIR 68 (1981) SA 271 which deals with the 17th Amendment has been interpreted differently by two respected writers. Sharma notes that it abridged property rights but credit it for validating all amendments up to the 17th amendment. De Vos on the other hand regards it as shaking the legal and political world in India by declaring that the fundamental right to property was sacrosanct. On the question of compensation and the realisation of socio-economic rights, this decision could be construed to favour less than market value or equal value for expropriated property depending on which side of the Sharma /De Vos view one holds. See De Vos op cit at 232-233. See also Sharma op cit at 181-182.
[186] Ibid. See also De Vos op cit at 233.
[187] Van der Walt (1999) op cit at 342.
[188] Lahiff op cit at 292.

reasonable conditions to improve access to land. Although the constitution did not and indeed could not have indicated the precise details of what this reasonable condition entail, a fair idea of what they may be is derived from the Government White Paper on land Reform. The White Paper, said Lahiff et al[189] is broadly in line with s 25(5) and sets out the aim, intended beneficiaries and the expected benefits of the redistribution scheme. It states thus:[190]

> *"The purpose of the land redistribution programme is to provide the poor with access to land for residential and productive uses in order to improve their income and quality of life. The programme aims to assist the poor, labour tenants, farm workers, women as well as emergent farmers. Redistributive land reform will be largely based on willing buyer willing seller arrangements. Government will assist in the purchase of land but will in general not be buyer or owner. Rather, it will make land acquisition grants available and will support and finance the required planning process. In many cases, communities are expected to pool their resources to negotiate, buy, and jointly hold under a formal title deed. Opportunities are also offered for individuals to access the grant for land acquisition."*

The objective of facilitating access to land for the poor including labour workers, farm workers, women and emergent farmers shows that the programme is essentially a response to the incidents of colonial, apartheid and current dispossessions. The land redistribution scheme relating to labour tenants and farm workers is therefore partially relevant to this research because it assist these categories of persons who meet the relevant criteria to gain access to land.

5.6.2 LABOUR TENANCY

The tenure reforms introduced in the new constitutional dispensation have been dealt with in terms of the categories of persons addressed by the reforms in the legislations. When approached from this perspective, the promulgation of the Land Reform (Labour Tenants) Act 3 of 1996 was meant to address the plight of labour tenants. The position of farm workers and others living on land not registered in their

[189] Ibid.
[190] Ibid.

name was taken up by the Extension of Security of Tenure Act 62 of 1997[191] and the Prevention of Illegal Eviction From Unlawful Occupation of Land Act No of 1988.

Labour tenancy is a resilient form of land holding which in the peculiar case of South Africa emerged after the European conquest of the indigenous peoples of the country. A labour tenant is a black person, who for want of his own land offers his/her labour (often including those of his dependants) to a white farmer in exchange for a place to live and land to plough or graze stock.[192] This was especially beneficial to the white landowner as it permitted him to exploit the land without having to exert any labour. In some instances, it allowed the landowner to live in ease in urban areas while black workers put the land into productive use on his behalf. Because labour tenancy was a direct consequence of land dispossession, the practice was as widespread as the dispossession that caused it.[193]

Section 25(6) of the 1996 Constitution creates a right to a secure tenure for persons or communities whose interest in land is "legally insecure as a result of past racially discriminatory laws or practices." The content of this right is determined by an act of parliament, subject to the constitutional expectation that such reformatory acts should lead "either to tenure which is legally secure or to comparable redress."[194] This situates the measures adopted to enhance security and upgrade the occupational interest of labour tenant and farm workers within the ambit of this thesis.

The study, however, excludes measures in this part of property law that do not have any direct link to dispossession on the basis of racially discriminatory laws and practices occurring from the 19 June 1913. There is therefore no reference to such matters e.g. the protection offered by Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction From Unlawful Occupation of Land Act No of 1988.[195]

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[191] J M Pienaar 'Labour Tenancy: Recent Development in Case Law' (1998) 8 Stellenbosch Law Review 428, hereinafter referred to as Pienaar (1998).

[192] Pienaar (1998) op cit at 424.

[193] Labour tenancy, though classified as a form of African tenure in white South Africa, is not natural to Africans in the sense that it does not have its roots in traditional customary practice. Blacks accepted it because they had nowhere else to go after their forced removal from their land. It was through it that they kept hope alive since it allowed them to maintain continued links with their ancestral lands. Although initially beneficial to European farmers, it was subsequently to come under very strident attacks by successive apartheid regimes. It however managed to survive until the democratic transformation resulting in the enactment of the interim and 1996 constitutions. See Budlender and Lasky op cit at 170. See also Horthon op cit at 105.

[194] See s 25(6) of the Constitution.

[195] The scope of the application of these Acts is sufficiently expansive to cover a wide range of people with insecure residence rights on land. Roux makes the point that ESTA extends protection to common law leases that also satisfy the definition of occupier in s 1(1) of the Act. PIE is seemingly enacted to

Pursuant to this constitutional mandate, the parliament passed various land legislations to reform the system of land tenure. The Land Reform (Labour Tenants) Act 3 of 1996 as amended primarily protects labour tenants from arbitrary evictions. In the White Paper on Land Reform[196] it was stated that the Act has a two-fold objective. Besides being anti eviction, the Act also made provision for the acquisition of land by existing labour tenants through the Settlement/Land Acquisition Grant scheme. Section 5 read together with sections 7 and 13 of the Act strongly protects the tenant from arbitrary evictions. This is because taken together they require that a tenant may only be evicted by the order of the Land Claims Court and only in certain circumstances.[197]

Although the Land Claims Court conceded in Zwane v Mbuyane[198] that it does not have automatic review jurisdiction over orders of eviction granted against labour tenants, the protection provided to them nevertheless remains commendable. T Roux,[199] citing Thukela Wildlife CC v Mvelase,[200] stated that the Court has jurisdiction in terms of s 30(1) of the Labour Tenant Act read together with s 22(1) (CC) of the Restitution Act to determine if a labour tenant's right to occupy land has been validly terminated. This right is unaffected by the fact that the tenant was at the time of the institution of the proceeding not a labour tenant. Generally, under s 13(IA) (b)) of the Labour Tenant Act, a magistrate should not proceed with a case for eviction when the tenant has applied for a grant of the land in terms of s 16(1) of the Labour Tenant Act. Once a respondent in a claim for eviction makes a prima-facie case that he/she is a labour tenant, the matter would be transferred to the Land Claims Court.[201]

An important feature of the Act is found in section 26 under which labour tenants who meet the legislative qualifications may apply for award of land or particular land right and financial assistance.[202] This provision is essentially restorative in content. Thus under section 16 (1) (a)-(b) of the Act labour tenants could apply for the land they or their predecessesor's had occupied as tenants for 5

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deal with land invaders who appear to have become emboldened since after the democratic transformation. See Roux (2000) op cit at 410.

[196] See note 30 chapter 4.

[197] Such an order of eviction must be in terms of the Act.

[198] 2000 (3) SA 1006 (LCC).

[199] Roux (2000) op cit at 419.

[200] 2000 (4) SA 231(LCC).

[201] Joseph Bayenes Board of Administration v Dlamani (2000) (4) SA 324 (LCC). See also Roux (2000) loc cit.

[202] See also Van der Merwe and Pienaar (1996) op cit at 350.

years prior to the commencement of the Act if they had been illegally deprived of them.

To qualify for both the grant and the anti-eviction protection, one has to establish that he/she is a labour tenant or his/her associate. This has made the question of who is a labour tenant crucial. The courts have not been consistent in construing the provision of s 1(a) (b) and (c) of the Labour Tenant's Act which defines the phrase. There are two broad trends in the interpretation of the provision under reference. The first takes a restrictive view of the definition of a labour tenant while the second is comparatively liberal.

The ambitious objective of the Labour Tenants Act was unfortunately capable of being frustrated by a restrictive definition of a labour tenant. Olivier J A held in Nglobo v Salimba CC, Mgcobo v Van Rensburg[203] that all three paragraphs of s 1 of the Act must be fulfilled before a person will qualify as a labour tenant. This conjunctive approach puts a debilitating burden on applicants.[204] In taking this view, Olivier J.A rejected the alternative and less cumbersome disjunctive approach. The justification for adopting this technical approach was according to the judge based on giving the words "and" and "or" as used in s1 their ordinary meaning. While acknowledging that the legislature may not have intended the result in the Ngcobo case, he insisted on the preference of his interpretation contending that in principle, this was right except where the results would be unfair, unjust or absurd.[205]

With respect, Olivier was not altogether correct. To insist on the conjunctive approach was contrary to the spirit animating the Act and the post independence constitutional dispensation of the country. The spirit of this Act lies in creating a tenancy regime which will eliminate tenure insecurity and the indiscriminate evictions of the past. It is indeed absurd and unfair for the judge to recognise the "sheer number of cases that have come before the courts since the Act."[206] and yet deliberately opt for an interpretation that will defeat the purpose of the Act by shutting out potential beneficiaries. Were Olivier to be sensitive to the historical sensibilities of the country

[203] (1999) 8 BCLR 855 (SCA).
[204] Often, it is easy to prove that the person lives or has a right to live on the farm (paragraph a) and that the person works for the owner of the farm in return for grazing or cropping rights on the farm (paragraph b). The third requirement has consistently proved more problematic. This is because (paragraph c) contains two requirements to wit proof that the applicant's parents or grandparents had lived on the farm and possessed cropping or grazing rights.
[205] L Du Plessis Re Interpretation of Statute Durban Butterworths (2002) 563. This alternative approach lessens the burden of proof on an applicant because it limits the definition of a labour tenant to the proof of either paragraphs (a) and (b) or (a) and (c).
[206] Du Plessis op cit at 536.

and the actual realities of the majority of forced removals, he definitely would have adopted an access facilitating interpretation.[207]

There has been a noticeable shift away from an access restricting interpretation of labour tenancy in more recent cases. It is apparent from both the tenor of these decisions and the academic comments on them[208] that the courts opted for a more liberal construction of labour tenancy. The first case, Klopper v Mkhize,[209] was heard in 1997 and involved an application by the applicant, the owner of a farm in which the respondents lived. The applicant who had terminated the farm services of the respondents sought an order of court evicting them (15 persons in all) and a declaration that they were not labour tenants as defined by s 1(X11). The applicant relied heavily on the interpretation of labour tenancy in Mahlangu's and Zulu cases for the contention that respondents were not labour tenants

Galgut J doubted the soundness of the cases on which applicants' contentions were predicated. He expressed the view that Mahlangu's case was wrongly construed. He disputed the contention by the applicant that this case held that the three paragraphs in s 1(X1) a, b and c must be read conjunctively. It, on the contrary, seemed to him that "in Mahlangu's case no more was said, however, than that what must be read conjunctively are paragraphs a and b".[210] Although the judge conceded that the Zulu's case required the fulfilment of all the criteria in paragraphs a, b and c, he held quite interestingly that he was unable to agree with the interpretation in the case[211] Galgut J rationalised his decision on the basis that to require paragraph (b) to be read conjunctively with both paragraphs (a) and (b) would in substantial measure stultify the Act[212].

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[207] A J Van der Walt has criticised judges who fail to show sufficient sensitivity to the history of the country when dealing with anti eviction legislations enacted to address the effects of past land policies. He has condemned the restrictive interpretation of anti eviction legislations by judges because they seem to create the impression these judges have so aligned themselves with the point of view of the past that there are not prepared to approach the interpretation of these reform legislation dispassionately and with an open mind. See Van der Walt (2002) op cit at 837-839. It is to be regretted that in eviction proceedings, the cost of litigation becomes expensive where the farm owner claims that the applicant is a farm worker. In such a case, although the general burden will be on the farmer to establish the claim, the applicant does have the evidential burden to call technical evidence to defeat the claim. In Mahlangu v De Jager 1996 (3) SA 235 (LCC) such evidence required the applicant to call a registered valuer to counter the evidence of the farm owner on the question of the comparison between remuneration and the value to be attached to the right of occupation and use of land. The Court in this case held that the applicant was not a farm worker. In doing so, less attention was paid to technical evidence with preference given to such sensitive issues like the fact that the applicant had lived all his life on the farm, as did three generations of his family.

[208] Pienaar (1998) op cit at 319.

[209] 1998 (I) SA 406 (N).

[210] Pienaar (1998) loc cit.

[211] Ibid.

[212] Ibid.

The issues and legal submissions in the second case, Tselentis Mining (Pty) Ltd and Anor v Madlalose and Others[213] were similar to those in the first. The case involved the issue of the determination of the status of the respondents who were living in the applicant's farm. The question revolved around whether paragraphs (a), (b) and (c) of the definition of a labour tenant were to be read conjunctively or whether they were to be read as stated in Klopper's case.

Meskin J discarded the approach in Zulu and Mahlangu cases describing them as incorrect.[214] Pienaar[215] has praised this interpretational approach by the courts pointing out that they marked a salutary departure from an approach which views labour tenancy in isolation. Meskin J defined labour tenancy with reference to the definition of other important notions in the Act such as "association" and "family member". These interpretations are consistent with the purposive approach that the Constitutional Court has always preferred.[216] Although the judges involved did not make direct reference to the advantages of a purposive approach, Meskin noted that it accorded with the intention of the legislature. This intention, in the context of Land Reform (Labour Tenancy) Act,[217] was to broaden the scope of the Act's powers to intervene and protect the security of tenure of a labour tenant. It demands a liberal rather than a restrictive construction of those entitled to benefit from the Act's anti eviction protection.

It is for this reason that Meskin J insisted that the intent was not to "make it a sine qua non of qualification as a labour tenant that as at 2nd June 1995 one's parents or grandparents" had grazing and cropping rights in addition to those possessed by oneself.[218] This was in his opinion objectionable because it will limit the number of persons who can benefit from the protection of the Act.

The immediate implication of the Tselentis Mining (Pty) Ltd case was far reaching. It meant that an "associate"[219] or "family member"[220] defined in s 1(iii) and s 1(iv) of the Act had a significant bearing on the definition of labour tenancy. For instance, it meant that the physical possession of a farm by an associate or family

[213] 1998 (1) SA 411 (N).
[214] Pienaar (1998) op cit at 320.
[215] Ibid.
[216] See Harksen v Lane NO 1998 (1) SA 300 (CC).
[217] No 3 of 1996.
[218] Pienaar (1998) op cit at 321.
[219] An associate is a family member of the labour tenant and include anyone nominated under s 3(4) as the tenant's successor or under s 4(1) to provide labour on behalf of the tenant. Pienaar (1998) op cit at 320
[220] Will mean any member of the tenant's family. Family here is construed in the extensive sense of the idea conveyed in the traditional African context.

member on behalf of a labour tenant is sufficient to satisfy the requirement of paragraph (a) of s 1(ii) of the Act. Apart from rendering actual possession and use of the farm by the labour tenant himself unnecessary, it also made it unnecessary to establish that the labour tenant's parents or grandparents had usufuctory rights over the farm.[221] This is in the writer's view an appropriate decision because it reflects the legislators' intention to prohibit the eviction of a wide variety of dependants of a labour tenant.

[221] By adopting a holistic view of the Act, it was shown that only two elements were essential for the definition of labour tenancy. These elements are (i) use and occupation of land and (ii) use of owner's land for family in exchange of labour by the tenant. See Tselentis Mining (Pty) Ltd and Ano v Madlalose Supra.

CHAPTER SIX

6.1 CONCLUSION

The South African land question is a controversial one and may remain so for the foreseable future. Although divergent views have been expressed on the early settlement of the country, it is apparent that Africans occupation of the region dates back to the Stone Age era.[1] These early indigenous settlers had a perfectly developed sense of ownership and resented intrusion into their land. It has also been shown that the natives of South Africa, like their counterparts in the rest of the African continent developed a pattern of land tenure that has been correctly conceptualised in human rights terms[2].

This thesis raises the crucial issue of the dispossession of Africans of their ancestral land. The writer attempts to address the complex question of dispossession from land and the present remedies to correct the phenomena. Relying in Alexkor Ltd & Anor v The Richterveld Community & Others[3] the candidate notes that it is not easy to deal with the problem because it occurred centuries ago, when the legal norms and principles of the later occupiers differed substantially from those of today. The candidate, nevertheless, endorses the constitutionalisation of the entitlement of the indigenous peoples to the restoration of the land that they had possessed from time immemorial.

The thesis addresses the question: to what extent has the post-apartheid land regime addressed the injustice caused by these latter occupiers. It may be observed that to succeed in accomplishing the aim of spatial segregation and dispossession, the apartheid policy received support from the courts. Mr. Justice Didcott, in a remarkably frank ex-curial statement, observed that this support was largely successful because the court's powers (to protect) had become so attenuated so as to be, for all practical purpose insignificant.[4] It is, for this reason, also relevant to investigate the performance of the courts with reference to the provision of access to land for the landless under the current dispensation.

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[1] See page 4 of chapter 1.
[2] This system of tenure was characterised by the provision of access to land on the basis of need.
[3] (2003) 12 BCLR 1301.
[4] J G Grogan Emergency Law Judicial Control Of Executive Power Under the States of Emergency in South Africa Unpublished PhD thesis University of Rhodes, Grahamstown (1989) 306.

This writer believes that 10 years is sufficient time for an informed evaluation of the post apartheid land policy. Has access to land for the dispossessed been enhanced significantly enough or is it a case of changes in laws, policies and rhetoric without a corresponding impact on the lives of the majority excluded under the old order? B Cousins[5] and B Chigara[6] have, in recent studies, criticised the country's land delivery rate as slow. Indeed, the former describes the reforms introduced by the property clause and its incidental legislations as "minimalist".[7] Cousin pointedly notes that there is a gap between legislation and implementation because of the compromises that were agreed upon in the negotiation preceding the 1994 elections.

The failure of the reforms to deliver access to the dispossessed has been a source of anxiety. According to Chigara the Land Access Movement of South Africa (LAMOSA)[8] have considered the Zimbabwe style land invasion a viable option to the South African approach. It is difficult to dispute the conclusions of these studies because cumulative statistics of settled restitution claims from 1995 to March 2004 reveals that only 17,631 hectares of land have been restored to 662,302 beneficiaries so far[9]. The slowness of land restoration through the restitution mechanism makes the alternative of a disorderly people oriented land invasion tempting.

6.1.2 LEGISLATIVE INTERVENTION

Although it has been observed that the ANC neither had an agenda for agrarian reform nor land redistribution before entering government,[10] the ANC government immediately launched a legislative onslaught to reform the effects of dispossession on assuming the reigns of power in 1994. The course of this reform was chartered by the interim and 1996 constitutions.

An important focus of the new property structure is s 25 of the 1996 Constitution which permits the expropriation of property subject to compensation for "a public purpose or in the public interest." Public purpose or interest in this particular

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[5] B Cousins (ed) At the Cross Road Land and Agrarian Reform in South Africa into the 21st Century Cape Town PLASS (UWC), NLC (2000) 2.

[6] E Lahiff, '*L*and reform in South Africa: Is it meeting the challenge*?'* Programme for Land and Agrarian Studies, University of the Western Cape, Cape Town, Policy Brief, no 1, 2001 2. E Lahiff who also states that land redistribution has moved at a slow pace and attributes this to the preservation of a land structure driven by market forces. Lahiff op cit at 5.

[7] Cousin op cit at 1.

[8] A loose group which claims to represent those dispossessed during apartheid and farm workers who have been evicted after the introduction of democratic governance. Lahiff loc cit.

[9] Database of the Land Restitution Commission.

[10] De Villiers B Land Reform: Issues and Challenges; A comparative overview of experiences in Zimbabwe, Namibia, South Africa and Australia Johannesburg Konrad-Adenauer-Stiftung (2003) 47.

context refers to the nation's commitment to land reform in order to facilitate access to land by those dispossessed under the old order.

Miller and Pope[11] assert that the constitution identified the specific mandate in this respect as the balance of priority in favour of a resolution of dispossession. In an article written in the same year that their major work on land in South Africa was published, these respected authors noted that the mandate required the state to take:

> *" reasonable legislative and other measures within its available resources, to foster conditions which enable citizens to gain access o land on an equitable basis. Specific separate provision is also made for tenure reform legislations to deal with insecure tenure of individuals and communities…and restitution or equitable redress to the extent provided for by an Act of Parliament in respect of dispossessions after June 1913 which also occurred on the basis of racially discriminatory law or practices."*

As pointed out earlier, a crucial feature of the emergent land policy is the restitution scheme devised as a mechanism to facilitate access to land by the dispossessed. However, because of compromises exacted during the negotiation of the constitution this restitution process was limited to the restoration of land dispossessed on or after June 1913. It also had a second timeframe that limited the period for the lodgement of the restitution claims.[12] The former constitutional limitation is re-enacted in s 2(1) (d) of the Restitution of Land Right Act 63 of 1997. This writer agrees with the views expressed by Cousin and Lahiff that these have led to a property structure that has made a speedy restoration of dispossessed land difficult.[13]

Apart from being the date that the notorious Land Act of 1913 became operational, the 1913 date has nothing else to commend it as the basis for limiting restitution. On the contrary, this limitation is in this writer's opinion arbitrary and capable of being construed as meant to serve the interest of those who benefited from the skewed land policy under apartheid. Such a perception creates a credibility problem for the restitution scheme and explains the frustration expressed by LAMOSA[14].

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[11] D L C miller and A Pope 'A south African Land Reform' (2000) 44 Journal of African Law 169, hereinafter referred to as Miller and Pope (No 2)

[12] This was subsequently extended to the 31st December 1998. De Villiers op cit at 51.

[13] See note 6.

[14] See note 8.

This writer contends that the issue should no longer be whether the courts could accommodate restitution that ante-dated the 19 of June 1913. It should rather be that of what should be done about this provision that short-shift the right of some to repossess lands wrongfully taken from their forebears. The writer has adopted this view in spite of the Constitutional Court's recent decision in the Alexkor Ltd case that[15]:

> *" in the light of the judgement in du Plessis and Others v De Klerk and Anor the drafters of the Constitution were aware of the general rule against retroactivity. They obviously applied their minds to this aspect in relation to the restoration of land and land rights, which has always been an issue of supreme importance…. Had there been any desire for the provision of the 1996 Constitution to have retroactive effect beyond this date, one would have expected this to have been so enacted. It was not."*

Although the Constitutional Court expressed the above strong views on the apparent finality of the limitation date, the judgment is nonetheless significant in so far as charting the future course for restitution is concerned. While dealing with its jurisdictional scope relating to its competence to deal with matters connected with a decision on a constitutional matter, the Court stated that:[16]

> " *A more difficult question is to determine whether this court has the jurisdiction to deal with all issues bearing on or related to establishing the existence of these matters. For example the question might be asked whether the issue concerning the existence of the community's rights in land prior to the colonization of the Cape, or the content or incidence of such rights, constitute in themselves "constitutional matters" the same might be asked concerning the continuous existence of such rights after the British Crown's annexation of the Cape in 1806, or after the 1847 Proclamation or the subsequent statutory and other acts thereafter"*

[15] Paragragh 40 Alexkor Ltd And Ano v The Richterveld Community And Ano Supra.
[16] See Paragraph 24.

This statement is significant in two important respects. Firstly, it may be conceived as making the point for the need to take into account pre-1913 historical facts so as to put the question of whether the community had any rights over the land on 19 June 1913 in better perspective[17]. Secondly, though couched in jurisdictional terms, it subtly raises questions about the recognition of aboriginal land title and to that extent the continuous relevance of the 1913 cut off date. This candidate prefers the latter interpretation.

The Court's finding that it "likewise has jurisdiction to determine all issues relevant to the matters that has to be established under s 2(1) of the Act, whether anterior thereto or not"[18] is particularly instructive. This is so when read alongside the statement that:[19]

> *"The wide construction is consistent with the purpose of the provision. It is intended to extend the jurisdiction of this court to matters that stand in a logical relationship to those matters that are primarily, or in the first instance, subject to the court's jurisdiction. This underlying purpose is to avoid fettering, arbitrarily and artificially, the exercise of the court's functioning when obliged to determine a constitutional matter."*

This approach of the Constitutional Court, in positively claiming jurisdiction as done above, is interpreted by this candidate as indicating something more than a mere remark devoid of any implications. To suggest otherwise is to assume rather unpatronisingly that the Court, which is the highest in the country, dealt with jurisdiction as a purely academic issue. The better view in this candidate's opinion is that the Court used jurisdiction in the broad sense of having the power to hear and determine the issues in an action.[20]

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[17] See Paragraph 31.
[18] See Paragraph 32.
[19] See paragraph 30.
[20] This means that it was indirectly calling attention to pre 1913 dispossession. See also the court's statement in paragraph 32 that "for the same reason, this court has jurisdiction in relation to all intervening events in relations to which it could be suggested that the community had lost a right on land." Clearly the question of the restoration of such land would be anterior to the finding that it had been lost.

It seems from recent comments on the Alexkor case by academics that the Constitutional Court employed the language of aboriginal title in the case deliberately. K Lehmannh[21] has, for this reason construed the decision as leaving the possibility that "the doctrine may yet at a future date find its way into the South African legal order, should an appropriate case come before a sympathetic bench." Although K Lehmannh has criticised the doctrine as inappropriate for South Africa, he recognised that moving the restitution date backward represent at least for the proponents of the doctrine of aboriginal title a possible solution to the problem posed by Restitution Act as amended. J Van Wyk[22] was on her part more categorical in her argument that the constitutional court is moving towards the recognition of aboriginal title. According to her the court's finding that[23]*:*

> *" the Ritcthersvelds community had an indigenous law communal ownership of the land and minerals at the time of annexation in 1847, which was a separate form of ownership from the common law ownership we know today , should support the view that the doctrine of aboriginal title should be recognised in South Africa....the constitutional court decision begins to open the door to claims based on aboriginal title"*

These views support the writer's contention that on a reflective interpretation of the Alexkor Ltd decision one could reasonably attribute to it a justification for the amendment of the provisions of s 25(7) of the 1996 Constitution to accommodate the restitution of pre-1913 dispossessions.

Besides, the Constitutional Court's finding that the LCC has jurisdiction to develop the common law as it relates to native title can reasonably be construed as importing two significant implications. It may be interpreted as suggesting (i) a green light for amending the cut-off date provisions on restitution[24] and (ii) the recognition of aboriginal title doctrine which could apply outside the Restitution Act as an extension of the common law[25]. The latter preposition is interesting.

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[21] K Lehmann 'Aboriginal Title, Indigenous Rights and the Right to Culture' 2004 20 SAJHR 88.
[22] Van Wyk op cit at 486.
[23] Ibid.
[24] See page 179.
[25] Wyk op cit at 486.

The question: why should the LCC and other courts have the jurisdiction to develop the common law and customary law to accommodate aboriginal title when the Constitutional Court had noted that pre-1913 dispossessions were outside the scope of the Restitution Act could clarify point (ii) above. Although there are differing views on the doctrine[26], some commentators indicate that the doctrine can be a legitimate and workable part of South African law[27]. Indeed, J V Wyk cites Haq's description of the application of the doctrine in South Africa as reflecting a contextual interpretation of the boundaries of the right to restitution as insightful[28]. Those holding these views believe that the doctrine can be a basis for asserting claims to land rights lost before June 1913 and have gone further to identifying the conditions that they think should ground a successful aboriginal land title claim.[29]

M Barry[30] has asserted, quite appropriately, that there are issues surrounding the Alexkor case that needs more theorising because of the progressive nature of the case in many ways. She however acknowledges that " the indigenous inhabitants of South Africa now have stronger legal tools with which to reclaim their ancestral lands" because of the doctrine of aboriginal title introduced by the case.[31] Attempting to deny the application of aboriginal title is of grave concern because its non-application continues to tilt the scale of justice disproportionately in favour of the dispossessor while the dispossessed continues to live in desperation.

The criticism of the land reform weakness in delivering access as expressed by Cousin and Lahiff are well founded.[32] They seemingly support the view that the government endorsed the contention that rectifying past injustice through a radical restitution scheme represents a superficial understanding of the historic realities of

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[26] Bennet and Powell and J Van Wyk support it while T Roux oppose it. Wyk op cit at 485.
[27] Wyk op cit at 485.
[28] Wyk op cit at 486. See also page 149.
[29] Bennet and Powell set out the factors which must be established to support a claim of aboriginal title. The include the fact that (a) the claimant's ancestors were in possession to the exclusion of others at the time of colonisation (b) the land inhered on the group which inhabited the land as a common property passing from generation to generation and (c) there is in existence traditional laws and customs regulating the group. Wyk op cit at 486. See also page 183 which addresses the factors identified in the Alexkor case.
[30] Barry op cit at 382.
[31] Barry op cit at 368. Allowing restitution on the basis of aboriginal title will increase the restitution of lost land as suggested above. Amending the cut-off date would generally increase the number of restitution claims, it would for instance allow claims to be made in respect of lands specifically identified as dispossessed by Klug in pages 132-3 of this thesis. The fear about the possibility of claims overwhelming the courts and thereby slowing down the tempo of restitution can be dealt with by extending the jurisdiction to deal with aboriginal claims to the regular courts as suggested by the LCC in the Alexkor case. See also Wyk op cit at 485-486.

South Africa which for some is the fact that the restitution of dispossessed land is not the best way to go[33]. The writer not only recommends this amendment but also calls for a further consequential revision of the Restitution Act as amended extending the time for the lodgement of restitution claims.

Such an amendment is vital because it conveys to the public that the property clause (s 25) is not an end in itself but an instrument to pursue the positive goal of creating access to land as a human right. Thus, where a particular proviso is seen to be impeding the state's ability to deliver access to land for the dispossessed, as s 25(7) appears to have done there is good reason to amend.

The amendment of the Constitution to accelerate a rule-of-law based delivery of restitution of land should not in principle be objectionable because it is both feasible and legitimate. Reference may here be made to the fact that Canada that has a similar history of dispossession has had to amend its constitution to accommodate claims based on aboriginal title[34]. In proposing these amendments, one is not oblivious of the fact that the limitation of restitution to the 19 of June 1913 was influenced by concerns alluded to in chapter five.

It was alleged that to extend restitution beyond this date would create a potentially explosive situation. The government was afraid that this would precipitate violent intra and inter tribe conflicts because of past overlapping claims over land. Secondly, it was thought that it will be difficult for persons and communities to establish their claims for dispossession were it to be extended beyond the prescribed date.[35]

In dealing with the first concern and the writer's recommendation that the constitution be amended, it is imperative for South Africa to draw the right lessons from events currently taking place in Zimbabwe. This is wise because the country's land dispossession history is intimately connected to that of South Africa.[36] The limitation placed on restitution for dispossessed land in South Africa is the result of

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[32] See note 6.
[33] Ibid. J Waldron has questioned the moral justification of restitution based on aboriginal land title. He argues that the injustice of past acquisition of land may be superseded by later changed circumstances. Although he wrote about the United States, M Barry indicates that this kind of thinking can be applied to South Africa. When so applied it in the main strengthens the position of those who benefited from the skewed land policy during apartheid. Barry op cit at 379.
[34] See s 35(1) of the Constitution Act 1982 of Canada.
[35] See Miller and Pope (no 2) op cit at 178.
[36] E Lahiff and B Chigara have made a connection between the two regardless of the distinctions in the property clauses of the two states. See note 6 & 8.

compromises reached with parties representing the interest of white privilege in the same way as the independent Constitution of Zimbabwe was circumscribed by compromises exacted in the Lancaster House Agreement.

It is necessary for South Africa to avoid a situation whereby it would be stampeded by pressure from the landless into haphazardly amending the Constitution as Zimbabwe did particularly in 2000[37]. A crisis-induced amendment as happened in Zimbabwe has led to land invasions, deaths and major disruptions.[38] There are indications that some South Africans are increasingly becoming impatient with the perceived slowness of the land restitution scheme and see this as the result of a deliberate policy of appeasement of present landowners.[39]

The land situation in Zimbabwe has also demonstrated that extending the land restoration process to incorporate aboriginal title need not necessarily awaken and or prolong destructive ethnic and racial rivalries[40] amongst the different ethnic groups in the country. While it is admittedly the case that the different ethnic nationalities in Zimbabwe such as the Shona, Ndebeles etc. had in the past fought over land, this has not in anyway resurfaced in the context of the country's policy of land restoration which does not have any limitation period[41]. The Zimbabwean experience rather shows that the danger to be avoided is to allow frustration with perceived impediments created under the present structure of s 25(7) to cause the people to take matters into their own hand.[42]

The Alexkor Ltd case has shown that the anxiety over how to establish pre-1913 dispossessions for the purpose of restitution is unfounded. Without expressly saying so, the Constitutional Court demonstrated that it is perfectly possible to

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[37] S16A (1) of the Constitution (Amendment No.16) Act No. 5 of 2000. This amendment was purely for the political reason of winning the 2000 presidential election in Zimbabwe and reflects the regime's recognition that disaffection with land reform was widespread and could be tapped to achieve political goals in spite of the poor performance of the government. T K Chitiyo Land violence and compensation <www:http//ccrweb.ccr.uct.ac.za/two/9_1zimbabwe.htmi> Accessed July 2003.

[38] T K Chitiyo Land violence and compensation <www:http//ccrweb.ccr.uct.ac.za/two/9_1zimbabwe.htmi> Accessed July 2003. .

[39] Land invasions are increasingly becoming a problem in South Africa. The National Landless People Movement identified 2003 as being the year of land occupations. See De Villiers op cit at 71. The movement's branch in the Eastern Cape has stated that it will start land invasions on the 14 of April 2004 which is the date of the national elections.

[40] Miller and Pope (no 2) op cit at 178.

[41] The Namibian land reform programme does not include the restoration of ancestral lands. But this has been criticized as reflecting political bias by SWAPO. It has been suggested that SWAPO was not interested in the restoration of ancestral land because ancestral lands were not dispossessed in Ovamboland which constitute its main base. Namibia presumably has the lowest land restoration scheme in southern Africa probably because of its land reform approach. De Villiers op cit at 35.

establish a dispossession ante dating 1913. The Court was able to adequately answer the question whether the Richtersveld community had rights over land and the content of this right as at 1847 prior to the British crown acquiring sovereignty over the land. It was pointed out that in making a determination of this nature, the adjudicating tribunal must do so by reference to indigenous law rather than the common law.

The court's view that "the undisputed evidence shows a history of prospecting in minerals by the community and conduct that is consistent only with ownership of the minerals being vested in the community"[43] is instructive. It shows that indigenous land rights and the manner in which this had been dealt with can be conveniently ascertained even when this occurred before the limitation period.[44] It also stated quite graphically the way forward with regard to how this should be done.

Such evidence of what one might call the root of title and the subsequent dispossession of the indigenous people could be derived from witness testimonies and writers accounts. The sources included in the particular case of the Richtersveld community –"a text describing the long history of copper mining in Namaqualand by the indigenous peoples."[45] There is no reason why it should not be possible to amend s 25(7) particularly as the reasons for its enactment are untenable in the first place.

The specific issue of dispossession and the post independence access facilitation measures to land for the dispossessed through legislation is in a take-off stage. It is for this reason that this writer thinks a broader amendment of the constitutional land reform structure is appropriate. It may be recalled that the limitation of the date for restitution for dispossessed land in s 25(7) of the 1996 Constitution was incorporated into the Land Restitution Act of 1994. This state of affairs has created a serious challenge in the area of the capacity of the responsible organs of state to effectively deal with the subject.

It is recommended that the structural fault with the cut off date can be easily fixed if s 25 (7) of the 1996 Constitution is amended to read as follows:

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[42] See note 8.
[43] Alexkor Ltd case Supra at paragraph 60.
[44] The Alexkor decision in this regard accords with those of H Klug who argued that it was possible to identify dispossession dating back to colonial times. Klug made reference to three specific examples in which lands were dispossessed through a conscious process of corruption and fraud before 1913 that ought to form the basis of restitutionary claims. The author criticized the land restitution scheme as limiting the capacity to deliver access to land to the dispossessed. See Pages 153 -154.
[45] See paragraph 61 of the decision.

> *A person or community dispossessed of property as a result of past racially discriminatory laws or practices has a right either to restitution of that property or to equitable redress.*[46]

The deliberate choice of the words "a right" rather than "entitled to" is intended to strengthen the content of the recommended provision.

The question of the controversy over the meaning of just and equitable compensation for land expropriated for restitution in particular and other land reform purposes generally have been stressed in this thesis. The point was made that market value compensation is not ideal for the country because it's too expensive and weakens the state's capacity to deliver access to the dispossessed through the restitution mechanism[47]. The solution to this problem lies with the amendment of s 25(2) (b) and s 25 (3) of the 1996 Constitution. Section 25(2) (b) should be amended to limit compensation to developments such as housing and economic plants on the expropriated land. It is not wise in the present circumstances to pay compensation for land which have on occasions been left vacant for speculative reasons.

Section 25(3) should be amended to require market value compensation for developments on the expropriated land. These amendments are necessary because it is unjust for compensation is to be seen as a source of profit for private property owners as it seems to be the case now. It will also ensure that the primary theoretical notion of compensation will be to prevent expropriation resulting in direct loss on investment on the land. It is obvious from already decided cases[48] that the courts have tended to opt for generous compensation awards. This is unhealthy because even the market value compensation was based on a so call need to secure a coalition which will insist on sufficient appropriation in the budget to carry out the land reform.[49] It is necessary for a constitutional amendment of the type proposed here to be adopted because it is by it that simple justice will be done to a people wrongly deprived of their land. Moreover, the amendment will bring the law in conformity with the underlying post apartheid

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[46] This formulation deliberately excludes a cut-off date. It makes restitution subject to the factors suggested in note 29 and page 183. It has the advantage of treating every case according to its merits and to that extent capable of dealing with both bogus and competing claims.

[47] Financial compensation for only a total area of 445,248 hectares of land so far restored has cost the state a whopping R1.2 billion excluding restitutionary discretionary and settlement grants. De Villiers op cit at 65.

[48] See Ex Parte Farmerfield Community Property Trust LCC 20/ 1996 and Ex Parte S.Duksh and R T Dulabh LCC 14/1996.

constitutional requirements of equity and justice rather than the expediency of political convenience and economic sustainability.

Besides, the proposed constitutional amendment there is need for a revision of the entire post-apartheid legislative regime dealing with land reform. The proposed revision should be in the nature of a comprehensive legislation dealing with all the facets of land reform which has been addressed by the Labour Reform (Labour Tenants) Act, ESTA, and PIE. However, because this proposal is profound and radical, the writer recommends that it should be preceded by a land summit to which all the stakeholders (e.g. traditional leaders, commercial farmers, women, the landless, political parties etc) in land would have the opportunity to participate. This is the way forward for the country if it wants to come to terms with this issue which has immense potential for division and discord in future.[50]

One may have sympathy for the government because such a summit and the subsequent legislative revision would have significant financial and human consequences. It must be stated, however, that there can be very little merit in continuing with the current restitution policy in the face of growing concern, even within state circles, that restitution is failing to meet policy priorities based on perceived public expectations.[51] Even the Land Department, has acknowledged that its experience has brought to light legislative and institutional shortcomings in the present structure of the land restitution process.[52] The state's response to this fundamental shortcoming that has consistently been through ad hoc amendments directed at dealing with immediate difficulties of perceived problems has proved ineffective and unsatisfactory. The Land Restitution and Reform Laws Amendment Act 18 of 1999 did not, for instance, substantially improve the perceived ineffectiveness of the restitution process to deliver access to land.

In January 2003, W. D Thwala[53] of the National Land Committee expressed concerns on the possible implications of the continuing racial misdistribution of land in the country. In sounding a note of warning he observed that these land crises "will either be resolved through a fundamental restructuring of the government land reform

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[49] Binswanger op cit at 141.
[50] P Dodson "Reconciliation in Crises" in G Yunupingu Our Land is Our Life: Land Rights-Past, Present and Future (eds) (1997)139, hereinafter referred to as Dodson (1997).
[51] Miller and Pope (No 2) op cit at 178.
[52] W.D Thwala in Land and Agrarian Reform in S. Africa 2003.< http:www.land action.org/disply.php?article=60>. Accessed on 12/12/03.

programme or it will be resolved by a fundamental restructuring of the property relations by the people themselves." This writer believes that the direction this issue takes will depend largely on whether or not the government will be prepared to introduce the kind of radical reforms that are being proposed here.

Regrettably, however, the government introduced the Restitution of Land Rights Amendment Bill in Parliament in July 2003. The proposed Bill seeks to further amend the principal restitution legislation – the Restitution of Land Rights Act 22 of 1994. It may be recalled that this legislation had, prior to this, been amended four times, namely, Act 84 of 1995, Act 78 of 1996, Act 63 of 1997 and Act 61 of 1998. The present Bill seeks an amendment to empower the Minister of Land Affairs to purchase, acquire in any other manner or expropriate land, a portion of land or right in land for the purpose of restitution or any other land reform purpose. The Bill proposes to enlarge the Minister's powers of expropriation of land for restitution by removing the provisions of the present Act which subjects this ministerial power to control by the courts.[54]

The Act which is yet another ad hoc attempt to deal with the structural deficiency of the restitution framework has already provoked impassioned opposition from parties representing South Africans of European descent in Parliament. It seems to me that these are issues which could be best dealt with comprehensively in a spirit of reconciliation during the course of the consultations that has been recommended in this thesis. The point has been made above for the enactment of a comprehensive Land Management Act. This Act, which should repeal all the multiple legislations dealing with creating new mechanisms for accessing land after apartheid, should as a matter of priority incorporate important provisions of these legislations and judicial principles on the point[55]. The proposed Act should be subdivided into two broad sections *viz:* urban land and rural land.

The section on urban land should deal with land restitution in both defined towns in terms of existing legislations and areas of major economic and industrial

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[53] Ibid.

[54] The Bill amends s 35(5) of the Restitution of Land Rights Act 22 0f 1994. This Bill was signed into law in December 2003. See The Herald 24th December 2003.

[55] Some of these issues have been discussed in chapter five of this thesis.

developments in the country.[56] It should thus concentrate on two key areas. The section should create the mechanisms for effective restitution without disrupting social, economic and industrial developments.[57] It is here that the legislator should balance the demands of equitable redress and the needs of reconciliation and development. A major feature to be addressed here is the question of the payment of just and equitable compensation to the dispossessed in lieu of the actual restoration land.

The section should also address the restitution and redistribution of vacant lands in urban areas. At the very minimum this legislation should be able to create an effective and speedy way of facilitating access to land for the urban landless. The current policy as reflected in the Grootboom case that appears to permit the different regions to devise methods appropriate to their peculiar demands and resources is basically unsatisfactory because it creates a potentially chaotic and dangerous differentiation in the country. The proposed Act should streamline the process by making it national in terms of content and procedure. It is by so doing that the possibility of prejudice being suffered by people from economically depressed regions can be avoided. It is hoped that the proposed Act should set the stage for an effective realisation of social justice through the land reform process.

Because the proposed Act should be a comprehensive code of land law in all of rural South Africa, the section on rural land should provide the legal framework governing restitution, land distribution, tenure reforms and the settlement of land disputes.[58] It should reflect the rural land policy of post-apartheid South Africa. In dealing with access through restitution, the proposed Act should resolve the following:

i The need for the provision of access to land through restitution to be conceptualised from a human rights perspective

[56] One has in mind built up areas whether such areas technically lie in towns or rural areas. The current idea that these areas should be excluded from the restitution process because it would lead to disruptions is unsound both in theory and in practice.

[57] Based on the amendment of s 25 of Constitution of the Republic of South Africa Act 108 of 1996 as proposed by this candidate.

[58] Uganda, for instance, adopted the Land Act of 1998 which set forth a similar legal framework which has worked well. See S. Couldham 'Land Reform and Customary Rights: The Case of Uganda' (2000) 44 Journal of African Law 65.

because dispossession of Africans and its resultant effects under external colonialism and apartheid was a crime against humanity.[59]

ii The issue of restitution of land held under indigenous tenures e.g. communal lands.

iii The introduction of a more gender sensitive restitution of land regime because women are still being discriminated against on matters of access to land.[60]

iv Whether it is not apposite to limit the question of payment of compensation to buildings and agricultural developments on the land. This will require a reappraisal of the concept of just and equitable compensation for land expropriated for land restitution and redistribution as discussed above.

v Whether in the context of rural land, restitution should not be limited to restoration of the land itself where the land is undeveloped.

These are admittedly issues on which it will be very difficult to secure a consensus. It is, nevertheless, hoped that the effective consultations that will result from the proposed land summit and a well coordinated public education campaign on the absolute necessity for a comprehensive resolution of these questions in an orderly manner should help the different stakeholders make the relevant concessions. However, these matters are in the view of this writer so supremely important for the continuous stability of the nation to justify the government resolving it on the basis of the democratic principle of majority rule in Parliament if the parties fail to reach a consensus in the proposed land forum.

6.1.3 JUDICIAL EDUCATION

The legal revolution heralded by constitutionally based democratic transformation and the display of a high degree of executive mindedness by South

[59] Moleah op cit at 153.

[60] There is, however, a noticeable movement away from discrimination against women. See the Constitutional Court decision in Bhe v Magistrate, Khayelitsha; Shibi v Sithole; SA Human Rights Com v President of South Africa 2005 (1) BCLR 1(CC) declaring sections 23(10)(a), (c) and (e) of the Black Administration Act 38 of 1927, regulation 2(e) of the Regulations for the Administration and Distribution of the Estates of Deceased Blacks 1987 and section 1(4)(b) of the Intestate Succession Act 81 of 1987 unconstitutional. See also sections 5(1), 22(3) and 26(2)(iv) of the Communal Land Right Act No 11 of 2004 which have improved women's representation in the management of communal land.

African judges in the past has made the need for judicial education inevitable. [61]It seems quite obvious that the courts have, in some instances, failed in their post-apartheid responsibility to create an access to land facilitating jurisprudence. There are two reasons for this failure both of which could effectively be remedied by a coherent policy of judicial training.

Firstly, it does appear that some judges have been unable to appreciate or accept the present land policy. This policy places emphasis on a different philosophical approach- essentially away from the predominantly positivist approach of the past. The approach as has been alluded to was aimed at preserving land rights acquired through mass dispossession of land by a small minority. The decisions in Joubert & Others v Van Rensburg & others,[62] Richterveld Community v Alexkor Ltd[63] and Slamdien's case[64] may be conveniently characterised as reflecting this phenomena. Van der Walt summed up this phenomenon as a failure to appreciate that a balanced and context-sensitive approach is to be preferred in the present era of transformation, fundamental right and land reform.[65]

The present writer believes that it is imperative for judges to be periodically educated on the issues that would consistently arise in restitution cases. It has to be recalled that most judges did not have the advantage of a formal study of a constitutionally based land law system, nor did they have an on the job exposure to such land law policy prior to 1994. The transformation in land law in the country has been so thorough that it is definitely unwise to assume that the judges will learn everything about them on the job.[66]

This proposal for judicial education/training is essential to deal with the need for attitudinal change by some judges. It is perceived in certain quarters that some judges are incapable of adapting themselves attitudinally to the present legal dispensation which emphasise the facilitation of access to land for victims of apartheid land policy[67]. It is said that such judges are insensitive to the country's bitter land history and the need to construe the land reform legislation and the property clause in

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[61] C Plasket The Fudamental Right to Just Administrative In The Democratic South Africa Unpublished PhD thesis submitted to Rhode University Grahamstown (2002) 560.
[62] Supra.
[63] 2001 (3) SA 1293 (LCC).
[64] Supra.
[65] Van der Walt (2002) op cit at 840.
[66] Plasket op cit at 560.
[67] Supra.

context. In Mkangeli & Others v Joubert & Others,[68] the Supreme Court of Appeal voiced its concern for judges creating the impression through their decisions that "they have so aligned themselves with a particular political point of view that they are not prepared to approach the interpretation of statutes dispassionatel".[69] The court criticised it as responsible for the inability by some judges to discharge their judicial oath credibly, particularly with regard to land dispossession.

Although this education would help the courts develop new insights into various provinces of the law, its impact on the current constitutionally driven reforms to resolve the issue of dispossessed land cannot be over emphasised. It will, for instance, help in resolving the conflicting positions taken by judges on the question of "just and equitable compensation"[70] payable for land expropriated for restitution and redistribution. This is a supremely important because it is a crucial element in determining the cost and speed of the land restitution process. Clearly an interpretation that is sensitive to the historical injustice associated with dispossession would avoid creating the impression that compensation should be generous or based on the market value of the land to be expropriated.[71]

It has been a central theme of this thesis that grave injustice was done to those dispossessed of their land under the old order. The present constitutional dispensation in general and the restitution legislation in particular ought to be construed as conceiving "justice and equity" from the perspective of the interest of the victims of the skewed apartheid land policies. This should involve a review of the judicial views on the assessment of just and equitable compensation. The new interpretation must defer to the fact that the current access to land regime simply creates a rule-of-law based mechanism for ensuring that indigenous people get back what was wrongfully taken from them. This explains why the argument that market value based compensation, the limitation of restitution for dispossession to 1913 and an uncontextual judicial interpretation of property legislations circumscribed access to land for the dispossessed has been a thread that runs through the pages of this thesis.

It may be temping to assume that the construction of a just and equitable compensation should be strongly influenced by the need to encourage reconciliation.

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[68] 2002 (4) SA 36 (SCA).
[69] Mkangeli v Joubert (Supra) at paragraph 27.
[70] See page 196 chapter 4.
[71] See also Ex Parte Dusksh v Dusksh & R.T supra and contrast with the First Certification case already alluded to.

Seen from this perspective "just and equitable" involves the payment of handsome compensations to the present lands expropriated for restitution and redistribution. This assumption is a dangerous one because rather than secure harmony in a polarised society like South Africa, the tendency among the landless is to see this approach as further tilting the scales of justice in favour of an already privileged class whose claims lack legitimacy in the eyes of many[72]. It also ignores the fact that access to land for the dispossessed has been cast as a fundamental right which in terms of s25 (8)[73] should not be impeded by reference to any other law. The experiences in Zimbabwe have shown that the land question was the perfect excuse for a desperate Mugabe regime to introduce discredited policies that have set the country on an alarming slide into chaos. There is need to avoid a similar possibility in South Africa.

[72] A J van der Walt argues that the scales are loaded heavily in favour of the property class. This has in his view meant that there is no real chance of effecting a balance between the property class and the dispossessed. Van der Walt (2002) op cit at 830.
[73] Constitution of the Republic of South Africa Act 108 of 1996.

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