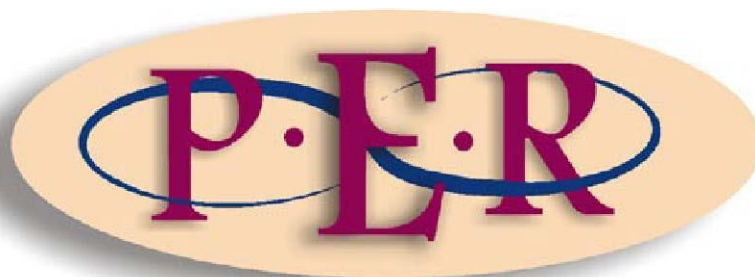


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LAND AS A "NATIONAL ASSET" UNDER THE CONSTITUTION: THE SYSTEM CHANGE ENVISAGED BY THE 2011 GREEN PAPER ON LAND POLICY AND WHAT THIS MEANS FOR PROPERTY LAW UNDER THE CONSTITUTION

H Mostert*

1 Introduction

One of the many issues arising from the Department of Rural Development and Land Reform's *Green Paper on Land Reform* of 2011¹ is how the policies it envisages relate to the South African constitutional order. Several concerns have been raised. One example is misgivings about the institution empowered with determining the value of land for purposes of taxation, rating and expropriation. Another is apprehension about the elimination of the judiciary from the process of determining and/or approving expropriatory compensation.² It is difficult, however, to analyse such issues properly at this stage. The *Green Paper's* purpose is to indicate possible directions of policy change, to solicit comments from developing policy that would eventually translate in changes to existing law.³ It is too early to predict specific issues of constitutionality that could be raised by a policy change not yet developed, nor implemented. Instead, this paper is about the choices that go into the broader policy framework displayed by the *Green Paper*, and how this may be translated into legislation that avoids unconstitutionality.

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¹ DRDLR *Green Paper*.

² See Hartley 2011 www.bdlive.co.za; LSSA 2011 www.lssa.org.za; SA Commercial Prop News 2011 www.sacommercialpropnews.co.za; DA 2011 www.politicsweb.co.za.

³ Gen N 686 in GG 34656 of 30 September 2011 (*Invitation for comments on the Green Paper on Land Reform*).

The motivation for focusing on this more general question really stems from my broader concern with our current legislative processes and the quality of the laws produced by it. Ill-considered legislative drafting may have disastrous consequences. The experience with the *Communal Land Rights Act*⁴ (CLaRA) may be mentioned by way of example. In 2010 the Constitutional Court⁵ declared this Act unconstitutional in its entirety, after the State had already thrown in the towel just half a day into the presentation of their argument on Constitution Hill.⁶ The decision in *Tongoane v National Minister for Agriculture and Land Affairs*⁷ was undoubtedly correct. The government's decision to return to the drawing board to find a workable solution for communal land rights was the right thing to do. But the *Tongoane* decision came after almost a decade of consultation, several attempts at drafting the law,⁸ five years of non-implementation after enactment⁹ and a drawn-out litigation process¹⁰ that must have cost the taxpayer millions, without changing the lives of even a single dweller of rural, communal land.

*Agri South Africa v Minister for Minerals and Energy*¹¹ deals with another example of legislation drafted in such a manner that it was obvious from the start that litigation would be inevitable to establish the meaning and confirm the purpose of a particular set of legal rules. Here the transitional provisions of the *Mineral and Petroleum Resources Development Act* (MPRDA),¹² now already expired,¹³ were at issue. The

⁴ *Communal Land Rights Act* 11 of 2004.

⁵ *Tongoane v National Minister for Agriculture and Land Affairs* 2010 8 BCLR 741 (CC).

⁶ Anonymous 2010 www.lrc.org.za; Hofstatter 2010 www.timeslive.co.za.

⁷ *Tongoane v National Minister for Agriculture and Land Affairs* 2010 8 BCLR 741 (CC).

⁸ For a brief history of the drafting, see Du Plessis and Pienaar 2010 *Fundamina* 83-84. Beginning in 1994 an effort was made to develop a statute dealing with communal land, but this was abandoned in 1999 as traditional leaders regarded it as unsatisfactory. The *Communal Land Rights Bill*, initially introduced in 2002, was furthermore redrafted due to opposition from traditional authorities and as a result the *Communal Land Rights Act* was passed in 2004. More detail in Johnson *Communal Land* 17-19.

⁹ Du Plessis and Pienaar 2010 *Fundamina* 84-87.

¹⁰ According to the *Sunday Times*, legal costs were estimated to be R5 million. This could have been avoided as correspondence shows Parliament and the Ministry of Rural Development and Land Reform "were warned as early as 2004 of the risk of taking a short cut in parliamentary procedure by failing to explain to the provinces the new powers being given to chiefs over communal land". See Hofstatter 2010 www.timeslive.co.za

¹¹ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC); *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA).

¹² *Mineral and Petroleum Resources Development Act* 28 of 2002 (hereinafter "MPRDA").

Constitutional Court confirmed the validity of the transitional provisions, holding that they did not amount to an unconstitutional expropriation, as they did not result in a state acquisition of property that used to be in the private domain.¹⁴ The implications of a decision against upholding the MPRDA did not feature in the Constitutional Court's judgment – only the lower court considered this overtly¹⁵ – but are nevertheless profound: were the transitional provisions to be declared unconstitutional, the cost would be exponentially more than in the case of CLaRA. The stakes are just so much higher in the case of the MPRDA, which – unlike CLaRA – has been implemented,¹⁶ and the transitional period has already expired. Were this Act to be declared unconstitutional and struck down, the costs involved would go even further than writing off years of planning and litigating the law. It would demand the reversal of proprietary positions already established under a new mineral law order; and this would cast serious doubt over our legal system for its ability to uphold the rule of law.

With examples such as these in mind, an imminent question when contemplating the relationship between our *Constitution*¹⁷ and the *Green Paper* is what can be learned from past mistakes. Does history have to repeat itself? This paper attempts to extract from past experiences such as CLaRA and the litigation about the MPRDA lessons to assist the formulation of new land reform policies in ways avoiding the pitfalls of unconstitutionality. To do so, it identifies the core tenets of the *Green Paper*, inquiring about the meaning and implications of certain notions that seem to be central to Government's thinking about revising the land reform programme. In this context the focus is specifically on the idea of land as "a national asset".¹⁸ Thereafter, the guidance to be had from past Constitutional Court experience with

¹³ Item 6(1), sch II, MPRDA provided that an old order prospecting right had to be converted by 1 May 2006. Item 7(1), sch II, MPRDA provided that an old order mining right had to be converted by 1 May 2009. Item 8(1), sch II, MPRDA provided that any unused old order right had to be converted within one year of the coming into the effect of the Act, ie 1 May 2005. See Mostert *Mineral Law* 96.

¹⁴ *Agri South Africa v Minister for Minerals and Energy* 2013 (4) SA 1 (CC) 71-75; *Minister of Minerals and Energy v Agri South Africa* 2012 5 SA 1 (SCA) para 72.

¹⁵ *Agri South Africa v Minister of Minerals and Energy* 2011 3 All SA 296 (GNP) paras 59-61.

¹⁶ The MPRDA came into effect on 1 May 2004.

¹⁷ *Constitution of the Republic of South Africa*, 1996.

¹⁸ DRDLR *Green Paper* Introduction.

the property clause (section 25 of the *Constitution*) is used to predict possible directions that a new policy on land reform could take.

2 Premise and system for land reform

Two related statements in the *Green Paper* form the backbone of the structure it proposes: The first is that "land is a national asset" which "defines national sovereignty".¹⁹ According to the *Green Paper* this is the premise on which any proposal for land reform, agrarian change and rural development should be based.²⁰

The other statement is about what it will take to make a programme for land reform, agrarian change and rural development work. The *Green Paper* states that it will require "political courage ... [the] will to make hard choices ... and bureaucratic commitment, passion and aggression"²¹ to pursue those choices. It declares that the zeal with which apartheid was implemented is the example that should be followed.²² The *Green Paper* makes it clear that the time for patience is over, that goodwill is not "an inexhaustible social asset", and that change must be rapid.²³ These statements confirm the Government's awareness that the envisaged policy changes to land reform will be far-reaching, and that some upheaval of existing positions will be unavoidable.

The Government admits in the *Green Paper*²⁴ that its problem is that the original target date for the completion of the land reform initiative, 2014, is around the corner and that it is nowhere near meeting the target of 30% redistribution. Though

¹⁹ DRDLR *Green Paper* 1.

²⁰ The resolution of the 52nd National Conference of the African National Congress (ANC) (December 2007) on agrarian change, land reform and rural development confirmed the ANC's acute awareness and sensitivity to the "centrality of land (the land question) as a fundamental element in the resolution of the race, gender and class contradictions in South Africa" (DRDLR *Green Paper* Introduction).

²¹ DRDLR *Green Paper* 3.

²² DRDLR *Green Paper* 3.

²³ DRDLR *Green Paper* 3.

²⁴ DRDLR *Green Paper* 5.

these statistics are contested,²⁵ they are used in the *Green Paper*. These figures are skewed by the fact that many victims of land dispossession chose financial compensation over alternative land. The South African Institute of Race Relations reports to have found that Government could have increased land reform transfers by "at least 1.3-million hectares", had all land dispossessions victims settled for alternative land, rather than financial compensation".²⁶

Two issues converge to cause a fundamental contradiction here: first, as the 2010 Bernstein report indicates,²⁷ the grand project of land reform in South Africa was underestimated from its conception. The full realisation of just how complicated this endeavour would be, dawned only as the broad land reform initiative progressed. The breadth and scope of the land reform project and the needs to be addressed by it are becoming clear only as the project progresses. The concomitant need for flexibility in developing land-reform related policies cannot, however, mask inadequate planning and conceptualizing of policies and laws.

Second, any political agenda has a shelf life of about four to five years. If nothing can be achieved within a particular election cycle, the electorate will be quick to condemn the governing party.²⁸ The problem is that no land reform venture of the scale embarked on in South Africa²⁹ can even remotely hope to meet the targets set within one generation, let alone a few election cycles. Although land reform is highly politicised,³⁰ it is, unfortunately, not an area in which real solutions fit political expediency.

This is not a problem peculiar to South Africa. All over Africa, in fact, all over the world, wherever land reform is high on a country's agenda, scholars³¹ have noted

²⁵ FMF *Comment* paras 9 and 11.

²⁶ SAIRR *South Africa Survey 2012* 600-603. Reported in Radebe 2013 www.bdlive.co.za.

²⁷ Bernstein, McCarthy and Dagut *Land Reform* 27-28.

²⁸ Anonymous *Business Day* 8; Dyonana *Daily Dispatch* 4; Hlongwa *City Press* 22.

²⁹ Lund 2012 www.fm.co.za.

³⁰ Mostert 2011 *PELJ* 85.

³¹ Adams *Breaking Ground* 59 as discussed in Palmer 2007 www.gsdr.org. Also discussed in Mostert 2011 *PELJ* 85.

the cyclical nature of land reform initiatives: The political commitment to land reform is often followed by hesitance or delays in implementation,³² as the costs and complexities of such ventures become apparent. Delays or slow implementation persists until internal political pressure necessitates renewed commitments to the original initiative,³³ or a rethinking of the existing land reform processes.³⁴ This is where the problems of linking party politics to land reform become obvious: to expect politicians, land administrators, civil society and donors to take a long-term perspective on land tenure reform is almost impossible to ask. However, a long-term approach is what is really needed.

Yet, regardless of where in the world such tendencies are studied, governing political parties are under pressure³⁵ to gratify their electorates instantly; or at least devise plans that will appease their electorates for another few cycles, even if real change to proprietary positions or poverty levels cannot so be achieved. For South Africa, the *Green Paper* is the beginning of that process. It marks the shift from the originally negotiated goals to a more aggressive programme of reform. The shift is the result of a realisation that the original aspirations are not attainable.

The four-tiered structure that the *Green Paper* proposes indicates its vision. The key features are:³⁶ (1) "reasonable access to land with secure rights" to fulfil basic housing needs and to enable productive livelihoods; (2) property rights that must be "clearly defined" and sustained by effective governance; (3) "long-term tenure" for resident non-citizens who meet specific criteria; and (4) effective regulatory systems ensuring good administration. The goal of land reform, the purpose of which is promoting "optimal land use" in "all areas and sectors,"³⁷ is to achieve social cohesion and development.³⁸ The proposed system hence encompasses a choice in

³² For the South African situation, see eg Groenewald *Mail and Guardian* 12.

³³ See for example the pressure exerted by the ANCYL: Quintal 2012 mg.co.za.

³⁴ Mostert 2011 *PELJ* 85.

³⁵ See eg Mkhabela *City Press* 22; Zuma 2013 www.politicsweb.co.za; Ndlangisa 2013 www.citypress.co.za; Nicolson 2013 www.dailymaverick.co.za.

³⁶ DRDLR *Green Paper* 4.

³⁷ DRDLR *Green Paper* 4.

³⁸ DRDLR *Green Paper* 1.

favour of secure land rights for all South Africans, and a secondary system of long-term tenure for resident non-South Africans who can invest in ensuring the country's food security and livelihoods, and who can improve agro-industrial development.

With these points in mind, this paper proceeds to scrutinise the core concept espoused by the *Green Paper*, namely land as a "national asset". In particular, the analysis deals with the consequences of this view of land, which at present is regarded as a crucial resource that (still) lies largely in private hands. The paper considers the meaning of the *Green Paper's* rhetoric, along with its practical implications for the way our property law is structured at present. Thereafter it is possible to consider how such a policy could be converted into a reform of land law that would align with the constitutional mechanisms for protecting private property interests.

3 Land as a national asset

At first glance it may not be altogether clear what exactly it is that the *Green Paper* proposes when it refers to "land [as] a national asset" which "defines national sovereignty".³⁹ From the comments available at this point,⁴⁰ it seems as if there is quite some confusion, or at least vast differences of opinion⁴¹ about what this statement means. Some believe this is a step in the direction of nationalisation of land.⁴² In early propositions from government,⁴³ it indeed seemed as if some form of nationalisation was contemplated. However, the current Minister has since been

³⁹ DRDLR *Green Paper* 1.

⁴⁰ See for example SAPA 2011 www.citypress.co.za; Dlukulu 2012 *Without Prejudice* 40; Steward 2012 www.politicsweb.co.za; Dardagan 2012 www.iol.co.za; SAPA 2011 mg.co.za; Mgidlana 2011 www.timeslive.co.za; SA Commercial Prop News 2012 www.sacommercialpropnews.co.za; SAPA 2011 www.news24.com; Du Toit 2011 anothercountryside.wordpress.com; Child K 2011 mg.co.za; Philips 2012 www.farmersweekly.co.za; Du Plessis 2011 dailymaverick.co.za.

⁴¹ The Institute of Race Relations called the Green Paper an "assault on the Constitution and the rule of law" - SAPA 2011 www.news24.com.

⁴² Jeffery 2012 www.politicsweb.co.za; SAPA 2012 www.citypress.co.za. Afriforum has started a petition with the aim of stopping the Green Paper - available at Afriforum 2012 www.afriforum.co.za; Stander *Weekend Post* 4.

⁴³ Dlukulu 2012 *Without Prejudice* 39.

quoted⁴⁴ as saying that regarding land as a "national asset" is not synonymous with nationalisation. Nevertheless, the governing party's position is all but clear. When prompted about the land reform agenda in Parliament more recently, the same Minister referred to the ANC's Mangaung conference to justify a land reform agenda geared specifically towards placing black people in control of the country's economy.⁴⁵ In addition, analysts⁴⁶ have made it clear after the President's last State of the Nation address⁴⁷ that continuing the current policy of paying market value for land to be redistributed will render land reform unaffordable in the medium term. The indications coming from the governing party about pursuit of an agenda of nationalisation are persistently confusing and opaque.⁴⁸ Against this background the purposes of the *Green Paper* need to be scrutinised.

Two issues deserve attention. The first is whether the *Green Paper's* vision really is one of nationalisation of land. Even if it is not, it seems clear enough that a quite far-reaching change of the legal regime is contemplated. The second question therefore is what the constitutional implications of implementing the proposed change would be.

3.1 *Is it, or is it not, nationalisation?*

There is a populist superficiality to the debate about nationalisation as found in popular media and political circles. Nationalisation, as it is raised at political rallies and reported about in newspapers, is a nebulous something, with different meanings and intensities at different times.⁴⁹ At its most basic level the call is for the resources

⁴⁴ Dlukulu 2012 *Without Prejudice* 39.

⁴⁵ SAPA 2013 www.iol.co.za.

⁴⁶ Jansen 2013 www.lhr.org.za.

⁴⁷ Zuma 2013 www.info.gov.za.

⁴⁸ Criticism to this effect comes even from within the governing coalition. See COSATU 2013 www.cosatu.org.za.

⁴⁹ Barnard-Naude 2012a constitutionallyspeaking.co.za; Barnard-Naudé 2012b constitutionallyspeaking.co.za.

to be converted from private (control or) ownership to state (control or) ownership.⁵⁰

The nationalisation debate is at its most heated in the arena of mining and minerals, but there is not much scope here to elaborate.⁵¹ I mention it here only to draw attention to the potential quagmire of problems for the rejuvenation of the land reform agenda.

There is a striking parallel here between the wording of the *Green Paper* and some provisions of the MPRDA. In its pivotal section 3, the MPRDA determines that mineral and petroleum resources are the "common heritage of all the people of South Africa and that the State is the custodian thereof for the benefit of the nation".⁵² The interpretation of this clause has kept scholars⁵³ busy for the past decade and even though much has been written about it, no court of law has so far taken the opportunities that presented themselves⁵⁴ to set out, once and for all, what exactly this provision means, or what its implications are for the interpretation of the rest of the Act. Clarity about state custodianship would have assisted in some of the recent cases litigated on issues involving the MPRDA.⁵⁵ Then again, in seeking meaning behind the notion of state custodianship, our judiciary might have attracted criticism for supposedly interfering with the legislative process.⁵⁶

⁵⁰ Mostert *Mineral Law* 154; Van Below 1994 *SAJIA* 128.

⁵¹ Some of the issues are discussed in Mostert *Mineral Law* 154; Binge *Means of Achieving Equitable Access*; Booyesen 2010 *Inside Mining* 3; Leon 2009 *Journal of Energy & Natural Resources Law* 597-644; ANCYL Towards the Transfer of Mineral Wealth. Van der Vyver 2012 *De Jure* 125-142 is one of only a few academic commentaries on this issue.

⁵² Section 3(1) of the MPRDA.

⁵³ Badenhorst and Mostert 2007 *TSAR* 469; Van den Berg 2009 *Stell LR* 139; Badenhorst 2010 *SALJ* 646; Dale *South African Mineral and Petroleum Law*; Van der Schyff 2008 *TSAR* 757; Watson *Ownership of and Custodianship over Unsevered Minerals*.

⁵⁴ Eg in *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd* 2011 1 All SA 364 (SCA). The *Holcim* decision came closest to providing a working definition.

⁵⁵ *Holcim (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd* 2011 1 All SA 364 (SCA).

⁵⁶ The court had to consider the extent to which it could interfere in the legislative process in *Doctors for Life International v Speaker of the National Assembly* 2006 6 SA 416 (CC), where four bills were declared unconstitutional for failure to properly utilise public participation. In *Tongoane v National Minister for Agriculture and Land Affairs* 2010 8 BCLR 741 (CC), CLARA was struck down for procedural non-compliance.

There may be a purpose in "fudging" core notions such as the one of state custodianship of mineral resources in the MPRDA, or the notion of "land as a national asset" in the *Green Paper*. Evading a clear meaning of such concepts may be the only way, for instance, of achieving a negotiated transformation. But the lesson that may be relevant here is that in the absence of greater clarity about what is meant by referring to land as a "national asset", the law to emanate from the *Green Paper* will have the same Achilles heel as that of the MPRDA: the fundamental concept is cause for confusion rather than a useful compass. This might give rise to an unnecessarily costly litigation processes in the interest of clarity.

This may have implications for the constitutionality of proposed reforms to land reform law, in the same way in which the MPRDA has come under fire⁵⁷ for its supposed expropriatory provisions which do not attract compensation. Elsewhere,⁵⁸ I indicated my opinion that the MPRDA does not intend to expropriate existing positions, nor amounts to an inadvertent expropriation. However, the weaknesses of the MPRDA⁵⁹ cause the opposite view to continue attracting proponents.⁶⁰

What the example of the MPRDA demonstrates, is the challenge to conceptualise the laws that will flow from the *Green Paper* in such a way that fundamental concepts are not vulnerable to contestation. To allow yet another important legal reform to be hijacked for the sake of political gamesmanship or whatever other reasons there may be, would be succumbing to such vulnerability.

Although the Minister of Rural Development and Land Reform has stated that the government's intention is *not* to nationalise land,⁶¹ there are indicators in the *Green Paper* itself that may lead some to believe that the opposite is true. Take for instance the level of state control envisaged by the creation of the offices and

⁵⁷ Van Niekerk and Mostert 2010 *Stell LR* 159.

⁵⁸ Mostert *Mineral Law* 127.

⁵⁹ See Dale *South African Mineral and Petroleum Law* MPRDA-128 to MPRDA-130(2).

⁶⁰ Eg Badenhorst and Olivier 2012 *THRHR* 329-343; Van der Vyver" 2012 *De Jure* 125-142; Dale *South African Mineral and Petroleum Law* MPRDA-129 to MPRDA-130(2).

⁶¹ Erasmus *Farmer's Weekly* 16.

organs that the *Green Paper* mentions: the Land Management Commission will have regulatory functions to ensure that land-holders will appropriately manage land,⁶² and powers to investigate "any issue" relating to land⁶³ and to verify title deeds for the sake of validation.⁶⁴ The Land Valuer-General will have the power to determine compensation for expropriation on the basis of constitutional principles,⁶⁵ thus avoiding the current involvement of the judiciary in either determining expropriatory compensation or confirming an agreement about compensation between the parties.⁶⁶ The Land Rights Management Board will have the power to enforce compliance with norms and standards, policies and laws.⁶⁷ The regulation envisaged by these clauses is extremely broad. It could have significant repercussions for the ability of private land holders to use the land in commercially viable ways. This begs the question of how the *Green Paper's* vision will affect property law more broadly.

3.2 Implications for the structure of property law

South African property law's centre of gravity has always been its understanding of the concept of "ownership" as full or unencumbered control over property within the limits laid down by law.⁶⁸ This has been a problematic viewpoint. Some of the most crucial pieces of property law scholarship⁶⁹ of the past century demonstrated convincingly that no reliance can be placed on the claim that ownership has ever been absolute.⁷⁰

What is striking about clause 3 of the *Green Paper*, which sets out how private land-holding is to function pursuant to the proposed changes, is the lack of support for

⁶² See DRDLR *Green Paper's* 6.2(c), 6(5).

⁶³ See DRDLR *Green Paper's* 6.5.2.

⁶⁴ See DRDLR *Green Paper's* 6.5.2(c).

⁶⁵ See DRDLR *Green Paper's* 6.6.2(b).

⁶⁶ Section 25(2)(b) of the *Constitution*. Gildenhuys *Ontheieningsreg* 154.

⁶⁷ DRDLR *Green Paper's* 6.7.3.

⁶⁸ *Gien v Gien* 1979 2 SA 1113 (T) 1120; Badenhorst, Pienaar and Mostert *Law of Property* 91-92; Van der Merwe and Pope "Property" 410; Mostert and Pope *Principles of the Law of Property* 345.

⁶⁹ See Scott 2011 *Acta Juridica* 23; Birks 1985 *Acta Juridica* 1; Van der Walt 1992 *De Jure* 446; Visser 1985 *Acta Juridica* 39.

⁷⁰ Scott 2011 *Acta Juridica* 24.

any conceptualisation which puts control over land primarily in the hands of private individuals. The manner in which clause 3 refers to "rights in property", "access to land with secure rights" and "secure long-term tenure" seems to avoid reliance on the concept of ownership as our law knows it.

Traditionally, in our Roman-Dutch law, ownership was conceptualized in absolutist and encompassing terms. Van der Merwe's description of ownership as the "most comprehensive right embracing not only the power to use (*ius utendi*), to enjoy the fruits (*ius fruendi*) and to consume the thing (*ius abutendi*), but also the power to possess (*ius possidendi*), to dispose of (*ius disponendi*), to reclaim the thing from anyone who wrongfully withholds it or to resist any unlawful invasion of the thing (*ius negandi*)"⁷¹ is most telling. The frequently used phrase *plena in re potestas* confirms, for instance, the owner's ability to act at will with the property within the limits of the law. It also expresses the widely held conception of ownership as the "most extensive" legal relationship that can exist between a person and property.⁷²

Descriptions such as these do not discount the fact that ownership is not limitless, but are more frequently relied upon to endorse the idea of ownership as full and uninhibited power over property - a notion which might have been more appropriate as a response to medieval feudalism than to the demands of the modern socio-economic context.⁷³ In fact, scholarship of this and the previous century has confirmed that conceptually, ownership was never absolute, neither in Roman law nor beyond it.⁷⁴ Nevertheless (and paradoxically), the idea of ownership as conveying absolute power over property, especially in as far as it relates to the ability to exclude others from using and enjoying the resource, was a widely

⁷¹ Van der Merwe "Things" paras 296, 298.

⁷² Cowen "Transformation of the Concept of Ownership" 8-9; Van der Walt 2008 *Stell LR* 325.

⁷³ See Lewis 1985 *Acta Juridica* 241.

⁷⁴ See Scott 2011 *Acta Juridica* 23; Birks 1985 *Acta Juridica* 1; Visser 1985 *Acta Juridica* 39.

accepted interpretation of the concept,⁷⁵ which particularly suited the purposes of the government in the time of apartheid.⁷⁶

The language of the *Green Paper* avoids reference to the unitary conception of ownership in which absoluteness of enforceability or exclusivity of the owners' entitlements would be a feature – misconceived or otherwise. The two elements that stand out most, when looking at the *Green Paper's* vision, is the presence of a strong, regulatory state⁷⁷ and the possibility of secure, but limited ("clearly defined") rights to land.⁷⁸ The wording of the *Green Paper* includes all land, not only productive agricultural land,⁷⁹ in its description of land as a national asset. It envisages land that is controlled through a much more interventionist state approach:⁸⁰ more severe regulation and/or limitations of proprietary positions,⁸¹ and greater state power in the granting of rights in property⁸² than what has hitherto been the case.

⁷⁵ Van der Merwe *Sakereg* 12-13; Scholtens "Law of Property" 578-579.

⁷⁶ Van der Walt notes that eviction was ostensibly neutral. However, "when applied in the context of apartheid land policy it soon became obvious that eviction is a political instrument that not only serves a general socio-political purpose in that it entrenches the existing hierarchy of owners and non-owners, but that it could also further less wholesome and far more contentious ideological goals, such as racial segregation and oppression." See Van der Walt *Property in the Margins* 60. Also see Van der Walt "Future of Common Law Landownership" 22-25 regarding the purported neutrality of property law.

⁷⁷ See DRDLR *Green Paper* s 3.

⁷⁸ See DRDLR *Green Paper* s 3.1.

⁷⁹ This is implied from the fact that s 3.1 as well as s 6.4(a)-(d) refer to all types of land (state, public and private), but s 6.4 expressly excludes communal land tenure, stating that it will be dealt with in a separate policy document.

⁸⁰ This is evidenced by the wording used in the Problem Statement and Vision for Land Reform, mentioned above. DRDLR *Green Paper* s 2.1 and 2.2 require the state to continue to invest in land relations, while s 3.1 introduces a four-tier system of administration. S 3.4 requires the administration of land through planning and regulatory systems. The creation of the Land Management Commission (LMC) under s 6.5 also evidences state intervention. The LMC has the power, *inter alia*, to subpoena and question any party, enquire about any land or initiative, grant amnesty and seize or confiscate land obtained through illegal means. In addition, the Land Valuer-General is granted wide powers to determine the price of land earmarked for land reform, arguably ousting the jurisdiction of the courts. The Land Rights Management Board mentioned in s 6.7 also shows a system of state intervention.

⁸¹ For example, the LMC has the power to subpoena private and public parties to answer any questions relating to land, enquire about any question relating to land, as well as verify and/or validate/invalidate any title deed in accordance with DRDLR *Green Paper* s 6.5.2(a)-(c).

⁸² The state will be involved in the selection of beneficiaries, the valuation of property, as well as the transfer of property through the creation of the Land Management Commission, Land Valuer-General and Land Rights Management Board.

The *Green Paper* definitely wants to move away from a legal structure in which full control of land lies with its owner. Or, put more mildly, the move is towards a legal structure in terms of which private "title" to land will be subject to much more severe limitation. In doing so, the *Green Paper* deviates from the pivotal concept of ownership as known in Roman-Dutch law, both in terms of the severity of its envisaged regulatory intervention by the state⁸³ and in the importance it affords to concepts such as "rights in property," "tenure" and "access", all of which cannot be equated with the ownership concept⁸⁴ (at least not in the form it still takes in South African common law as explained above).

There are strong indications here that the *Green Paper* envisages not merely minor changes to laws that have a bearing on land reform, but indeed fundamental changes to the way in which land law is constructed and practiced. This is the point at which one must ask how constitutionality can be assured.

4 Keeping it constitutional

Upon the above analysis, the issue of constitutionality in terms of section 25 of the *Constitution* may surface at least in two respects: On the one hand, the constitutionality issue may be raised with regard to the matter of whether a large-scale reworking of legal positions concerning property is possible, given the protection afforded by the constitutional property clause. To determine this question, the nature of such a revision of proprietary positions needs to be clear, as must be the government's strategy: will changes be effected in the form of regulatory interventions (only), or is expropriation of existing proprietary positions foreseen?

Supposing that the intended changes to land law are indeed an exercise of the state's police power,⁸⁵ a second question arises. The exercise of the state's police

⁸³ See s 6.1(a) and (b) where it is clear that the land reform process, and thus transfer of ownership, will be subject to certain restrictions. These include productive use of the land to ensure food security.

⁸⁴ Van der Merwe and Pope "Property" 406.

⁸⁵ For a discussion of police power, see Van der Walt *Constitutional Property Law* 213-218.

power – its ability to impose regulations on property holders⁸⁶ – is a legitimate constitutional activity.⁸⁷ Section 25 provides that such regulation should not amount to an arbitrary deprivation⁸⁸ of property. Can the changes envisaged by the *Green Paper* be undertaken in such a manner as that they do not amount to an arbitrary deprivation?

To answer questions like these, it is necessary to take a stance on the underlying matter of whether it is justifiable to allow a state to exert this type of severe control over an important resource in a constitutional state such as ours where property rights enjoy constitutional protection from arbitrary infringement. The analysis below supports my view that *even* severe regulatory control *can* be justifiable, if regard is had to sections 25(1), (2) and (3) of the constitutional property clause, and if the regulation is undertaken carefully and thoughtfully.

Almost a decade after it has been decided, *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*⁸⁹ (the "*FNB decision*") remains the definitive judicial engagement with section 25. It still represents the most comprehensive consideration to date of the structure and application of section 25 to property disputes. As such, it remains our point of departure and a valuable account of the framework for constitutional property protection and regulation in South Africa.

4.1 The FNB decision and the dictates of section 25

The *FNB decision* dealt with the constitutionality of a law permitting the confiscation of movable property (motor vehicles) belonging to First National Bank by the South

⁸⁶ The exercise of police power is legitimate provided that the deprivation is authorised by a law of general application, it is not disproportionate in its effects and it serves a legitimate public purpose. See Van der Walt *Constitutional Property Law* 218.

⁸⁷ Section 25(2)(a)-(b) of the *Constitution*.

⁸⁸ Section 25(1) of the *Constitution*.

⁸⁹ *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) (the *FNB decision*).

African Revenue Service to settle the tax debt of some of the bank's debtors who were purchasing the property by way of instalments.⁹⁰ In applying section 25 to the matter, the court took its cue from an idea of which several variations had long been supported in South African scholarship,⁹¹ namely that the *Constitution* foresees a broad range of limitations on property rights generally designated as "deprivations", within which expropriations form a special "subcategory".⁹²

In terms of this understanding of section 25(1), read with the general limitations clause, section 36(1) of the *Constitution*, all *deprivations* (also expropriations) must be undertaken by a law of general application, may not be arbitrary, and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁹³ In addition, section 25(2) expressly requires *expropriations* to be for a public purpose or in the public interest.⁹⁴ Also, a constitutionally valid expropriation invariably must be compensated according to section 25(3).⁹⁵

The *FNB* court used the section 25(1) prohibition against "arbitrary" deprivations to develop a flexible test by which to determine whether "sufficient reason"⁹⁶ existed for an infringement upon property rights. According to the court, the "sufficient reason" test entailed the consideration of various relationships. These include:⁹⁷ (i) the purpose of the infringement in relation to the law effecting it; (ii) the purpose

⁹⁰ Section 114 of the *Customs and Excise Act* 91 of 1964. For more detail, see Van der Walt 2002 *SAJHR* 86-113.

⁹¹ The court in particular mentioned the following: Lewis 1992 *SAJHR* 389; Van der Walt *The Constitutional Property Clause*; Van der Walt *Constitutional Property Clauses*. Other significant contributions by South African scholars in this field include Budlender "Constitutional Protection of Property Rights"; Chaskalson 1993 *SAJHR* 388; Chaskalson 1994 *SAJHR* 131-139; Chaskalson 1995 *SAJHR* 222; Chaskalson and Lewis "Property"; Kleyn 1996 *SA Public Law* 402; Murphy 1994 *SAJHR* 385; Murphy 1995 *SA Public Law* 107; Roux 1996 *AJICL* 755; Van der Walt and Botha 1998 *SA Public Law* 17; Erasmus 2000 *SA Public Law* 105.

⁹² The *FNB* decision para 59ff. Badenhorst, Pienaar and Mostert *Law of Property* ch 21. See also Mostert *Mineral Law* 120-121; Van der Walt *Constitutional Property Law* 219.

⁹³ The *FNB* case paras 57-60; Van der Walt *Constitutional Property Law* 218-219.

⁹⁴ See Slade *Justification of Expropriation* 39-56.

⁹⁵ Section 25(3) of the *Constitution*. See also Van der Walt *Constitutional Property Law* 503; Du Plessis *Compensation for Expropriation* 99.

⁹⁶ The *FNB* decision paras 65, 99.

⁹⁷ The *FNB* decision para 100.

of the infringement in relation to the affected property or its owner; and (iii) the nature of the affected property in relation to the extent and purpose of the deprivation.⁹⁸

In explaining the "sufficient reason" test,⁹⁹ the court outlined broadly the purposes that would justify infringement of property rights: Where ownership of land or corporeal movable items were affected by a restriction, the purpose of the restriction would have to be more compelling than in the case of less extensive property rights.¹⁰⁰ Likewise, for an encompassing restriction affecting all the incidents of ownership, there would have to be a more compelling purpose than where only some of the incidents of ownership are affected.¹⁰¹ The court stressed that "sufficient reason" would sometimes be established by "no more than a mere rational relationship between means and ends",¹⁰² while in other cases a full-blown proportionality inquiry¹⁰³ would be necessary. In this particular case, the court cautioned against "cast[ing] ...the net ... far too wide".¹⁰⁴ The provision in question was struck down for being unconstitutional.¹⁰⁵

The "sufficient reason" test is a substantive one. Procedural fairness is another consideration for which one has to search further than *FNB* for guidance. In *National Credit Regulator v Opperman*¹⁰⁶ the Constitutional Court suggested that a deprivation will be procedurally arbitrary if the statute effecting the intervention does not allow courts the discretion to make a just and equitable order. This is supported

⁹⁸ See further *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 44 where the list of considerations were reiterated as follows: "(a) the nature of the property concerned and the extent of the deprivation; (b) the nature of the means-ends relationship that is required in the light of the nature and extent of the deprivation; and (c) whether the relationship between means and ends accords with what is appropriate in the circumstances and whether it constitutes sufficient reason for the s 25(1) deprivation".

⁹⁹ The *FNB* decision para 100.

¹⁰⁰ The *FNB* case para 100(e).

¹⁰¹ The *FNB* case para 100(f).

¹⁰² The *FNB* case para 100(g).

¹⁰³ The *FNB* case para 100(g).

¹⁰⁴ The *FNB* case para 108.

¹⁰⁵ The *FNB* case paras 133.

¹⁰⁶ *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 69.

by *Mkontwana v Nelson Mandela Metropolitan Municipality*,¹⁰⁷ in which the Constitutional Court conceptualised procedural fairness for purposes of section 25(1) as a flexible concept, influenced by the circumstances applicable in the case. The suggestion hence is that procedural arbitrariness will be determined by the absence of possibility of judicial control.¹⁰⁸

If Government has its way, as set out in the *Green Paper*, the extent of state control to be exerted over land and land-holding will be, it is fair to say, far more severe than what has been the case so far. Though this does not necessarily mean that nationalisation is what is intended, the government patently wishes to extend the state's police power – its regulatory abilities – over a resource which is clearly of national interest.

The constitutional property clause itself envisages reforms to land and natural resources that may interfere with property rights, providing in section 25(8) that interpretations of the property clause itself may not "impede the state from taking legislative and other measures" to achieve these kinds of reform in the interests of addressing the results of past racial discrimination. It adds that "departures from the provisions of [the property clause]" must accord with the provisions of the general limitations clause (section 36(1) of the *Constitution*). The relationship between section 25 and section 36 of the *Constitution* has been branded as problematic by scholars,¹⁰⁹ and the Constitutional Court in the *Opperman* case apparently shares this sentiment.¹¹⁰ If an infringement is found to amount to an arbitrary deprivation of property, there really is not all that much scope for justifying it under section 36(1).

¹⁰⁷ *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 1 SA 530 (CC) para 65. See further *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 40.

¹⁰⁸ See further Van der Walt 2012 *Stell LR* 90-93 where it is argued that deprivations should be distinguished on the basis of whether they are caused by administrative actions or brought on directly by legislation.

¹⁰⁹ Both Roux "Property" 46-26 – 46-28; Van der Walt *Constitutional Property Law* 74-79 opine that s 36(1) is unlikely to play a significant role in the context of arbitrary deprivations due to nature of the tests used in ss 25(1), 36(1).

¹¹⁰ *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 73.

4.2 *What this means for the Green Paper*

It is against this backdrop that the question can be asked whether the *Green Paper's* envisaged regulatory interventions would "cast the net far too wide".¹¹¹ Given the *Green Paper's* vision of a much stricter regulatory regime on land holding in our country, it is possible that laws emanating from this policy document may result in claims of unconstitutionality. However, I would like to argue that unconstitutionality is not inevitable.

Even though the laws envisaged by the *Green Paper* could espouse a much more interventionist approach with land than what we have at present, it is my opinion that such an approach is possible, and that it can be constitutional when tested against section 25 in its current form, and leaving aside the possibility of a constitutional amendment. The foundations have already been laid in the *FNB decision*: the sufficient reason test requires that the purpose of an interventionist approach be more compelling, the more extensive the property interests affected by the impositions are.¹¹² Since land is such a valuable asset,¹¹³ one would expect the motivation for an intervention to be subjected to strict scrutiny.

There seems to be another parallel here between what the *Green Paper* intends and what has been put in place in the context of mineral and petroleum resources. What the MPRDA does, is to put in place a regulatory system which enables the state to meet its goals of achieving broader and more equitable access to the mining industry, avoiding monopolising of sectors in the industry and to ensure optimal exploitation of mineral and petroleum resources.¹¹⁴ The *Green Paper* expresses goals congruent to these, in wanting to ensure equitable land allocation and use, sustained food production and deracialising of the rural economy.¹¹⁵ The trajectory

¹¹¹ *National Credit Regulator v Opperman* 2013 2 SA 1 (CC) para 108.

¹¹² The *FNB* case para 100(e).

¹¹³ The *FNB* judgment acknowledges the value of land by requiring stricter scrutiny where it is involved - *FNB* case para 100(f).

¹¹⁴ Preamble to the MPRDA.

¹¹⁵ Section 4(1)(a)-(c) of the DRDLR Green Paper.

for land reform as established by the *Green Paper* is meant to improve land reform perspectives without impairing agricultural production and food security. It intends to avoid or minimise restitution and redistribution practices that do not generate sustainable livelihoods, employment and incomes.¹¹⁶ These are goals that make sense in our context, and for which there certainly is justification¹¹⁷ even if it means that implementing measures would constitute major deviations from current legal positions.

One must ask, however, whether such purposes really necessitate a system change. To what extent is the system change simply a response to pressures from the disgruntled electorate? How much of the *Green Paper* is just an exercise in political expediency? It is particularly noticeable that the four-tier system suggested conflates *place-to-live* issues and *food-security* issues. At the very least, it is questionable whether these matters have more in common than merely that they are of interest to the electorate. "Place to live" and "food security" are separate matters of national concern. Given the scope of both these problems, why are they conjoined in a document that forces both to be treated only superficially?

The reasons for engaging in the land reform rejuvenation project of the *Green Paper* are without doubt compelling: a severe intervention will be necessary if the constitutionally mandated goal of land reform¹¹⁸ is to be achieved within a reasonable time. But what the intervention will be must be carefully contemplated in view of the *Green Paper's* stated purposes for reform. Moreover, the statutory law emanating from the *Green Paper* must provide for the possibility of judicial oversight to ensure procedural fairness.

Also, the severity of the intervention may be tempered in many ways for those with existing property holding: One way is to provide for expropriatory compensation.¹¹⁹

¹¹⁶ Section 6(1)(a)-(b) of the DRDLR Green Paper.

¹¹⁷ See generally in this regard Bernstein, McCarthy and Dagut *Land Reform*.

¹¹⁸ Section 25(4)-(9) of the *Constitution*.

¹¹⁹ This has been implemented in other legislative schemes. See for example item 12, sch 2, MPRDA and s 5 of the *Restitution of Land Rights Act* 48 of 2003.

Another is to allow transitional provisions, giving current property holders a chance to align their positions with the new land regime.¹²⁰ A third is to allow exceptions to the regime. There is not sufficient indication in the *Green Paper* of how the severity of the interventions envisaged will be counteracted.

5 Concluding remarks

Unfortunately, in conclusion, it is not really possible yet to analyse in greater detail whether the specific statutory interventions that will flow from the *Green Paper* will be constitutional. For that to happen, there must be clarity about what these laws are going to be. And for the laws to display clarity, it is crucial that the fundamental concepts of the *Green Paper* be scrutinised carefully before they are turned into the foundations of a new land law.

I must end, therefore, with a dual plea: first, for clearer guidance by the state of what the notion of "land as a national asset" that "defines national sovereignty" really entails; and second, for recognition that political expediency does not fit the land reform agenda. If we are going to get land reform right, it will be because it is done for generations to come and not just for victory in the next election cycle.

¹²⁰ This was provided for by items 6, 7 and 8 of the MPRDA.

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List of abbreviations

AJICL	African Journal of International and Comparative Law
ANCYL	African National Congress Youth League
ClARA	Communal Land Rights Act
DA	Democratic Alliance
DRDLR	Department of Rural Development and Land Reform
FMF	Free Market Foundation
LMC	Land Management Commission
LSSA	Law Society of South Africa
MPRDA	Mineral and Petroleum Resources Development Act
PELJ	Potchefstroom Electronic Law Journal
SAIRR	South African Institute of Race Relations
SAJHR	South African Journal on Human Rights
SAJIA	South African Journal of International Affairs
SALJ	South African Law Journal
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
TSAR	Tydskrif vir die Suid-Afrikaanse Reg