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An Inclusionary housing perspective on spatial justice: Location, affordability, and the South African Constitution

by

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DEDICATION

To my loving wife and children

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Summary

This thesis argues that the implementation of inclusionary housing in South African law will affect property rights in the form of landownership and expected earnings. By invoking the non-arbitrariness test that was adopted by the Constitutional Court in the *FNB* decision, the thesis illustrates that the factors mentioned in the non-arbitrariness test can be used to understand the scope of the state's obligations in fulfilling the right of access to adequate housing. The symbiotic nature of the relationship between the right to property (section 25) and the right of access to adequate housing (section 26) is therefore underscored. In drawing this link, I rely on the principle of spatial justice that is enshrined in the Spatial Planning and Land Use management Act (SPLUMA) to show that the implementation of inclusionary housing requires a more inclusive reading of spatial justice than what the Act envisages. I argue that to effectively implement inclusionary housing, the owner's right to exploit property for economic benefit should be balanced by a housing beneficiary's right to well-located, affordable housing. While the South African legal response to the problem of homelessness has emphasized affordability of housing, location has largely been overlooked. To satisfy the non-arbitrariness test for the deprivation of property rights, it must be shown that the imposition of inclusionary housing requirements on property developers will lead to housing that is both affordable and well located. Appropriate building and rent regulation measures can lead to affordable and well located housing in the South African legal context, but only if these measures recognize that a developer is not ordinarily entitled to the most profitable use of her property. As currently conceptualized, the principle of spatial justice in SPLUMA gives owners excessive protection against state interference with their property rights by insisting that the spatial justice principle must be read together with the principles of sustainability and effectiveness. The thesis concludes that SPLUMA nevertheless lays a foundation for the implementation of inclusionary housing in South Africa because it requires municipalities to include crucial information (such as estimates of the level of unemployment, family sizes and expected economic activity) in their Municipal Spatial Development Frameworks (MSDFs). MSDFs will play the role of providing sufficient reason for regulating developers' property rights (especially the right to exploit property for economic benefit) in line with the idea of substantive non-arbitrariness envisaged in *FNB*.

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Introduction

1.1 Background

The "social face"[1] of South African cities post-apartheid continues to exhibit the social and racial segregation that were the hallmark of this dark period. Nearly three decades after the end of apartheid, its vestiges can be seen in the way that space and resources are allocated. Most of the population still lives in abject poverty, crammed in dilapidated and dangerous informal settlements with no access to basic services such as water, sanitation, refuse removal, and electricity.[2] The type of housing in these areas falls short of the constitutional standard of "access to adequate housing."[3] The National Development Plan[4] ('NDP') estimates that by 2030, some 7.8 million more people will inhabit South African cities, and a further 6 million people by 2050.[5] At this rate, it is increasingly clear that drastic steps are needed to change the spatial make-up of South Africa's cities if they are to survive the pressure exerted by rural—urban migration.

The government's efforts to provide housing to the urban poor have been commendable, from a statistical perspective. The building of subsidised, low-cost 'RDP'[6] housing has led to the sheltering of over two million households. What has been lacking is the alignment of these efforts to the goal of building houses that are located close to employment opportunities and that offer access to social amenities.[7] Although government policy targeted the development of compact cities as part of

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[1] Van Wyk J "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26—41 38 ('Van Wyk "SPLUMA, spatial justice, and housing"').

[2] Tissington K *A resource guide on housing policy and implementation in South Africa 1994—2010* (2011) 5; Todes A "Housing, integrated urban development and the compact city debate" in Harrison P, Huchzermeyer M & Mayekiso M *Confronting fragmentation: Housing and urban development in a democratising society* (2003) 110; Strauss M *A right to the city for South Africa's urban poor* (2017) 5 ('Strauss *Right to the city for SA*').

[3] Section 26 of the Constitution of the Republic of South Africa 1996 ('Constitution') provides:

> " (1) Everyone has the right to have access to adequate housing.
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.
> (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions."

[4] National Planning Commission *National Development Plan: Vision for 2030* (2012) 1 ('NDP')

[5] NDP 266.

[6] See Parliament *White Paper on Reconstruction and Development,* General Notice 1954 of 1994, Government Gazette 16085, 15 November 1994.

[7] Van Wyk "SPLUMA, spatial justice, and housing" 39.

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integrated urban development,[8] housing developments have tended to be spread out from urban centres, producing sprawl.[9] The gentrification of inner cities has resulted in housing in these locations becoming unaffordable for middle-income households.[10] The result of this is the reinforcement of poverty since the urban poor are obliged to expend their meagre resources on transportation to their places of work.[11]

Amidst these efforts, it seems that the significance of the social and economic integration functions of housing has been overlooked.[12] The focus on mass production of housing, although understandable from a political perspective, has failed to bring about social and economic integration in the lived spaces that make up cities. Residential areas are still largely divided along economic and racial lines. There is a shortage of well-located land that can spur inclusivity in spatial planning, making it difficult for integrated housing development to be realized.[13] Most of the new residential sites are located on green field land on the outskirts of cities with no access to crucial services.[14] This results in inequality in housing and in the distribution of resources generally.[15]

Against this backdrop, the allure of inclusionary housing is easy to discern. Inclusionary housing is a method of housing delivery the essence of which is to encourage or require property developers to include affordable housing units in their

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[8] *White Paper on Housing GG* 354 *GN* 1376 of 23 December 1994 para 5.7.1.3.
[9] Van Wyk "SPLUMA, spatial justice, and housing" 39; Adebayo O *Still no room at the inn: Post-apartheid policy and the challenge of integrating the poor in South African cities* (2010) 3, available online at http://wk.ixueshu.com/file/2729ba4b1f3fa64b.html (accessed on 20 March 2020); Roberts R *Planning for affordable housing through inclusionary housing against the apartheid spatial landscape in the Western Cape province, South Africa* (2017) 2 ('Roberts *Planning for affordable housing*').
[10] Parnell S "South African cities: Perspectives from the ivory tower of urban studies" (1997) 34 *Urban Studies* 891—906 898.
[11] Stats SA *Household Survey 2018* p 59, available online at http://www.statssa.gov.za/publications/P0318/P03182018.pdf (accessed 1 February 2020).
[12] Pieterse E *Post-apartheid geographies in South Africa: Why are urban divides so persistent?* (Leuven: Cities in development: Spaces, conflict and agency, 2009) 1; Presidency *Twenty year review: South Africa (1994—2014) - Background paper: Regional and spatial development* (Pretoria: Presidency, 2013); Roberts *Planning for affordable housing* 7.
[13] Strauss *Right to the city for SA* 5; NDP 267.
[14] Socio-Economic Rights Institute (SERI) *Edged out: Spatial mismatch and spatial justice in South Africa's main urban areas* (2016) 6, available online at https://www.escr-net.org/resources/edged-out-spatial-mismatch-and-spatial-justice-south-africas-main-urban-areas (accessed on 10 April 2020).
[15] UN-Habitat *World cities report 2016- Urbanization and development: Emerging futures* (2016) 206, available online at https://unhabitat.org/world-cities-report (accessed 15 April 2020); UN-Habitat *State of the world's cities* 2010/2011 (2008) 73, available online at https://unhabitat.org/state-of-the-worlds-cities-20102011-cities-for-all-bridging-the-urban-divide (accessed 18 April 2020).

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otherwise market-priced developments.[16] The aim of inclusionary housing is to avoid urban sprawl by densifying the use of land in the course of housing development.[17] This should also lead to social integration as the physical space between different social groups is lessened.[18]

This approach to housing aims to foster social and economic integration. Iglesias notes that inclusionary zoning is aimed at correcting the effects of 'exclusionary zoning' policies and practices.[19] After centuries of exclusionary zoning practices in the U.S, inclusionary zoning was instituted as a panacea for the problems associated with the lack of social and economic opportunities that exclusion caused. Inclusionary housing or zoning was therefore targeted at both social and economic integration. Social integration would ensure that there is harmony between different racial or ethnic groups by limiting the construction of exclusive residences.[20] Under U.S. law, the "public welfare" goal of the police power has been said to be wide enough to encompass the pursuit of "well-balanced" communities.[21] The purpose of economic integration is to ensure that all residents of an area are given equal opportunities to advance economically through equitable access to education and job opportunities.[22] Inclusionary housing aims at achieving affordable housing as well as fostering social and economic integration.[23] This has obvious resonance in South Africa, given its apartheid past. The current model of providing free and subsidised housing has not achieved affordable housing or the two types of integration mentioned above. The "racialised urban form," as Parnell terms it, persists in contemporary South Africa as social and economic inequalities which undergird this urban form have not

[16] Iglesias T 'Inclusionary zoning affirmed: *California Building Industry Association v City of San Jose*' (2016) 24 *J. Affordable Hous.* 409—434 410 ('Iglesias "Inclusionary zooming affirmed"'); South African Property Owners Association (SAPOA) *Inclusionary housing: Towards a new vision in the city of Johannesburg and Cape Town metropolitan municipalities* (2018) 4 ('SAPOA *Inclusionary housing*').
[17] Van Wyk J "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26—41 36 ('Van Wyk "SPLUMA and spatial injustice"')
[18] Van Wyk "SPLUMA and spatial injustice" 36.
[19] Iglesias "Inclusionary zoning affirmed" 411.
[20] Recent Cases "Takings Clause: Affordable housing- California Supreme Court upholds residential inclusionary zoning ordinance- *California Building Industry Ass'n v City of San Jose*, 351 P.3d 974 (Cal. 2015)" (2016) 129 *Harvard L. Rev.* 1460—1467 1461 ('Recent Cases "*California Building Industry Ass'n*"'). Also see Roberts *Planning for affordability* 9.
[21] *Berman v Parker* 348 U.S. 26, 33 (1954); *Village of Belle Terre v Boraas* 416 U.S. 1, 6 (1974); Recent Cases "*California Building Industry Ass'n*" 1465.
[22] Recent Cases "*California Building Industry Ass'n*" 1465, 1466. Also see Charles CZ "The dynamics of racial residential segregation" (2003) 29 *Ann. Rev. Soc.* 167—207 197—199.
[23] Calavita N & Mallach A *Affordable housing, social inclusion, and land value recapture* (2010) 11; Robertson R *Planning for affordable housing* 10.

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disappeared.[24] Academic commentators have suggested that planning processes should correct these inequalities by incorporating inclusive settlements that bring marginalised groups back into the fold of property ownership and meaningful housing opportunities.[25] Yet, despite this resonance, the idea of inclusionary housing has not taken hold in South Africa. This is partly due to the cost of delivering affordable housing units in a sustainable manner and alongside market-related housing units.[26] Developers worry about their ability to recover these costs and make a fair return on their investments.[27] These concerns relate to developers' property rights which are protected by section 25 of the Constitution.[28]

This thesis argues that price and rental ceilings are essentially property use restrictions affecting private developers under South African law,[29] and that the police power provides sufficient reason for such restrictions. However, when the issue of property use restrictions is considered from the perspective of the Constitution's property clause and the housing clause respectively, the result is an interesting

[24] Parnell S "South African cities: Perspectives from the ivory tower of urban studies" (1997) 34 *Urban Studies* 891—906 902.
[25] Robertson "Planning for affordable housing" 8; Kihato C "Beyond bricks and mortar: South Africa's low-cost housing programme 18 years after democracy" (2013) 22 *Poverty & Race* 1—6 5; Haferburg C "Townships of tomorrow? Cosmo City and inclusive visions for post-apartheid urban futures" (2016) 39 *Habitat International* 261—268 267. See also UN Habitat *The state of the world's cities 2004/2005: Globalization and urban culture* (2004) 2.
[26] Robertson "Planning for affordable housing" 161.
[27] SAPOA *Inclusionary housing* 4.
[28] The relevant subsections of section 25 of the constitution provide:

> "(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
> (2) Property may be expropriated only in terms of law of general application: (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including: (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.
> (4) For the purposes of this section: (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land."

[29] The U.S. Supreme Court has arrived at a similar conclusion regarding the Takings Clause of the U.S. Constitution. This conclusion is discussed in detail in Chapter 4 below. See also Recent Cases "*California Building Industry Ass'n*" 1462. Further see the following cases discussed in Chapter 4 below: *Permian Basin Area Rate Cases* 390 U.S. 747, 768 (1968); *Pennell v City of San Jose* 485 U.S. 1, 11 (1988); *Yee v City of Escondido* 503 U.S. 519, 528—530 (1992).

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interaction between the various factors that determine the existence and arbitrariness of a deprivation, on the one hand, and the reasonableness standard for judging the adequacy of the government's actions in fulfilling socio-economic rights. This interaction is explained further in chapters 2 and 3.

1.2 Research problem: The limits of the right to exploit property

The central question is whether section 25 of the Constitution contemplates that the right to property entails the right to put property to its most profitable use. This question is important because it is linked to the foremost objection against inclusionary housing, namely, its impact on the property rights of owners.[30] It has been claimed that requiring developers to forego a part of their investment in housing development amounts to expropriation of property which should be compensated. Although the Constitutional Court has answered the question as to whether the economic benefit of the exploitation of property constitutes an element of ownership,[31] there is still room to critically consider the scope of the right to exploit property in the housing development and land reform contexts. This thesis fills this gap by addressing the question of the profitable use of property within the context of two seemingly contradictory constitutional provisions, namely, the right to property and the right of access to adequate housing. Van der Walt notes that a healthy tension exists between these two constitutional provisions.[32] I suggest how property theory can approach this tension bearing in mind the unique socio-economic situation that South Africa faces: A history of racial segregation and dispossession of land, poor living conditions for the majority of South Africans, a residential policy designed to extract cheap labour from the majority of South Africans on racial grounds, and poor services such as substandard healthcare, education, and job opportunities.

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[30] Floryan M "Cracking the foundation: Highlighting and criticizing the shortcomings of mandatory inclusionary zoning practices" (2010) 37 *Pepp. L. Rev.* 1039—1112 1047; Ellickson RC "The irony of inclusionary zoning" (1981) 54 *S. Cal. L. Rev.* 1167—1216 1170; Kautz BE "In defense of inclusionary housing: Successfully creating affordable housing" (2002) 36 *Univ. S. Fla. L. Rev.* 971—1032 974 987; Berger L "Inclusionary zoning devices as takings: The legacy of the *Mount Laurel* cases" (1991) 70 *Nebr. L. Rev.* 186—228 205.

[31] *South African Diamond Producers Organization v Minister of Minerals and Energy NO and Others* 2017 (6) SA 331 (CC) para 52, discussed at para 2.3.1 below.

[32] Van der Walt AJ "The state's duty to protect property owners v The state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *SAJHR* 144—161 149, 150. See also Van der Walt AJ & Viljoen S "The constitutional mandate for social welfare: Systemic differences and links between property, land rights and housing rights" (2015) 18 *PELJ* 1035—1090 1036 1038.

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The thesis considers the interpretive framework of section 25 of the Constitution. This includes a discussion of the Constitutional Court's ground-breaking judgment in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* [33] ('*FNB*') which sets out the parameters for the interpretation of this provision. *FNB* clarified that the property clause (section 25 of the Constitution) *inter alia* serves a public purpose. It is not meant to merely give private property relations the imprimatur of constitutional recognition while perpetuating the assumptions and logic of the private property institutions.[34] Instead, the property clause must be allowed to permeate the private property sphere and, at times, override the latter's objectives on public law grounds such as the preservation of health, safety, and community wellbeing.

A transformative constitution sets the stage for the resolution of this tension. Transformative constitutionalism requires courts to adjudicate the Bill of Rights by developing the common law to conform to the Constitution.[35] The transformative spirit of the constitution has, perhaps understandably, been most relevant to the resolution of property conflicts which entailed an element of the negative protection of the housing right. This makes sense, because the history of South Africa is one that was characterised by the removal of entire racial groups from certain places for political reasons. Much of this was done with the complicity of the common law, specifically private property law doctrines that enforced the exclusionary power of property ownership. The Constitutional Court has addressed the correlation between the eviction of unlawful occupiers, on the one hand, and the property rights of the owner, on the other. In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Others*[36] ('*Blue Moonlight Properties*') the Court stated that an owner may have to be patient while the state attempts to identify alternative accommodation for unlawful occupiers who are domiciled on her property and who face eviction.[37] Furthermore, in *Port Elizabeth Municipality v Various Occupiers*[38] ('*PE*

[33] 2002 (4) SA 768 (CC).
[34] *FNB* para 50.
[35] Van der Walt AJ "Transformative constitutionalism and the development of South African property law (part 2)" (2006) *J. S. Afr. L.* 1—31 22; Mulvaney T & Singer JW "Move along to where? Property in the service of democracy" in Muller G, Brits R, Slade BV & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ Van der Walt* (2018) 1—20 19.
[36] 2012 (2) SA 104 (CC).
[37] *Blue Moonlight Properties* para 100.
[38] 2005 (1) SA 217 (CC).

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Municipality') 68 individuals unlawfully occupied private land that had been zoned for residential development. 1600 people, including the property's owners, signed a petition calling for their eviction. Sachs J stated that while the protection of private property is important, the owner's rights must be understood in the context of the social and historical context of forced evictions.[39] Those who were forcefully evicted under apartheid must be assisted to obtain secure property rights as well as access to adequate housing.[40]

1.2.1 Research questions

1.2.1.1 Disjointed/ inconsistent policy objectives

The Court in *Grootboom* explained that there must be a distinction between providing the right of access to adequate housing for those in dire need and those who are able to pay for housing.[41] While, for the former group, the state's intervention would typically consist of emergency measures to prevent homelessness, for the latter group the state's role was more about "unlocking the system."[42] Laws must be enacted to facilitate proper planning and access to finance must be improved. The provision of access to housing stock and the facilitation of self-built housing must also be targeted.[43]

The policy and statutory framework for the realisation of the housing right is incoherent and based on inconsistent objectives. For example, The Housing Act[44] aims to establish a framework for the sustainable development of housing.[45] Certain principles underpin the housing development process in terms of section 2 of the Housing Act. First, housing development must give priority to the needs of the poor.[46] Secondly, all

[39] *PE Municipality* para 15.
[40] *PE Municipality* para 15.
[41] *Grootboom* para 36.
[42] *Grootboom* para 36.
[43] *Grootboom* para 36.
[44] Act 107 of 1997.
[45] Section 1 of the Housing Act defines "housing development" as:

> "[T]he establishment and development of habitable, stable and sustainable public and private residential environments to ensure viable households and communities in areas allowing convenient access to economic opportunities, and to health, educational and social amenities in which all citizens and permanent residents of the Republic will on a progressive basis have access to: (a) permanent residential structures with secure tenure…(b) potable water, adequate sanitary facilities and domestic energy supply."

[46] Section 2 (1) (a) of the Housing Act.

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spheres of government must consult meaningfully with those affected by housing development.[47] Thirdly, government must ensure that housing development is "economically, fiscally, socially and financially affordable and sustainable", it provides a wide range of tenure options, and it is based on integrated development.[48] Furthermore, in terms of section 9 of the Act, municipalities are required to take "reasonable and necessary" steps to provide adequate housing on a progressive basis.[49]

Furthermore, although the policy positions immediately after the end of apartheid aimed at encouraging a wide spectrum of tenure forms for housing, subsequent government efforts have tended to emphasize home ownership at the expense of rentals.[50] For example, the White Paper on Housing included the idea that all forms of tenure, including rental, should be encouraged.[51] This position is contradicted by other policy positions that seem to only encourage ownership. For example, while initiatives

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[47] Section 2 (1) (b) of the Housing Act.
[48] Section 2 (1) (c) of the Housing Act.
[49] Section 9 (1) of the Housing Act provides:

> "Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to:
>
> a) Ensure that (i) the inhabitants of its area of jurisdiction have access to adequate housing on a progressive basis; (ii) conditions not conducive to health and safety of the inhabitants of its area of jurisdiction are prevented or removed; (iii) services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner which is economical (*sic*) efficient;
> b) Set housing delivery goals in respect of its area of jurisdiction;
> c) Identify and designate land for housing development;
> d) Create and maintain a public environment conducive to housing development which is financially and socially viable;
> e) Promote the resolution of conflicts arising in the housing development process;
> f) Initiate, plan, co-ordinate facilitate, promote and enable appropriate development in its area of jurisdiction.
> g) …..
> h) Plan and manage land use and development."

By contrast, sub-section (2) provides for what may be termed the powers of municipalities (as opposed to duties). For example, they may promote a housing development project by a developer, or act as developers in certain instances.

[50] Maass S "Rental housing as adequate housing" in Liebenberg S & Quinot G *Law and poverty: Perspectives from South Africa and beyond* (2012) 317—322 320.

[51] Department of Housing (DOH) *White Paper: A new housing policy and strategy for South Africa*, General Notice 1376 of 1994, Government Gazette 16178, 23 December 1994 para 3.2.2; Royston L "Security of urban tenure in South Africa: Overview of policy and practice" in Durand-Lasserve A & Royston A (eds) *Holding their ground, secure land tenure for the urban poor in developing countries* (2002) 165—181 176.

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such as the Individual Housing Subsidy Programme[52] are available to those who wish to own homes, no comparable programme targets renters.[53] This is a serious issue that impacts the sustainability of housing programmes. Maass explains that the focus on home ownership tends to deprive individuals of the benefits of renting. For example, home ownership may entail certain hidden costs which can make housing unaffordable and lead to distress sales.[54] There is, therefore, a direct link between tenure form and affordability.

1.2.1.2 Lack of attention to location and affordability

In General Comment 4,[55] the Committee on Economic, Social and Cultural Rights (CESCR) sets out several characteristics of adequate housing. These include legal security of tenure;[56] availability of services, materials, facilities and infrastructure;[57] affordability;[58] habitability;[59] accessibility;[60] location;[61] and cultural adequacy.[62] In this thesis, my proposition is that the implementation of the objectives of inclusionary housing relies on location and affordability because these are the two characteristics that directly impact the social and economic inclusivity of housing. It seems that courts and policy makers are failing to appreciate the importance of housing location and affordability when they make decisions touching on the adequacy of housing.

Location and affordability, taken together, underpin the idea that housing and spatial justice are connected. Spatial justice seems to be a universal value lying at the heart of most national initiatives aimed at providing adequate housing.[63] At the most basic level spatial justice is a response to the phenomenon of spatial injustice, which refers

[52] DHS "Individual Subsidy Programme" Part 3 Vol 3 of the National Housing Code (2009).
[53] Tissington *Resource guide to SA housing* para 7.1.
[54] Maass S *Tenure security in urban rental housing* (2010) 127, 128.
[55] General Comment 4: *The Right to Adequate Housing (Art. 11(1)* UN Doc E/C 1992/23.
[56] Para 8 (a).
[57] Para 8 (b).
[58] Para 8 (c).
[59] Para 8 (d).
[60] Para 8 (e).
[61] Para 8 (f).
[62] Para 8 (g).
[63] Henri Lefebvre is the French philosopher credited with originating the idea of spatial justice. He advocated the understanding of local conditions as a pre-requisite for creating space. He stressed the predominance of the role of the inhabitants over that of planners in this process. See Lefebvre H *The production of space* (1991); Khoza G S *Planning interventions to lessen the disjuncture between physical and social space: A Lefebvrian analysis of K206 housing in Alexandra* (2007).

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to the interactions between space and society that produce injustice.[64] Spatial justice seeks to formulate solutions to these specific problems.[65] Inclusionary housing is aimed at achieving socially and economically integrated human settlements, apart from providing affordable housing. My purpose for including the principle of spatial justice in this research is to illustrate that, while social and economic integration should ideally result from the principle of spatial justice, the principle's application in the South African planning context is unclear. The difficulty with the concept of spatial justice is that its meaning and content vary across jurisdictions.[66] It is important to sketch what I believe should be the meaning of spatial justice in the South African context in line with the research problem that I address in this thesis. The right to exploit property was partly served through common law institutions such as the *rei vindicatio* which enabled a landowner to exclude others from her property. Although it is more common to speak of the right to exclude as the object of the *rei vindicatio*, ultimately any landowner would wish to economically exploit her property to the maximum extent possible. Unfortunately, property values continue to be preserved through exclusion to date. Robertson illustrates the connection between exclusion and the preservation of property values in the following statement:

> "Most town planning and zoning schemes were developed with a racial schema and continue to be used to preserve high property values in particular areas, thereby consciously excluding the poor. With these inequalities and persisting urban sprawl, the apartheid landscape remains, with segregation, fragmentation and leapfrog development."[67]

In this thesis, I focus on the principle of spatial justice as articulated by the Spatial Planning and Land Use Management Act[68] ('SPLUMA'). SPLUMA was enacted to provide a unified framework for land use planning in South Africa. The Act supersedes

[64] Van Wyk "SPLUMA, spatial justice, and housing" 28.
[65] Van Wyk "SPLUMA, spatial justice, and housing" 28.
[66] For example, in 1998, the Netherlands Scientific Council for Government Policy stated that spatial justice meant that "people should have access to good facilities and services wherever they are." This was described as one of the basic principles of spatial planning in the Netherlands. Although this report does not amount to legislation, it is a useful tool for deciphering official attitudes in the Netherlands at the time. The emphasis was on the provision of good facilities and services, not integration. See National Scientific Council for Government Policy (WRR) *Spatial Development Policy* (Report no.53, 1998) 5.
[67] Robertson *Planning for affordable housing* 108.
[68] Act 16 of 2013.

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any other statute to the extent that the latter's provisions contradict SPLUMA.[69] SPLUMA ties spatial justice to development, the very essence of creating space. In terms of the 'development principles' set out in section 7, the tenets of spatial justice are the following:

> "i) Past spatial and other development imbalances must be redressed through improved access to and use of land;
>
> ii) Spatial development frameworks and policies at all spheres of government must address the inclusion of persons and areas that were previously excluded, with an emphasis on informal settlements, former homeland areas and areas characterised by widespread poverty and deprivation;
>
> iii) Spatial planning mechanisms, including land use schemes, must incorporate provisions that enable redress in access to land by disadvantaged communities and persons;
>
> iv) Land use management systems must include all areas of a municipality and specifically include provisions that are flexible and appropriate for the management of disadvantaged areas, informal settlements and former homeland areas; and
>
> v) A municipal planning tribunal considering an application before it, may not be impeded or restricted in the exercise of its discretion solely on the ground that the value of land or property is affected by the outcome of the application."

Furthermore, the concept of spatial justice operates in an environment where it competes with several other, equally ill-defined, principles such as integrated development,[70] sustainable human settlements, and inclusive settlements.[71] Because of the duplication of ideas across these principles, it is not clear how the principle of spatial justice would lead to inclusivity in the process of housing development. SPLUMA anticipates that this will be achieved, *inter alia*, through a focus on previously excluded persons and areas such as informal settlements and former homeland

[69] Section 2 (2) of SPLUMA.
[70] See section 9 of the Housing Act, quoted at note 49 above, on the various aspects that constitute the concept of integrated development. This level of detail about a supposedly simple planning concept means that it cannot play any meaningful role in guiding planning decisions. There is no focus in the concept, as it also duplicates some of the ideas included in the principles of development under SPLUMA.
[71] Robertson *Planning for affordable housing* 144.

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areas.[72] However, informal settlements and former homeland areas were not the only sites of exclusion under apartheid. Exclusion also took place when racialised enclaves were formed through the usage of common law principles that gave landowners undue power over non-owners.[73] Part of the strategy for this exclusion was the use of property values to lock out those who could not afford to live in these areas (mostly inhabited by whites).[74] When addressing the need for inclusionary housing, it seems counter-intuitive to prioritise informal settlements and former homeland areas. While efforts to improve such areas are commendable and necessary in other contexts, inclusionary housing should instead be addressed by prioritising areas within urban centres where opportunities are greater than in the marginalised areas.

1.3 Hypothesis

Although the right of ownership is not absolute both under the common law and the Constitution,[75] the lived experiences of most South Africans point to the continued resilience of the law's exclusionary logic in the post-constitutional era.[76] The emergence of gated communities and security estates, for instance, is evidence of this exclusionary bent.[77] In this thesis, I identify the right to exploit property for economic benefit as the main aspect of the right of ownership that can lead to the exclusion of those who seek housing that is affordable and well located. Through a discussion of sections 25 and 26 of the Constitution, I argue that the "normal" regulatory framework governing property rights is not sufficient to cater for the specific objectives of social and economic integration in housing. Development applications should be granted subject to suitable conditions imposed on the developer to ensure that housing developments include a percentage of affordable units that are well integrated. The power to impose such conditions is central to the implementation of inclusionary housing and will ensure that the beneficiaries of affordable housing also enjoy the locational advantage associated with the market-rate housing units within a housing

[72] Section 7 (ii) of SPLUMA.
[73] Landman K "Exploring the impact of gated communities on social and spatial justice and its relation to restorative justice and peace-building in South Africa" (2007) *Acta Juridica* 134—155 147.
[74] Robertson *Planning for affordable housing* 108.
[75] Dhliwayo P *A constitutional analysis of access rights that limit landowners' right to exclude* (2015) 253—254
[76] Robertson "Planning for affordability" 89.
[77] Landman K "Gated communities in South Africa: The challenge for spatial planning and land use management" (2004) 75 *Town Planning Review* 151—172 162.

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development. However, the principle of spatial justice as defined in SPLUMA compromises the achievement of the objectives of inclusionary housing. While it specifies the matters which the Municipal Planning Tribunal must consider, the principle must be considered in conjunction with several other provisions of SPLUMA which serve to preserve the *status quo* in spatial relations by insisting on the principles of sustainability[78] and efficiency.[79] These factors serve to protect property values against attempts by the state to achieve affordable, integrated housing.

The issue of property values is significant in the property development process. A distinction must be drawn between the value of the applicant's property and that of adjoining property. The resolution of the former issue is governed by the provisions of the National Building Regulations and Building Standards Act[80] ('NBRBSA'). In this regard, Jafta AJ (as he then was) stated in *Walele v City of Cape Town and Others*[81] that the NBRBSA allows the local authority to "impose conditions for the exercise of the landowner's rights over his or her own property" in the process of approving a development application. This clearly includes conditions designed to limit loss to neighbouring or adjoining property.[82] The latter issue (loss to the applicant's own property) is relevant to this thesis and is based on the police power principle. In terms of this principle, the state's right to regulate property is not qualified by an obligation to leave the property value unaffected or to pay compensation for the resulting loss to the owner.[83] The state can regulate the use, enjoyment and exploitation of private

[78] Section 7 (b) of SPLUMA.
[79] Section 7 (c) of SPLUMA.
[80] Act 103 of 1977.
[81] 2008 (6) SA 129 (CC) para 52.
[82] Section 7 (1) of the NBRBSA provides as follows:

> "(1) If a local authority, having considered a recommendation referred to in section 6(1)(a)-
> (a) is satisfied that the application in question complies with the requirements of this Act and any other applicable law, it shall grant its approval in respect thereof;
> (b)
> (i) is not so satisfied; or
> (ii) is satisfied that the building to which the application in question relates-
> (aa) is to be erected in such manner or will be of such nature or appearance that-
> (aaa) the area in which it is to be erected will probably or in fact be disfigured thereby;
> (bbb) it will probably or in fact be unsightly or objectionable;
> (ccc) it will probably or in fact derogate from the value of adjoining or neighbouring properties;
> (bb) will probably or in fact be dangerous to life or property,
> such local authority shall refuse to grant its approval in respect thereof and give written reasons for such refusal…"

[83] Van der Walt "Building under the Constitution" 40.

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property, even to the extent of causing financial loss to the owner, provided that this is done in terms of a law of general application, for a legitimate purpose and not arbitrarily.[84] The notion that the police power includes the power to resolve longstanding housing shortages, and living conditions generally, is supported by the United States ('U.S.') Supreme Court decision in *Berman v Parker*.[85]

Despite the enactment of SPLUMA, no comprehensive definition of inclusionary housing has been achieved, nor have the procedures for its implementation been described by legislation. .[86] However, the objectives of inclusionary housing are provided for in SPLUMA. For instance, section 20 (1) of SPLUMA mandates every Municipal Council to develop a Municipal Spatial Development Framework ('MSDF') which must detail the demand for housing units across different socio-economic categories of the population.[87] It must also contain estimates of economic activity and employment trends according to location in the next five years,[88] and designate places where national or provincial inclusionary housing policies may be implemented.[89] Lastly, it must contain details regarding areas in which shortened land use application procedures may be applied.[90] Furthermore, section 24 of SPLUMA mandates municipalities to implement zoning through the establishment of "Land Use Schemes."[91] A Land Use Scheme plays the role of effecting an MSDF and must include, *inter alia*, provisions for the inclusion of affordable housing in residential land development,[92] and provisions for development incentives.[93] These provisions of SPLUMA therefore allow for the implementation of inclusionary housing through

[84] Van der Walt "Building under the Constitution" 40; Van der Walt *Constitutional property law* 3 ed (2011) 214—215.
[85] 348 U.S. 26, 32 (1954).
[86] There have been attempts to formally introduce inclusionary housing through dedicated legislation in South Africa, without success. In Breaking New Ground (BNG), a policy document of the South African government, the possibility of introduction is foreshadowed. Item 3.2, bulletin 2 refers to the possibility of introducing residential development permits, which will essentially oblige developers to either build affordable units on site together with the market units or build affordable units in adjacent areas. In either case, affordable units are to constitute at least 20% of all units built. See *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* (2004), available online at http://www.capegateway.gov.za/Text/2007/10/bng.pdf (accessed on 6 May 2017).
[87] Section 21 (f) of SPLUMA.
[88] Section 21 (g) of SPLUMA.
[89] Section 21 (i) of SPLUMA.
[90] Section 21 (l) (ii) of SPLUMA.
[91] Section 25 of SPLUMA is more explicit in this regard. It states that a Land Use Scheme must include, *inter alia*, a map indicating the land use zones in place in a municipal area.
[92] Section 24 (1) (d) of SPLUMA.
[93] Section 24 (2) (e) of SPLUMA.

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national or provincial inclusionary housing policies and through Land Use Schemes that are in line with MSDFs.

SPLUMA states that a Municipal Planning Tribunal ('MPT') shall not be impeded in the performance of its duties simply because property values will be affected by the decision.[94] This provision therefore means that the value of property can still be considered by the MPT along with other factors. This thesis examines these other factors and how they affect the "property value" factor, especially when inclusionary housing options are considered by the MPT. My goal is to show that the factors contained in the non-arbitrariness test relied upon in *FNB* are only the starting point in this exercise. I argue that the affordability and location of housing must also be considered before one can answer the question as to how the right to exploit property should be treated when implementing inclusionary housing. Simply applying the non-arbitrariness test to inclusionary housing risks losing sight of the nuanced approach that South Africa's peculiar circumstances demand.

1.4 Methodology and approach

This thesis employs a multidisciplinary approach to the issue of housing which considers the problem of spatial justice from a legal, social, and economic perspective. I consider the perspectives of sociologists, architects, and philosophical theorists such as Lefebvre and Huchzermeyer who explain the significance of spatial justice. I also incorporate the planning law and property law perspectives of legal academics to explain that inclusionary housing can only succeed if all these perspectives are considered in designing the programme.

1.5 Scope and terminology

This thesis is confined to the property aspects of inclusionary housing, as opposed to discussing the various technical details of implementing inclusionary housing. Where appropriate, reference is made to various methods of implementing inclusionary

[94] Section 7 (vi) of SPLUMA provides:

> " [A] Municipal Planning Tribunal considering an application before it, may not be impeded or restricted in the exercise of its discretion solely on the ground that the value of land or property is affected by the outcome of the application."

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housing from the perspective of property regulation. For example, density bonuses and impact fees are discussed in Chapter 2, but merely to illustrate that the choice of method can be influenced by whether it would result in deprivation of property, and whether such deprivation would be arbitrary. This chapter, although not intended as a comparative chapter, also draws from foreign law to answer the question whether developers' interests under inclusionary housing should be regarded as constitutional property.

The terms "developer" and "landowner" are used interchangeably to denote persons engaged in housing development for a living, rather than landowners building houses on land for their own residence.[95] I make a distinction between private developers and Social Housing Institutions ('SHIs') involved in the construction of social housing in terms of the Social Housing Act.[96] SHIs are accredited institutions which provide affordable housing options and manage mostly rental housing stock in terms of the Social Housing Act.[97] Although SHIs are involved in housing development, the Act sets them apart from private developers in that, *inter alia*, they must be registered companies, and that their management of the completed projected is complemented by local authorities.[98] They also engage in social housing as an affordable housing venture, thereby voluntarily limiting the extent to which they can profit. By contrast, in this thesis I confine the concept of "development" to private developers who engage in their business for profit.

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[95] The Housing Consumer Protection Measures Act 95 of 1998 regulates the business of home building. Section 1 of the Act defines "the business of a home builder" as:

> "(a) to construct or to undertake to construct a home or to cause a home to be constructed for any person;
> (b) to construct a home for the purposes of sale, leasing, renting out or otherwise disposing of such a home;
> (c) to sell or to otherwise dispose of a home contemplated in paragraph (a) or (b) as a principal; or
> (d) to conduct any other activity that may be prescribed by the Minister for the purposes of this definition."

In line with the research theme of this thesis, some home builders may be considered developers to the extent that they engage in the activity for profit.

[96] Act 16 of 2008.

[97] Section 1 of the Social Housing Act defines a SHI as:

> "[A]n institution accredited or provisionally accredited under this Act which carries or intends to carry on the business of providing rental or co-operative housing options for low to medium income households (excluding immediate individual ownership and a contract as defined under the Alienation of Land Act, 1981 (Act No. 68 of 1981)), on an affordable basis, ensuring quality and maximum benefits for residents, and managing its housing stock over the long term."

[98] Section 14 (b) of the Social Housing Act.

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The thesis discusses the ownership of both land and expected earnings from a right to property perspective. I also point out that inclusionary housing can be implemented through both the ownership option and the rental option.[99] In other words, developers of rental housing may be subject to the requirements of inclusionary housing just as much as their counterparts who build houses for purchase and ownership.[100] I undertake the discussion in Chapter 4 against this backdrop. I use the term "rent regulation" to refer to the process by which a fair rent is determined bearing in mind the value of the property.[101] According to Bright, the rent determined under this process is usually less than market rent.[102] This is the sense in which the term is used in this thesis. It is distinguished from "rent control" which refers to the fixing of rent at historical levels.[103] In other words, there is a level of specificity in rent control that does not apply to rent regulation. In Chapter 4, I occasionally refer to rent control to describe the position under foreign law because the rationales for rent control and rent regulation are in some cases similar. When I discuss South African law, reference is made to rent regulation.

1.6 Chapter overview

Chapter 2 conducts a theoretical analysis of inclusionary housing from a law of property perspective which includes the Constitution and common law principles. It is argued that inclusionary housing is a requirement that implicates the property rights of developers. The chapter outlines the principles applicable to inclusionary housing, which include the identification of the property interests that developers have identified in their objection to inclusionary housing. The chapter also analyses the justification

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[99] The City of Johannesburg's inclusionary housing policy states that inclusionary housing will consist of private ownership and rental. See City of Johannesburg *Inclusionary housing: Incentives, regulations, and mechanisms* (2019) para 3.1.4, available online at http://housingfinanceafrica.org/documents/south-africa-city-of-johannesburg-inclusionary-housing-policy-of-2019/ (accessed on 16 August 2020).

[100] See SAPOA *Inclusionary housing* 4; Beyer S "Inclusionary housing is rent control" available online at https://www.forbes.com/sites/scottbeyer/2015/05/27/inclusionary-zoning-is-rent-control-2-0/#63c2c94f561c (last accessed on 6 August 2020); Arpey C "The multifaceted manifestations of the poor door: Examining forms of separation in inclusionary housing" (2017) 6 *Am. Univ. Bus. L. Rev.* 627—645 631.

[101] Maass S "Rent control: A comparative analysis" (2012) 15 *PELJ* 40—100 62 ('Maass "Rent control"').

[102] Bright S *Landlord and tenant law in context* (2007) 185.

[103] Maass "Rent control"62.

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for inclusionary housing from the standpoint of non-arbitrariness and investigates the powers of municipalities *vis a vis* the implementation of inclusionary housing.

Chapter 3 focuses on affordability and location. I analyse the constitutional right of access to adequate housing by delving into the constituent elements of section 26 (2) of the Constitution to show that inclusionary housing requires us to show how these elements lead to inclusivity. For example, it shows that municipalities must incorporate participatory processes into budgeting. The chapter also shows, through a discussion of South African case law, that decisions regarding the eviction of individuals have been based on an inadequate understanding of the significance of location. Taking this example, the chapter argues for a better appreciation of location in the inclusionary housing context where positive measures are necessary for the programme to succeed.

Chapter 4 is a comparative chapter. I conduct a comparative study of the principles and practice of property regulation in the U.S, ECHR, and India. I subsequently focus my attention on comparing these jurisdictions from a building controls and rent regulation perspective to show the connection between the general property regulation environment and the building and rent regulations. This choice of issues is dictated by my position that inclusionary housing depends mainly on these two types of control of property. This chapter shows that various justifications exist for the property controls that are employed in these jurisdictions and argues that inclusionary housing can only succeed in South Africa if some form of rent regulation is established.

I then conclude this thesis in Chapter 5 with a summary of my arguments for the regulation of property rights based on housing affordability and location.

1.7 Summary

This study contributes to the legal discourse on spatial justice by attempting to analyse the concept in South African terms, taking the Constitution and other legal sources

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into account.[104] Having analysed it, I demonstrate how spatial justice can be concretised in South Africa through implementing inclusionary housing. The main features of the study are an extensive review of legislation and the Constitution, as well as a discussion of theories of property and social justice. I contend that sections 25 and 26 of the Constitution are compatible with inclusionary housing.

[104] Fubbs J *Urban planning and social justice in South Africa* (1993) 27 (Identifies and defines essentialism as a planning criterion. However, the author does not conduct an in-depth examination of its meaning for and application in South Africa).

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Inclusionary housing as constitutionally valid deprivation of property

2.1. Introduction

As a society that has experienced upheaval and stared at the prospect of disintegration, South Africa has had a chequered relationship with the concept of property.[1] The acquisition and keeping of property under apartheid was based on, and reinforced, racial segregation and the exploitation of black Africans for cheap labour.[2]

[1] See *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) ('*Shoprite Checkers*') para 4 where Froneman J alluded to the fractious nature of the property debate in South Africa which threatens to unravel the "constitutional project". See also *Law Society of South Africa and Others v Minister of Transport and Another* 2011 (1) SA 400 (CC) para 83 ('*Law Society SA*'). Both cases illustrate that two issues regarding property continue to characterize legal discourse. The first concerns what sorts of interest the law should recognize as property. The second is what limitations the identified property right may be subjected to as a matter of constitutional law. Van der Walt states that the range of interests that will be regarded as property is a question that must be answered in each individual case with reference to the values that the Constitution seeks to promote. More specifically, the question is whether the inclusion of a specific right within the scope of the property clause will promote the values underpinning an open and democratic society based on human dignity, equality and freedom. He also points out that even though a specific property interest may be protected under the property clause, this protection may not extend to all the individual entitlements usually associated with that interest. See Van der Walt The *constitutional property clause* 55, 68; Erasmus J *The interaction between property rights and land reform in the new constitutional order in South Africa* (1998) 253 ("Erasmus *Property rights and land reform*").

[2] In *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC) paras 9—10, the Constitutional Court explained the oppressive nature of the statutes and policies that were used to subjugate Africans under apartheid. One such statute was the Prevention of Illegal Squatting Act 52 of 1951 ('PISA') which utilized criminal proceedings as a strategy to get rid of squatters. In addition, the Group Areas Act 36 of 1966, the Black Land Act 27 of 1913, the Black Trust and Land Act 18 of 1936 and the Black Service Contract Act 24 of 1932 all sought to achieve the same goals, that is, the restriction of Africans' occupation of land and the promotion of cheap labour by allowing only limited, controlled occupation in certain areas. See also *DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2001 (1) SA 500 (CC) para 41; *Brink v Kitshoff NO* 1996 (4) SA 197 (CC) para 40; *Tongoane v National Minister for Agriculture and Land Affairs* 2010 (6) SA 214 (CC) paras 21—26; Muller G "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367—396 371—375; Kloppers HJ & Pienaar GJ "The historical context of land reform in South Africa and early policies" (2014) 17 *PELJ* 677—706 680; Davenport TRH "Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control" (1985) *Acta Juridica* 53—76 61; O'Regan C "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act" (1989) 5 *SAJHR* 361—394 363; Mailula D "Customary (communal) land tenure in South Africa: Did *Tongoane* overlook or avoid the core issue" (2011) 4 *Const. Ct. Rev.* 73—112 81. Examples of apartheid legislation that reinforced the exclusionary conception of property, specifically against blacks, include the Slums Act 76 of 1979 (barring the development of slums and further providing that the lack of housing was not a defence in this regard), Prevention of Illegal Squatting Act 52 of 1951 (enabling the removal of squatters forcibly and without legal intervention, and ousting the jurisdiction of the courts in cases challenging such measures), Black Land Act2 7 of 1913 (prevented blacks from acquiring land outside scheduled areas), Development Trust and Land Act 18 of 1936 (created Trust areas, the precursors to the subsequent creation of homelands), Black Administration Act 38 of 1927 (created a separate administrative system for people in what were termed "black areas"), and the Health Act 63 of 1977 (obliged landowners to eliminate potential health hazards from their land). See further Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (1997) 246.

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Many black people were dispossessed of their belongings and driven off their land as part of the grand scheme of apartheid, which aimed to deny the majority black population any opportunities of self-actualisation through economic activity. Significantly, they were denied the opportunity to establish secure homes from which they could grow social relationships and find fulfilment in the community.[3]

During the transition from apartheid to democracy, some expressed misgivings and fear about what the future held in store.[4] With the end of apartheid, there was uncertainty about how the law would continue to treat existing holdings in property. Land, specifically, had been at the centre of the struggle against colonialism and apartheid, and dispossession had occurred on a tremendous scale during these periods.[5] The negotiations for a new Constitution for South Africa became significant

[3] See *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 42 ('*Goedgelegen*'). Referring to the forced removals policy, Moseneke DCJ stated that: "With the passage of time, the composition and cohesion of communities who were victims of dispossession would be compromised in that communities would be displaced and alienated from their original homes at huge human and social expense."
See also Bundy C "Land, law and power: Forced removals in historical context" in Murray C & O'Regan C (eds) *No place to rest: Forced removals and the law in South Africa* (1990) 3.

[4] Erasmus *Property rights and land reform* 241. For a comprehensive account of the negotiations, including the deliberations within the various committees at the World Trade Centre negotiations, see Chaskalson M "Stumbling towards section 28: Negotiations over the protection of property rights in the interim constitution" (1995) 11 *SAJHR* 222—240 224. Chaskalson's insights into the negotiations reveal the divergent positions held by the two main parties in the run-up to the enactment of the Interim Constitution of 1993, including the government-held view that property is so sacrosanct that even the state's power of taxation should be subject to it. See also Chaskalson M "The property clause: Section 28 of the Constitution" (1994) 10 *SAJHR* 131—139 131. Further see Davis D "The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles" (1992) 8 *SAJHR* 475—490 487; Mureinik E "Beyond a charter of luxuries: Economic rights in the Constitution" (1992) 8 *SAJHR* 464—474 471, 474; Haysom N "Constitutionalism, majoritarian democracy and socio-economic rights" (1992) 8 *SAJHR* 451—463 461; Lewis C "The right to private property in a new political dispensation in South Africa" (1992) 8 *SAJHR* 389—430 393; Liebenberg S "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty? (2002) 6 *Law Democracy & Development* 159—192 161.

[5] See Zimmerman J "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" (2005) 122 *SALJ* 378—418 418; Muller G "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367—396 370; Smith EB "South Africa's land reform policy and international human rights" (2000) 19 *Wisc. Int'l. L. J.* 267—288 269. See also *Daniels v Scribante and Others* 20017 (4) SA 341 (CC) ('*Daniels*') para 1 where Madlanga J refers to the following sentiment attributed to an old former Transkei resident, and is cited in Rugege S "Land reform in South Africa: An overview" (2004) 32 *Int'l. J. Legal Info.* 283—312 286:

> "The land, our purpose is the land, that is what we must achieve. The land is our whole lives, we plough it for food, we build our houses from the soil, we live on it and we are buried in it. When the whites took our land away from us we lost the dignity of our lives, we could no longer feed our children. We were forced to become servants, we were treated like animals. Our people have many problems, we are beaten and killed by the farmers, the wages we earn are too little to buy even a bag of mielie-meal. We must unite together to help each other and face the Boers. But in everything we do we must remember that there is only one aim and one solution and that is the land, the soil, our world."

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because of expectations about how property rights would be dealt with.[6] The negotiations took place in the context of two divergent positions: the African National Congress (ANC) wanted the wording of the property clause to enable the pursuit of land reform objectives, given the history of land dispossession under colonialism and apartheid.[7] The National Party's (NP) position reflected anxiety over what would become of existing property rights, and the need for their protection. After the negotiations, section 28 (1) of the Interim Constitution of the Republic of South Africa Act 200 of 1993 ('Interim Constitution') provided for positive guarantees that are normally associated with property, namely, the right to acquire, hold and dispose of property.[8] Some academic commentators argued that this provision did not truly provide a positive guarantee to acquire property for those who had none.[9] In contrast, section 25 of the Constitution of the Republic of South Africa, 1996 ('Constitution') provides a negative guarantee against arbitrary deprivations and expropriations.[10] The first 4 sub-sections of section 25 provide that:

> "(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.

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[6] In *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996* 1996 (4) SA 744 (CC) ("*First Certification Case*"), the Constitutional Court was faced with an objection to the Constitution, namely, that it failed to expressly protect the right to acquire, hold and dispose of property. The Court held that "no universally recognised formulation of the right to property exists." See *First Certification Case* para 72.

[7] It is notable that section 25 of the Constitution expressly states that the notion of "property" is not restricted to land. This shows that land is regarded as property and is dealt with alongside all other types of property in the same constitutional provision, the property clause. This may be contrasted with the Constitution of Zimbabwe, for instance, which distinguishes between constitutional property rights and land rights. According to Tsabora, the apparent reason for this distinction is that land rights are regarded as higher-order property rights which should be treated differently from "ordinary" property rights. This arguably reflects the concerns that have emanated from Zimbabwe's history of colonialism and land dispossession. See Tsabora J "Reflections on the constitutional regulation of property and land rights under the 2013 Zimbabwean Constitution" (2016) 60 *J. Afr. L.* 213—229 215. Similarly, the Constitution of Kenya provides for the right to property in article 40, whilst land (including the regulation of land use and planning) is covered by sections 60—68 of the Constitution. See Constitution of Kenya (2010).

[8] Section 28 of the Interim Constitution provided that:

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

Cf section 71 of the Constitution of Zimbabwe, which is arguably more elaborate in its positive guarantee of property rights. Section 71 (2) provides that:

> "Subject to section 72, every person has the right, in any part of Zimbabwe, to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property, either individually or in association with others."

[9] Van der Walt AJ *Constitutional property law* (2005) 27 ('Van der Walt Constitutional property law').

[10] Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 327 ('Van der Walt *Constitutional property clauses*'). Further, see *First Certification Case* para 72; Smith "Land reform and human rights" 280.

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> (2) Property may be expropriated only in terms of law of general application: (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.
>
> (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including: (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation.
>
> (4) For the purposes of this section: (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land."

From this negative guarantee, it is clear that property rights may be regulated in the public interest.[11] This provision allows the state to invoke its "police power" in the interest of enforcing the public interest through regulation of property rights.[12] As Van der Sijde writes, the police power has come to encompass values such as the protection of the environment as well as cultural and heritage conservation.[13] This power, which has traditionally only been associated with the protection of public health, safety or well-being, is now applied to a wider range of circumstances. The exercise of the police power has raised questions regarding its place in the protection of the rights guaranteed in the Bill of Rights (including the right to property guaranteed by

[11] See Van der Sijde E *Reconsidering the relationship between property and regulation* (2015) 97 ('Van der Sijde *Property and regulation*'); *Mkontwana* para 81. Van der Walt has noted fears that a purely negative formulation of property rights (such as is contained in section 25 of the Constitution) effectively insulates section 25 from analysis in terms of section 36 of the Constitution which entails a substantive proportionality inquiry. However, he argues that these concerns are unfounded because section 25 must always be subjected to the substantive proportionality test that section 36 (the limitation clause) entails. He notes that although bills of rights were originally cast in defensive language which insulated rights against state interference, this is not how South Africa's Bill of Rights should be viewed as it is a post-liberal, reformist document. This means that section 25 allows the state to adopt land reform initiatives, but subject to substantive proportionality review. See Van der Walt *Constitutional property law* 27—29.

[12] Regulation is considered an inevitable part of the property system rather than an extraneous imposition. See Van der Walt A J *Property and constitution* (2012) 130; Van der Sijde *Property and regulation* 151. However, it should be stressed that section 25 is not the only instance of regulation in the Constitution, as regulation is an over-arching theme in various other constitutional provisions. It is not confined to the property context. Regulation is part of a legal system that utilizes limitations but also imposes controls to monitor the effects of limitations. See Van der Sijde *Property and regulation* 151.

[13] Van der Sijde *Property and regulation* 98.

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section 25).[14] It is also important to consider how to resolve the tension between section 25 and section 26 of the Constitution.[15]

This chapter sets out to achieve three objectives. The first is to consider the normative framework for understanding financial incentives in South African property law. Since the decision in *FNB* advocates for a contingent definition and approach to property rights,[16] it is worthwhile to consider what role financial incentives can play in determining the constitutional validity of the property regulation resulting from inclusionary housing. It has been suggested under U.S. takings jurisprudence that an inclusionary housing programme cannot be valid unless it incorporates financial incentives.[17] I show how financial incentives are relevant to understanding how far a property regulation measure goes. While the "goes too far" concept applies to takings jurisprudence under the U.S. Constitution, I attempt to show that the substance of this inquiry is relevant to understanding whether a measure is arbitrary under section 25 of the Constitution.[18] The second objective is to understand the legal taxonomy of expected earnings in South African law,[19] especially in the context of a planning law

[14] Bezuidenhout has conducted a review of some of the aspects of police power that have been provided for by legislation, such as the protection of national heritage in the National Heritage Resources Act 25 of 1999, the prevention of animal disease in the Animal Diseases Act 35 of 1984, and telecommunications in the Electric Communications Act 36 of 2005. See Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* (2015) 210—246 ("Bezuidenhout *Regulatory state action*").

[15] See, generally, Van der Walt AJ "The state's duty to protect property owners v The state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *SAJHR* 144—161 149, 150'; Van der Walt AJ & Viljoen S "The constitutional mandate for social welfare: Systemic differences and links between property, land rights and housing rights" (2015) 18 *P.E.L.J.* 1035—1090 1036 1038.

[16] *FNB* paras 51-56.

[17] In *Home Builders' Association of Northern California v City of Napa* 108 Cal. Rptr. 2d 60 (2001), the city had imposed a 10% affordable housing requirement on all developments. The plaintiffs challenged this requirement, arguing that it did not meet the "essential nexus" and "rough proportionality" standards set out in *Nollan*/*Dolan*. The California Court of Appeal dismissed this argument. The Court held that the heightened scrutiny implied in *Nollan*/*Dolan* did not apply. More importantly, in determining the constitutionality of the Ordinance, the Court considered the "significant benefits" that the Ordinance extended to complying developers. It was further held that the ordinance did not result in a taking since it allowed the City to waive the requirements imposed.

[18] Although the issue of how far a regulatory measure goes has traditionally only been discussed in relation to takings under U.S. law, it is submitted that the grant of a government benefit to a person or a group of persons similarly raises concerns about whether such a measure goes too far and is thus invalid. Bell and Parchomovsky address this issue comprehensively, demonstrating how government "givings" can trigger considerations of fairness and equality in much the same way as takings do. See Bell A & Parchomovsky G "Givings" (2001) 111 *Yale L.J.* 547—618 574 ('Bell & Parchomovsky "Givings"'). See also Davidson NM "Property's morale" (2011) 110 *Mich. L. Rev.* 437—488 459 ('Davidson "Property's morale"').

[19] The other property form that is relevant to inclusionary housing is landownership whose constitutional standing is relatively straightforward.

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system of building licencing where one has no right to build except by first obtaining a licence. Apart from sections 25 and 26 of the Constitution, I discuss constitutional and statutory provisions on local government, and cases and materials relevant to the deprivation of property, relating this discussion to what I consider will be the South African approach to implementing inclusionary housing. Although Chapter 4 of this thesis is the dedicated comparative chapter, I occasionally refer to foreign law in this chapter for illustrative purposes.

2.2. The property-related concerns of developers in inclusionary housing schemes

2.2.1 Introduction

The most obvious property-related concern regarding inclusionary housing is that it reduces developers' incomes.[20] Inclusionary housing entails the requirement that a developer dedicate a certain percentage of market-related housing developments to the provision of affordable housing.[21] The law generally envisages two different modes of compliance with this requirement, namely, mandatory and voluntary compliance.[22] In terms of mandatory inclusionary zoning, the law requires developers to set aside a certain portion of their developments for affordable housing, and does not give developers any option for opting out of this arrangement. However, since such strict requirements will inevitably lead to hardship, certain incentives are usually incorporated into this arrangement to lessen the burden borne by developers.[23]

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[20] See Ellickson RC "The irony of inclusionary zoning" (1981) 54 *S. Cal. L. Rev.* 1167—1216 1170 ('Ellickson "Inclusionary zoning"'); Kautz BE "In defense of inclusionary housing: Successfully creating affordable housing" (2002) 36 *Univ. S. Fla. L. Rev.* 971—1032 974 987 ('Kautz "Defense of Inclusionary zoning"'); Berger L "Inclusionary zoning devices as takings: The legacy of the *Mount Laurel* cases" (1991) 70 *Nebr. L. Rev.* 186—228 205 ('Berger "Inclusionary zoning devices"')

[21] Ellickson "Inclusionary zoning" 1169; Iglesias T "Inclusionary zoning affirmed: *California Building Industry Association v City of San Jose*" (2016) 24 *J. Affordable Hous. & Cmty. Dev. L.* 409—434 410 411 ('Iglesias "Inclusionary zoning affirmed"'); Arpey C "The multifaceted manifestations of the poor door: Examining forms of separation in inclusionary housing" (2017) 6 *Am. Univ. Bus. L. Rev.* 627—645 629; Curtin DJ & Naughton EM "Inclusionary housing ordinance is not facially invalid and does not result in a taking" (2002) 34 *Urb. Law.* 913—918 914 ('Curtin & Naughton "Inclusionary housing ordinance"'); Floryan M "Cracking the foundation: Highlighting and criticizing the shortcomings of mandatory inclusionary zoning practices" (2010) 37 *Pepp. L. Rev.* 1039—1112 1044 ('Floryan "Shortcomings of mandatory inclusionary zoning"').

[22] Lerman BR "Mandatory inclusionary zoning: The answer to affordable housing problem" (2006) 33 *B.C. Envt'l. Affairs L. Rev.* 383—416 389 ('Lerman "Mandatory inclusionary zoning"'); Porter DR "The promise and practice of inclusionary zoning" in Downs A (ed) *Growth management and affordable housing: Do they conflict?* (2004) 212, 213 ('Porter *Promise and practice of inclusionary zoning*'); Floryan "Shortcomings of mandatory inclusionary zoning" 1045.

[23] Kautz notes that incentives can be provided without public funding. See Kautz "Defense of inclusionary zoning" 983. This supports the generally held view that inclusionary housing makes no call

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Typically, such incentives include density bonuses which allow developers to exceed the maximum number of units designated for a project.[24] Although such incentives are generally not considered necessary, some commentators argue that they are necessary if an expropriation claim is to be averted.[25] On the other hand, voluntary inclusionary housing presents developers with the element of choice.[26] It is usually instituted based on an *ad hoc* arrangement or agreement between developers and the state.[27] Academic consensus appears to be that this mode of delivery is less effective than the mandatory model, because developers invariably opt for a housing delivery programme that will maximise their returns.[28] They therefore choose not to participate in voluntary programmes where they are sure to minimise their returns. In most cases, voluntary programmes must be backed up by some form of incentive, such as state subsidies, before they can have any meaningful impact on the delivery of affordable housing.[29]

In this section, I explore the protection of landownership and expected earnings as forms of property under the property clause (section 25 of the Constitution). I also inquire whether the modalities for implementing inclusionary housing amount to deprivation of property, and whether such deprivation should be regarded as arbitrary.

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on public resources, making it an attractive avenue for providing low-cost housing. However, this view must be regarded as based specifically on American law, as the nature and functions of municipalities under South African law present a vastly different picture where expenditure by municipalities depends on relatively scarce public resources. See the discussion under paragraphs 2.3.1, 2.3.2 and 2.3.3 below on the responsibilities of municipalities.

[24] SAPOA *Inclusionary housing* 10; Berger "Inclusionary zoning devices" 191; Ellickson "Inclusionary zoning" 1180; Kautz "Defense of inclusionary zoning" 981. It should further be noted that other types of incentive are often used, either on their own or in conjunction with density bonuses. These include fee waivers, expedited permit processing and tax abatements. See Floryan "Shortcomings of mandatory inclusionary zoning" 1095; Kautz "Defense of inclusionary zoning" 983.

[25] See Curtin & Naughton "Inclusionary housing ordinance" 913, 914; Porter *Promise and practice of inclusionary zoning* 229

[26] Lerman "Mandatory inclusionary zoning" 391, Berger "Inclusionary zoning devices" 215

[27] Floryan "Shortcomings of mandatory inclusionary zoning" 1105; In *Westpark Avenue Inc. v Township of Ocean* 48 N.J. 122, 224 A.2d 1 (1966), a municipality had imposed a series of requirements on a developer as a condition for allowing the latter to obtain a development permit. One of these required the developer to contribute to a school construction fund at the rate of 300 U.S. Dollars per house to be built. The Court characterized this contribution as having been made under duress and held that the contribution was not voluntary.

[28] Floryan "Shortcomings of mandatory inclusionary zoning" 1045.

[29] Brunick N, Goldberg L & Levine S *Voluntary or mandatory inclusionary housing? Production, predictability and enforcement* (2004) 3, 4; Floryan "Shortcomings of mandatory inclusionary zoning" 1045.

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2.2.2 Landownership and expected earnings as property

South African property law has grappled with questions regarding whether specific forms of interest amount to property for purposes of legal protection.[30] The question has usually arisen in a variety of contexts. In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[31] ('*FNB*'), *FNB*, a commercial bank (FNB) was the owner of three motor-vehicles that it had leased to a company in the normal course of its business. While parked at the company's premises, one of these vehicles was seized by the revenue authorities pursuant to the provisions of section 114 of the Customs and Excise Act.[32] The seizure was in respect of customs duty and penalties allegedly owed by the company. This tax debt was unconnected to the vehicles in question. Nevertheless, the tax authorities established a statutory lien over the vehicles to secure payment of this tax debt,[33] and subsequently sold the vehicles in execution. This situation presented a conflict between two sets of interests: the state claimed its interest in the vehicles to enforce payment of the tax debt, while the commercial bank claimed that it had reserved ownership in the vehicles to secure payment of its loan to the company. The issue was whether the statutory lien and subsequent sale in execution violated FNB's constitutional property rights contrary to section 25 of the Constitution.[34]

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[30] See, for example, *Moroka Swallows Football Club Ltd v The Birds Football Club & Others* 1987 (2) SA 511 (W) at 531E-G; *South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons & Another* 2003 (3) SA 313 (SCA) at 321 E-G; *Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae)* 2006 (1) SA 144 (CC). See also Louw AM "Suggestions for the protection of star athletes and other famous persons against unauthorized celebrity merchandising in South African law" (2007) 19 *S. Afr. Merc. L. J.* 272—301 300; Du Bois M "Intellectual property as a constitutional property right: The South African approach" (2012) 24 *S. Afr. Merc. L. J.* 177—193 178; Van der Walt AJ & Shay RM "Constitutional analysis of intellectual property" (2014) 17 *PELJ* 52—85 53 ('Van der Walt & Shay "Intellectual property"'); Erlank W "Don't touch my virtual property: Justifications for the recognition of virtual property" (2016) 133 *SALJ* 664—687 666. In addition to these, Van der Walt predicts that the proliferation of land use related rights will pose problems for South African property law, especially when they are linked to land reform. He lists some examples of current land use rights, including claims in terms of the Restitution of Land Rights Act 22 of 1994, informal land rights under the Interim Protection of Informal Land Rights Act 31 of 1996, rights in property associations in terms of the Communal Property Associations Act 28 of 1996, and initial ownership in terms of the Development Facilitation Act 67 of 1995. See Van der Walt *Constitutional property law* 116—7. It should be noted that these debates are not unique to South African law. See Philbrick FS "Changing conceptions of property in law" (1938) 86 *U. Pa. L. Rev.* 691—732 725; Underkuffler LS "On property: An essay" (1990) 100 *Yale L.J.* 127—148 128, 130.

[31] 2002 (4) SA 768 (CC).

[32] Act 91 of 1964.

[33] *FNB* para 8.

[34] *FNB* para 24.

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The Constitutional Court made some important pronouncements on the scope of section 25 of the Constitution. In the first place, section 25 calls for an interpretive approach that strikes a balance between two divergent purposes, namely, the protection of private property and the service of the public interest.[35] Therefore, a context-sensitive approach to section 25 is required. No single interpretation will fit all cases. Secondly, the Constitutional Court stated that whether an interest qualifies as property must depend on the nature of the legal right in question and not "the subjective interest of the owner in the thing owned" or on the "economic value of the right of ownership."[36] According to this logic, one should not conflate the legal right and the commercial interest in the property. A purely economic interest should not be protected as property. In this section, I discuss two distinct property forms that would be affected by inclusionary housing. These are landownership and expected earnings.

2.2.2.1. Landownership as property

The idea that landownership amounts to property appears to be settled both in South African constitutional jurisprudence and under the common law. The Constitution states that property includes, but is not limited to, land.[37] The South African Constitution deals with the issue of land under the property clause (section 25) and does not contain a separate clause on land as several other constitutions do.[38] Since land is included in the concept of property, this appears to be a recognition of the value of land as an asset, although clearly there are other functions of a non-economic nature that land performs. For instance, land is the basis of several constitutionally sanctioned projects such as land restitution, land redistribution, and land tenure

[35] *FNB* para 50.
[36] *FNB* para 56.
[37] Section 25 (4) of the Constitution.
[38] Some academic commentators were opposed to the inclusion of land within the property clause. For instance, Professor Derek Van der Merwe argued that doing so would weaken the institution of communal tenure of land. He added that enshrining land in a Bill of Rights had the potential of hardening the common law-based attitudes which were already anti-reform and exclusionary. See Van der Merwe D "Land tenure in South Africa: A brief history and some reform proposals" (1989) *J. S. Afr. L.* 663—692 692. Also see Lewis C "The right to private property in a new political dispensation in South Africa" (1992) 8 *SAJHR* 389—430 391. Examples of constitutions that adopt a bifurcated approach to property and land are the Zimbabwean and Kenyan constitutions detailed at note 7 above.

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reform.[39] The common law also accepts that landownership includes ownership of everything above and below the land, including minerals.[40]

Due to the acute shortage of well-located land essential for residential development, the question is whether landowners' property rights should be subjected to further limitation where their land offers locational advantage in relation to proximity to services and opportunities. In other words, are landowners' property rights at a heightened risk of limitation where it is determined that such land can lead to affordable, well-located housing? To answer this question, it is important to consider how the Constitution protects landownership from the point of view of section 25 of the Constitution. In *FNB*, the Constitutional Court pointed out that the constitutional conception of property must now include the ownership of land.[41] Although this statement was *obiter*, it was made in the context of laying down what the Constitutional Court considered to be the starting point for defining property under the Constitution. The Court made the point that, apart from landownership, the ownership of a corporeal movable was the other type of interest that qualified as property in terms of section 25, at the minimum.

Whether the imposition of inclusionary housing results in the deprivation of landownership is a question that must be answered by referring to two main principles that have emerged from case law on the scope and meaning of section 25 of the Constitution. Firstly, the fact that the imposition may result in the permanent physical invasion of property does not in itself amount to deprivation.[42] There is no principle in South African constitutional property law that treats a permanent physical invasion of property as a deprivation, unlike the position under U.S. law.[43] Instead, the impact of the invasion on the landowner is a relevant factor in the physical invasion scenario and must be considered along with the invasion itself to determine whether a

[39] Keightley R "The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property" (1999) 15 *SAJHR* 277—307 277.
[40] *Union Government (Minister of Railways and Harbours) v Marais and Others* 1920 AD 240 at 246; *AngloGold Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA) para 16; *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) para 7, Mostert H *Mineral law: Principles & policies in perspective* (2012) 7.
[41] *FNB* para 51.
[42] Van der Walt AJ *Constitutional property law* 3 ed (2011) 299.
[43] *Loretto v Teleprompter Manhattan CATV Corp* 458 U.S. 419 (1982); Van der Walt *Constitutional property law* 297.

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deprivation has occurred. Secondly, if the imposition is based on a constitutionally mandated land reform purpose, then the permanency of the invasion is immaterial to the question of deprivation.[44] The apparent reason for this is that land reform, by its nature, must result in some physical invasion of private land. However, it is possible to avoid the permanent physical invasion of land in the inclusionary housing setting by limiting the invasion in terms of its duration.[45] In this regard, the renting of inclusionary housing units is an option that would ensure that the renter occupies a house for a certain period, after which the landlord would be free to revert it to market-rate rent. However, this option assumes that the building specifications for both market and non-market units in the housing project are not markedly different, because this would make it impossible for the developer to simply switch from affordable to market rent without first incurring expenses to upgrade the concerned unit.

There are several theoretical premises for considering this question. First, private property doctrine is not insulated from the influences of public law. Instead, private property must also be considered through the lens of public law and the pursuit of the social good. The Constitution requires that property rights be defined according to the public good. It appears uncontroversial to state that, unlike the situation under the Takings Clause of the U.S. Constitution, it is completely legitimate for private property to be "pressed into some form of public service."[46] This reading of the property clause is expressly endorsed by several decisions of the Constitutional Court dealing with the meaning and scope of section 25 of the Constitution.[47]

Secondly, there is a transformational angle to the consideration of this question. Through the presumptive power of property ownership, the common law ensured that many blacks were dispossessed of their land and prevented from realizing their economic potential. Not only were they dispossessed of agricultural land, but also land where they could build their homes and enjoy a fulfilled life with their families. Since the displacement of these people was calculated to achieve a political purpose by

[44] Van der Walt *Constitutional property law* 299.
[45] The City of Johannesburg inclusionary housing policy states that "Once built, inclusionary housing units must remain inclusionary for perpetuity, or until repealed by a Council resolution." See City of Johannesburg *Inclusionary housing: Incentives, regulations, and mechanisms* (2019) para 4.1.4 (c).
[46] *Lucas v Southern California Coastal Council*, 505 U.S. 1003 1018 (1992).
[47] See the cases cited at note 51 below.

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consigning them to underserviced, unsafe and unproductive localities, any reading of the property clause must aim at the reversal of this injustice. It was an injustice because the displacement denied the affected individuals and communities the opportunity of self-actualization that comes with belonging to a locality of one's choice. This, therefore, amounted to spatial injustice by way of removal of residential choice.

Thirdly, and building on the preceding point, the property clause must therefore engage with what it would mean to have a spatially just society in post-constitutional South Africa. The entire concept of property and its use had been rendered spatially unjust under apartheid in the sense that what one could own was pre-determined by space and law, but for an overtly political purpose. Therefore, space and law did not organically interact to produce a legal and spatial landscape that honoured the innate ability of human beings to excel in their chosen fields of endeavour. Ownership patterns came to reflect a deeply unjust social order.[48] Therefore, there was a shortage of land which, in turn, led to the growth of informal settlements and squatting. In a spatially just scenario, property relations would be identified as the key area of private law that is in dire need of transformation. It is the third point regarding spatial justice that I focus on because of its potential to help highlight some of the stark choices that inclusionary housing presents for South African law. The limitation of landownership for a significant segment of the population resulted in a spatially manifested injustice whose reversal can only be achieved by reforming property relations.

2.2.2.2. Expected earnings as property

Not all interests qualify as property under the Constitution. Moseneke DCJ alluded to this in *Shoprite Checkers (Pty) Ltd v MEC for Economic Development, Eastern Cape*[49] (*'Shoprite Checkers')* where he stated that there may well be sound reasons for not protecting a specific interest as property under section 25 (1) of the Constitution.[50] The definition of property rights now serves the purpose of achieving social goals that go beyond the mere enjoyment of the right of ownership.[51]

[48] Haferburg C "Townships of to-morrow? Cosmo City and inclusive visions for post-apartheid urban futures" (2013) 39 *Habitat International* 261—268 261.
[49] 2015 (6) SA 125 (CC).
[50] *Shoprite Checkers* paras 94, 115 and 120. See also Van der Sijde *Property and regulation* 273, 282. For a U.S. perspective, see Singer JW *Entitlement: The paradoxes of property* (2000) 142—144 208.
[51] *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) para 33 ('*Reflect-All*'); *FNB* para 64; *Mkontwana* para 81; *Phumelela*

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Developers' objections to inclusionary housing centre around the expectation of earnings in the housing development endeavour. Against this backdrop, the question arises as to how to characterise expected earnings for purposes of property law analysis. This question requires us to examine the constitutional taxonomy of expected earnings. Generally, the fact that a benefit is contingent or expected to materialise sometime in the future is not a bar to its being protected as property. The important consideration here is whether such contingent interests are recognized, and have vested, in terms of private law.[52] Incorporeal interests such as licences and shares are recognised and protected as property by private law.[53] However, interests such as licenses and permits are anchored in the administrative process and are therefore different from other commercial interests.[54] Kellerman observes that there is some resistance to recognizing these interests as property in terms of the property clause.[55] Nevertheless, they may acquire property status if they have some commercial value and if they vest in terms of the applicable statutes and regulations.[56]

Expected earnings connected to housing development may be regarded as property for purposes of section 25 of the Constitution, provided that they are recognized and have vested in terms of, for instance, the National Building Regulations and Standards

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Gaming and Leisure Ltd v Grundlingh and Others 2007 (6) SA 350 (CC) para 38 ('*Phumelela*'); *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review project as* Amicus Curiae*)* 2007 (4) SA 222 (CC); Van der Walt & Shay "Intellectual property" 53. From a foreign law perspective, the idea of the social obligations of property is embodied in several constitutional provisions such as the German Constitution (The Constitution (Basic Law) of the Federal Republic of Germany (1949) art.14, The Italian constitution (1947) art. 42 and the Japanese Constitution (1946) art. 29. See also Chen AHY "The basic law and the protection of property rights" (1993) 23 *Hong Kong L. J.* 31—78 35.

[52] There is some variation in the formulation of these twin requirements. While Kellerman posits that the interests must have acquired value and vested (Kellerman *Immaterial property interests* 9), Van der Walt refers to the requirement that the interest must be recognized and vested (Van der Walt *Constitutional property law* 95). This difference does not appear to be substantial because property interests will generally be recognized if they have acquired value and *vice-versa*.

[53] Van der Walt *Constitutional property law* 87—88; Du Bois "Intellectual property as a constitutional property right" 183; Kellerman M *The constitutional property clause and immaterial property interests* (2011) 95 ('Kellerman *Immaterial property interests*'); *Cooper v Boyes NO and Another* 1994 (4) SA 521 (C) at 538. However, Van der Walt argues that some interests (such as workers' rights) are both controversial and unnecessary to include within the property clause although they may be regarded as property in some jurisdictions. He argues that such interests are already protected under specific constitutional clauses, such as the right to have access to social security (including, where necessary, social assistance) (section 27 (1) of the Constitution). Such welfare-based interests are considered "new property" in some jurisdictions. See Reich CA "The new property" (1964) 73 *Yale L. J.* 733—787 734—737.

[54] Kellerman *Immaterial property interests* 95.

[55] Kellerman *Immaterial property interests* 95.

[56] Kellerman *Immaterial property interests* 96.

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Act[57] ('NBRSA'). The NBRSA governs the building of houses according to standards set by the statute.[58] It requires that all houses in South Africa must comply with the requirements established by the Act.[59] Muller[60] describes the NBRSA as "partial legislation of a technical nature" to the extent that it supplements a raft of other statutes and regulations relating to some aspects of the building process, and also because the detail of the regulations require a certain level of skill to interpret and apply. Significantly, Muller argues that the NBRSA does not give direct effect to a right in the Constitution, since it was enacted before the Constitution came into effect.[61] SPLUMA, on its part, was enacted after the Constitution came into effect and the presupposition is that it seeks to promote the values espoused in a constitutional setting that places a premium on human dignity, equality and freedom. SPLUMA does not create a property right in the earnings that a developer expects to derive from housing development. Instead, the Act aims to provide a national framework for spatial planning and land use management that promotes social and economic inclusion.[62] The Act also provides for development principles and norms and standards (including the principle of spatial justice) that must govern the development process.[63]

Since expected earnings are a kind of commercial property, it is conceivable that an argument may be made for their exclusion from the protection provided by the property clause. The basis of this argument would be that they do not constitute the sort of property that is necessary for the holder's self-fulfilment. After all, in *Shoprite Checkers,* Froneman J seems to have required that before an interest is recognized as property it must answer to some "higher value" that is treasured by the Constitution.[64] In other words, it must be sufficiently linked to the enjoyment of other constitutional rights (such as human dignity, equality and freedom) before it can enjoy constitutional protection. He stated that the property clause of the Constitution was not designed to "advance economic wealth maximisation or the satisfaction of individual

[57] Act 103 of 1977.
[58] Section 17 of the NBRSA.
[59] Section 10 of the NBRSA.
[60] Muller G "Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa" (2015) 132 *SALJ* 616—638 626 ('Muller "Evicting unlawful occupiers"').
[61] Muller "Evicting unlawful occupiers" 626 627.
[62] Section 3 (b) of SPLUMA.
[63] Section 3 (c) of SPLUMA.
[64] *Shoprite Checkers* para 50.

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preferences, but to secure living a life of dignity in recognition of the dignity of others."[65] Self-fulfilment is such a value,[66] and if the particular interest cannot be shown to contribute to self-fulfilment (because it is too impersonal, for instance) then it should not be protected by the Constitution. The answer to this contention is that such a blanket denial of constitutional protection for commercial property is not warranted, not least because it goes against the nuanced approach broached in *FNB* for determining what constitutes property for purposes of the Constitution. As Michelman and Marais argue, it is more convincing to invoke the "higher values" debate at the arbitrariness (second) stage when a property limitation is reviewed in terms of the two-stage approach utilised in South African law.[67] Considering higher values at the "is it property" (first) stage blurs any distinction between the constituent elements of the two-stage approach. The *FNB* approach places context at the centre of the determination process, making it necessary for the court to consider the interest in each case against the backdrop of all the other facts. In other words, a court cannot abdicate its responsibility of conducting a context-specific analysis of the interest in question by simply resorting to rigid categories such as "commercial property" thereby ensuring a preconceived outcome. Furthermore, the Constitutional Court has always regarded a wide array of interests as property for purposes of section 25 of the Constitution.[68] To insist that such interests must first fulfil the "higher values" function risks contradicting this generous approach.

2.2.2.3. Conclusion

What are the proprietary interests at stake under inclusionary housing? Landownership amounts to property and is therefore much less controversial. Section 25 of the Constitution includes land in the concept of property. [69] Expected earnings present a more difficult taxonomical problem, especially where they have not yet

[65] *Shoprite Checkers* para 50.
[66] *Shoprite Checkers* para 50.
[67] Michelman FI & Marais EJ "A constitutional vision for property: *Shoprite Checkers* and beyond" in Muller G, Brits R, Slade BV & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 121—146 138.
[68] See *First Certification Case* para 72; *Law Society* para 84; *Opperman* para 63.
[69] Section 25 (4) of the Constitution provides as follows:

> "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."

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vested.[70] Given the Constitutional Court's proclivity for a generous interpretation of "property" under section 25 of the Constitution, is it probable that the Court would be persuaded to look at housing developers' interests as constituting property? It is striking that the objections alluded to above sound in monetary terms only, that is, earnings. The concern is that since inclusionary housing subjects the developer's property to a requirement that leads to loss of earnings, it is an onerous requirement that amounts to taxation.[71] Ellickson writes that:

> These programs are essentially taxes on the production of new housing. The programs will usually increase general housing prices, a result which further limits the housing opportunities of moderate-income families. In short, despite the assertions of inclusionary zoning proponents, most inclusionary ordinances are just another form of exclusionary practice.[72]

Expected earnings are a form of property protected under the property clause because there is a generally favourable disposition towards recognising incorporeal interests as property. Although they are not recognized as a form of property under private law, expected earnings constitute unconventional immaterial property interests in the form of commercial property and should therefore qualify for constitutional protection. It is, however, important for a claimant to demonstrate that such rights have economic value and have already vested.[73] In *FNB* the Court's reasoning made clear that it was concerned with a corporeal movable given the facts of the case.[74] The Court stated that the ownership of both corporeal movables and land was "at the heart of our constitutional concept of property."[75] The Court's reasoning shows that the door was left open for the consideration of incorporeal interests as property, especially since this category of property is not specifically excluded from the property clause.[76] Roux argues that the pursuit of a transformation-oriented, public law definition of property

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[70] Kellerman *Immaterial property interests* 9.
[71] Municipalities generally avoid funding affordable housing measures through taxation because the power of taxation is extensively circumscribed. See the discussion under section 2.4.3 below on the distinction between fees and tax in relation to municipalities.
[72] Ellickson "The irony of inclusionary zoning" 1170. See para 2.4.3 below for a discussion on linkage and impact fees.
[73] Kellerman *Immaterial property interests* 9.
[74] *FNB* para 51.
[75] *FNB* para 51.
[76] In *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T) the Court took the opposite view, holding that a right that is not specifically mentioned in the property clause is thereby excluded from the ambit of constitutionally protected property interests. This view is incorrect and has been criticized in academic circles. See Van der Walt *Constitutional property law* 87; Kellerman *Immaterial property interests* 15—16, 246.

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(which is required by the Constitution) would ineluctably lead to such recognition.[77] In principle, expected earnings qualify as property under this reasoning if one simply considers the fact that this possibility was not ruled out by *FNB*.

However, expected earnings will ordinarily not have vested when a landowner applies for development permission to erect housing unless it is shown that vesting had taken place through contract. It may be true that the economic value of land is as important as the land itself. It may also be argued that where a landowner acquires property with the intention of developing it for economic gain, then value has been created in respect of the activity intended to be performed. On the other hand, virtually all landowners acquire property with the intention of developing it. Therefore, there is no basis for making a meaningful distinction in this regard. My discussion of the deprivation and arbitrariness issues below therefore proceeds on the assumption that the expected earnings in question have vested.

2.3. Is there deprivation and is it arbitrary?

2.3.1 Deprivation

In *FNB*, the Constitutional Court stated that "any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."[78] However, the Court's subsequent decision in *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC for Local Government and Housing in the Province of Gauteng and Others*[79] ('*Mkontwana*') established the principle that section 25 of the Constitution provides protection against deprivation of property that falls into two categories. The first is deprivation that constitutes substantial interference, and the second is deprivation that goes beyond the normal restrictions on property use that one would find in an open and democratic society.[80] Therefore, the Court significantly altered the *FNB* principle by importing qualifiers into the picture in a

[77] Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (2003) 46-10.
[78] *FNB* para 57.
[79] 2005 (1) SA 530 (CC).
[80] *Mkontwana* para 32.

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manner that seemed to undercut what *FNB* stood for. Subsequent Constitutional Court decisions[81] have perpetuated this apparent difference in approach and created confusion, as Van der Walt[82] and Bezuidenhout[83] argue. As Van der Walt has noted,[84] the weight of authority after *Mkontwana* now seems to favour the wider definition in *FNB*.

The Court distilled the applicable test into the following portions. The first part of the methodology is to establish whether the affected interest amounts to property.[85] Assuming that the affected interest amounts to property, the second portion of the test is whether there has been a deprivation of that property. If deprivation is established, the third portion of the test is whether the deprivation is consistent with section 25(1) of the Constitution.[86] If it is arbitrary, then it is inconsistent with section 25(1) and therefore the fourth stage of the test is whether the deprivation can be justified under section 36 of the Constitution.[87] If the deprivation is not authorised by a law of general application, or if it is arbitrary and it cannot be saved under section 36 of the Constitution, that is the end of the matter.[88] However, if the deprivation is not arbitrary, or if it is but can be justified under section 36 of the Constitution, the test proceeds to

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[81] In *Reflect-All* para 38 the Court referred to both *FNB* and *Mkontwana* insofar as the definition of deprivation was concerned. Its decision indicated a preference for the wider definition in *FNB* inasmuch as it found that depriving property owners of the right to transfer property deprived them "in some respects of the use, enjoyment and exploitation of their properties." Subsequently, in *Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others* 2011 (1) SA 293 (CC) para 44 ('*Offit Enterprises*') the Court referred to both the *FNB* and *Mkontwana* definitions of deprivation. However, the Court stated that "substantial interference" was required before it could consider whether there had been deprivation. This reasoning is consistent with the narrower definition of deprivation in *Mkontwana*. See further Van der Walt AJ *Constitutional property law* 3 ed (2011) 207 ('Van der Walt *Constitutional property law* 3 ed').

[82] Van der Walt *Constitutional property law* 3 ed 207.

[83] Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* (2015) 16—17.

[84] Van der Walt AJ "Constitutional property" (2012) *ASSAL* 186.

[85] *FNB* para 46.

[86] Section 25 (1) of the Constitution requires that all deprivations should be authorized by a law of general application, and further that they should not be arbitrary.

[87] *FNB* para 46. Section 36 is the general limitations clause of the Constitution. It provides as follows:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
> (a) the nature of the right;
> (b) the importance of the purpose of the limitation;
> (c) the nature and extent of the limitation;
> (d) the relation between the limitation and its purpose; and
> (e) less restrictive means to achieve the purpose."

[88] *FNB* para 46.

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its fifth leg, which is whether the deprivation amounts to expropriation under section 25(2) of the Constitution.[89] If it does, the sixth question is whether the expropriation complies with section 25(2) (a) and (b) of the Constitution.[90] If it does not, the last question is whether the expropriation can nevertheless be justified under section 36 of the Constitution.[91] This type of evaluation focuses on whether the regulatory action bears an appropriate relationship between the public benefit it confers and the private harm it causes, or whether there is simply a rational (reasonable) relationship between means and ends.[92]

The Court's approach to the deprivation question has recently undergone yet another reconfiguration that might have a significant impact on how the deprivation of property question is conceptualised with reference to inclusionary housing. In *South African Diamond Producers Organization v Minister of Minerals and Energy NO and Others*[93] ('*Diamond Producers*'), the applicant complained about amendments to the law governing dealing in diamonds, the Diamonds Act.[94] Amendments to this Act[95] prohibited unlicensed assistants from serving foreign diamond buyers. This affected the pricing of diamonds in such a way that it prevented producers and dealers from receiving the full market value of their diamonds. They argued that this amounted to deprivation of property. They complained that this amendment was arbitrary in that it did not provide a sufficient reason for this deprivation.[96] The appellant viewed this amendment as a limitation affecting its members' ownership rights, especially their *ius disponendi* (right to dispose of property) since they could no longer obtain their goods' market value upon selling.[97]

The Court's analysis of the problem was based on the initial determination that the diamonds in question were clearly property.[98] This is uncontroversial since diamonds are corporeal objects. The question was whether section 20A deprived the applicant's

[89] *FNB* para 46.
[90] *FNB* para 46.
[91] *FNB* para 46.
[92] Van der Walt *Constitutional property law* 146—147.
[93] 2017 (6) SA 331 (CC).
[94] Act 56 of 1986.
[95] Diamonds Amendment Act 29 of 2005 and Diamonds Amendment Act 50 of 2005.
[96] *Diamond Producers* para 20.
[97] *Diamond Producers* para 36.
[98] *Diamond Producers* para 41.

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members of ownership of these diamonds. This was a question of whether there had been substantial interference with their property. The Court reasoned that for there to be deprivation, the limitation imposed must be substantial in that it must have a "legally relevant impact on the rights of the affected party."[99] According to Khampepe J, the limitation in this case was directed at the manner in which the producers and dealers were able to conduct sales, rather than the right to sell itself.[100] It is clear that for Khampepe J to reach this conclusion, she had to regard the right of ownership as consisting of discrete components (including the *ius disponendi*), and then to conceptually sever[101] the *ius disponendi* from the aggregate right of ownership. She went further to distinguish this self-standing component of the right of ownership from the manner of its exercise. This amounted to a unique form of conceptual severance because it separated the *ius disponendi* from the manner of its exercise even though the Court had earlier held[102] that the affected interest was diamond ownership.[103] Unlike traditional conceptual severance, the unique form of severance employed here was not meant to afford the self-standing right constitutional protection but rather to deny it protection because the aggregate right was intact.[104] Since the rest of the rights inhering in ownership were unaffected by the limitation, no deprivation took place.[105] This is how the Court came to the conclusion that there had been no substantial interference with the rights of the affected parties in this case.[106]

[99] *Diamond Producers* para 61.
[100] *Diamond Producers* para 52.
[101] Traditional conceptual severance refers to a judicial practice that defines a given right or collection of rights as especially significant within a bundle of rights setting. The identified right or group of rights becomes a core strand in the bundle. The result is that when that core strand is taken away, the whole of the property is deemed to have been affected. See Van der Walt AJ "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) 11 *SAJHR* 169—206 200 ('Van der Walt "Civil law tradition in SA Property"'). The problem with conceptual severance in this traditional sense is that it can result in an anti-reformist judicial posture because any minor infringement of a property right would be considered a deprivation. See Van der Walt "Civil law tradition in SA Property" 201.
[102] *Diamond Producers* para 41.
[103] Marais EJ "Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection" (2018) 34 *SAJHR* 167—190 182 ('Marais "Narrowing the meaning of deprivation"').
[104] Marais "Narrowing the meaning of deprivation" 182.
[105] *Diamond Producers* para 52.
[106] It can be deduced from this unique form of conceptual severance that the *ius disponendi* is not intended to perform the function of guaranteeing a fair return on investment. Although the Court in *Diamond Producers* pointed out (para 52) that the producers and dealers could still obtain the highest possible price for their diamonds, Marais correctly argues that the price would depend on what the framework in place allowed. See Marais "Narrowing the meaning of deprivation" 182.

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The decision in *Diamond Producers* is problematic for deprivation analysis in that it complicates the law on the nature of the right of ownership. South African law has always regarded ownership as a unitary right.[107] The notion that ownership consists of a bundle of sticks, and that the removal of one stick leaves the rest intact, has not been accepted in South African law. Even though, initially, the different approaches in *FNB* and *Mkontwana* were already problematic, the added dimension in *Diamond Producers* is that the Court used the *ius disponendi* as the crucial factor for determining whether there had been a substantial interference with a property right. Khampepe J conceptually severed the *ius disponendi* itself from the manner of its exercise, which then led to her finding that the *ius disponendi* was not taken away in this case.[108] From the decision, it is apparent that had the Court concluded that the *ius disponendi* had in fact been taken away, this would have made no difference to the result or the Court's analysis because Khampepe J also reasoned that it could not be assumed that market conditions would not have changed in any event, thus altering the price of the diamonds.[109] In this way, the Court seemed to require a causal relationship between the limitation and the price drop. This is how the Court conceptualised "substantial interference."[110] The impact on the owner can only be legally relevant if there has been such substantial interference.

The reasoning in *Diamond Producers* is a reflection of the logic of ownership as a bundle of rights, a notion which Wesley Hohfeld popularised in his work regarding the

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[107] Marais "Narrowing the meaning of deprivation" 182. See, further, Van der Walt AJ "Unity and pluralism in property theory: A review of property theories and debates in recent literature: Part I" (1995) *J. S. Afr. L.* 15—42 30 ('Van der Walt "Unity and pluralism in property theory"'). It must be observed that Van der Walt, although acknowledging the principle of unitary ownership, does not favour its application to matters concerning land reform. In his view, the fragmentation of ownership is an innovation to facilitate land reform. See, further, Van der Walt AJ "The fragmentation of land rights" (1992) 8 *SAJHR* 431—450 436 ('Van der Walt "Fragmentation of land rights"'). Comparatively, German law also recognizes the unitary nature of ownership. See Lubens R "The social obligation of property ownership: A comparison of German and U.S. law" (2007) *Ariz. J. Int'l. & Comp. L.* 389—449 396.

[108] *Diamond Producers* para 52.

[109] *Diamond Producers* paras 53, 60—61. Marais argues that the market variability argument in *Diamond Producers* affirms the narrower definition of deprivation adopted in *Mkontwana* in that limitations caused by the "normal" workings of the market are excluded from constitutional scrutiny. See Marais "Narrowing the meaning of deprivation" 184.

[110] Previously, the Constitutional Court in *Offit Enterprises* had clarified two points regarding substantial interference. The first was that substantial interference is a matter of degree and duration. The second was that mere threats do not amount to "substantial interference or limitation that goes beyond the normal restrictions on property use and enjoyment." See *Offit Enterprises* paras 41 & 42.

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nature of rights generally.[111] Hohfeld conceptualised property as consisting essentially of legal relations with regard to a thing.[112] Singer explains that part of the legacy of Hohfeld's work is that it legitimised the regulation of property rights, since it made it easier to argue that although an owner had had a distinct part of her ownership taken away, she had been left with much else to fall back on.[113] The reasoning in *Diamond Producers* makes it easier to argue for the increased regulation of property generally, but also by specifically casting the *ius disponendi* as an ownership entitlement that, on its own, should never be seen as determining whether a deprivation has taken place. The *a priori* answer to the question of whether deprivation has occurred is that taking away the *ius disponendi* does not significantly impact an owner, and is therefore not so legally relevant as to amount to deprivation.

The deprivation question is therefore a particularly interesting site for contesting any interference with landownership property rights in the process of implementing inclusionary housing. The *ius disponendi* is a prominent component of the ownership in question. The right to dispose of land (as property) is impacted when a price or rental ceiling is imposed on a landowner as a condition for developing her land. In some cases, there seems to be pressure to disaggregate the rights of ownership into distinct elements in order to show that an owner is, after all, not so badly off just because one of her ownership entitlements has been taken away. Even though Marais criticises the *Diamond Producers* decision for adopting this approach,[114] it is likely that it will gain prominence especially where access to land is implicated.[115]

[111] Hohfeld WN "Some fundamental legal conceptions as applied in judicial reasoning" (1913) 23 *Yale L. J.* 16—59 21 ('Hohfeld "Fundamental legal conceptions"').
[112] Hohfeld "Fundamental legal conceptions" 21.
[113] Singer JW "Property as the law of democracy" (2014) 63 *Duke L. J.* 1287—1336 1290 (n 8).
[114] Marais "Narrowing the meaning of deprivation" 182. Marais's criticism of the reasoning in *Diamond Producers* remains valid to the extent that the Court sought to distinguish between the *ius disponendi*, on the one hand, and its exercise, on the other. This distinction was artificial and appears to have been taken to such an extreme that it overlooked the reality that the market can only charge what the regulatory framework will allow it to. It would have been convincing to find that the *ius disponendi* had been taken away, paving the way for an inquiry into the arbitrariness of the resulting deprivation.
[115] Van der Walt "Unity and pluralism in property theory" 30; Van der Walt "Fragmentation of land rights" 436

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2.3.2 Arbitrariness

In *FNB*, a customs debt owed to the South African Revenue Service triggered the seizure of a motor vehicle belonging to a third party, but which was in the possession of the revenue debtor's possession. First National Bank, a financial institution which happened to be the financier of the credit agreement in respect of the motor vehicle, sued the state for compensation following the seizure which it alleged was contrary to section 25 of the Constitution.[116] It was contended by the applicant that the deprivation in respect of the motor vehicle amounted to expropriation of property, for which the Constitution required compensation.[117]

The Constitutional Court clarified the meaning of "arbitrary deprivation" in section 25 of the Constitution. The Court stated that a deprivation is arbitrary if the enabling law does not provide sufficient reason for it or if it is procedurally unfair.[118] Although the Court did not define procedural unfairness, it nevertheless made it clear that it was a distinct ground for judicial review of a law of general application that has the effect of depriving an owner of property. The arbitrariness of a deprivation must be determined bearing in mind the means employed and the ends sought to be achieved, the relationship between the purpose of the deprivation and the person whose property is affected, as well as the relationship between the purpose of the deprivation and the nature of the property and the extent of the deprivation.[119] The Court further laid down an important test for the adjudication of conflicts of this nature (where section 25 of the

[116] *FNB* para 26.
[117] *FNB* para 26.
[118] *FNB* para 100. In a discussion of the possible meaning and implications of the procedural arbitrariness test, Van der Walt distinguishes between two possible types of procedurally unfair deprivation. First, deprivation can be the result of administrative action, and should generally follow the procedure laid down in the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'), failing which the deprivation would be unfair. Secondly, deprivation can also result from the direct operation of legislation. In this case, the deprivation could possibly result from the legislation's failure to provide some judicial oversight or periodic review of the legislative framework that results in the deprivation. On this second point, it is arguable that it is the need for the specific kind of deprivation that would be reviewed or subjected to oversight. If the circumstances that brought about the need for the deprivation cease to exist, then the legislative framework should be altered. See Van der Walt AJ "Procedurally arbitrary deprivation of property" (2012) 23 *Stell. L. Rev.* 88—94 93 94.
[119] *FNB* para 100.

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Constitution was at issue) to determine whether a legal provision amounted to arbitrary deprivation of property.[120]

To determine whether a deprivation is substantively arbitrary, the Constitutional Court reiterated that the question to be asked is whether sufficient reason has been provided for it. To establish sufficient reason, Ackermann J articulated the following test:

> "(a) It is to be determined by evaluating the relationship between means employed, namely the deprivation in question, and ends sought to be achieved, namely the purpose of the law in question.
>
> (b) A complexity of relationships has to be considered.
>
> (c) In evaluating the deprivation in question, regard must be had to the relationship between the purpose for the deprivation and the person whose property is affected.
>
> (d) In addition, regard must be had to the relationship between the purpose of the deprivation and the nature of the property as well as the extent of the deprivation in respect of such property.
>
> (e) Generally speaking, where the property in question is ownership of land or a corporeal moveable, a more compelling purpose will have to be established in order for the depriving law to constitute sufficient reason for the deprivation, than in the case when the property is something different, and the property right something less extensive. This judgment is not concerned at all with incorporeal property.
>
> (f) Generally speaking, when the deprivation in question embraces all the incidents of ownership, the purpose for the deprivation will have to be more compelling than when the deprivation embraces only some incidents of ownership and those incidents only partially.
>
> (g) Depending on such interplay between variable means and ends, the nature of the property in question and the extent of its deprivation, there may be circumstances when sufficient reason is established by, in effect, no more than a mere rational relationship between means and ends; in others this might only be

[120] *FNB* para 46.

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established by a proportionality evaluation closer to that required by section 36(1) of the Constitution.

(h) Whether there is sufficient reason to warrant the deprivation is a matter to be decided on all the relevant facts of each particular case, always bearing in mind that the enquiry is concerned with "arbitrary" in relation to the deprivation of property under section 25." [121]

It is important to discuss the context in which the requirement of inclusionary housing arises. South Africa's housing crisis is one that reflects the failures of the market regarding the provision of housing. The Presidency states as follows:

"South Africa's land and housing market has successfully omitted the country's poorest citizens due to high land and property costs, and the inability of many poor people to obtain affordable credit. This means that many of the state's urban settlement interventions and other affordable housing projects remain on the peripheries of cities (where lower land costs prevail), impacting on the spending patterns of their households, due to commuting costs."[122]

There are two major components of this crisis. The first is the growing number of people who reside in decrepit, dilapidated structures in crammed spaces. This is informal housing and is characterised by lack of running water, poor or no sewerage facilities and lack of electricity.[123] The second component consists of housing that still portrays the spatial architecture of apartheid where most of the population lived in far-flung structures, removed from all meaningful opportunity in terms of education, healthcare and jobs.[124] This second type of crisis represents the crisis of "spatial mismatch." Both aspects of the housing crisis can be attributed to the legacy of apartheid which was underpinned by influx control measures and forced removal.[125]

[121] *FNB* para 100.
[122] Presidency *Twenty-year review: South Africa (1994—2014)* 70. See also Robertson *Planning for affordability* 111.
[123] See *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others as Amici Curiae)* 2005 (5) SA 3 (CC) para 3.
[124] Jacobs BJ "The post-apartheid city in the new South Africa: A constitutional *Triomf*" (2006) 18 *Pace Int'l. L. Rev.* 407—454 426.
[125] Wolf R "Participation in the right of access to adequate housing" (2007) 14 *Tulsa J. Comp. & Int'l. L.* 269—294 271 ('Wolf "Participation in housing"'). See also *City of Johannesburg Metropolitan Municipality* v *Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 35 ('*Blue Moonlight Properties*'); Maass S *Tenure security in urban rental housing* (2010) 9.

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The National Development Plan[126] ('NDP') and the 1994 White Paper on Housing[127] ('WPH') identify apartheid spatiality as a lingering problem for post-apartheid South Africa. The NDP states that those who have been locked out of opportunities by this spatial reality must be assisted to turn their fortunes around.[128] The Breaking New Ground Policy[129] (BNG) similarly addresses the need to pay attention to the legacy of apartheid spatial engineering. It states that "sustainable human settlements" must form the basis of wealth creation, poverty alleviation and equity.[130] It calls for "public interventions" in the formation of the built environment, as well as in the creation and distribution of wealth.[131]

These sentiments impact on property and ownership, echoing the concern that the market has failed to address the lack of meaningful housing opportunities for most South Africans. Furthermore, these concerns implicate South Africa's international obligations regarding the right to development[132] and the right to self-determination,[133] because the lack of adequate housing affects the ability of citizens to determine their own legal and political destiny.[134] Article 1 of the Declaration on the Right to Development[135] enshrines the right of every human being to enjoy, *inter alia*, economic

[126] *National Development Plan: Vision for 2030* (2011).
[127] DOH *White paper: A new housing policy and strategy for South Africa GG* 354 *GN* 1376 of 23 December 1994.
[128] NDP 117. See also SERI *Edged out: Spatial mismatch and spatial justice in South Africa's main urban areas* (2016) 3, available online at http://www.seri-sa.org/images/SERI_Edged_Out_report_final_high_res.pdf (accessed on 20 August 2019).
[129] *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* (2004), available online at http://www.capegateway.gov.za/Text/2007/10/bng.pdf (accessed on 6 May 2017).
[130] BNG para 3.
[131] BNG para 3.2.
[132] Declaration on the Right to Development, G.A. Res. 41/128, at 186, U.N. Doc. A/RES/41/53/Annex (Dec. 4, 1986).
[133] Article 1 of the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 17, 21st Sess., U.N. Doc. A/6316 (Dec. 16, 1966) provides that:
> "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."
[134] Wolf "Participation in housing" 271.
[135] See note 132 above.

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development.[136] Article 2 underscores the right of every individual to participate in development.[137]

From the non-arbitrariness test, it follows that the two property forms discussed above (that is, landownership and expected earnings) must be analysed separately. The state would seemingly find it easier to provide sufficient reasons for regulating expected earnings than it would landownership. Land is an important cultural and social resource whose value therefore depends on the needs in a given case.[138] It is submitted that, in principle, landownership will receive greater protection during arbitrariness analysis if the land in question fulfils a more personal, human dignity type of function than land that serves a purely commercial function.[139] Since land meant for development purposes is impersonal in nature, I contend that its regulation only requires a rational connection between means and ends as opposed to land upon which the owner's home is located, for instance, which calls for proportionality-type reasons before a deprivation passes constitutional muster.

Perhaps more importantly, the above test seemingly does not cover the issue of the statistical difference that an inclusionary housing condition would make in terms of housing shortage. Inclusionary housing is not geared to produce housing on a large scale, therefore it is unlikely that a local authority would be able to demonstrate a significant reduction in the housing backlog as a result of adopting inclusionary

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[136] Article 1 provides:

> "1) The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
> 2) The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources."

[137] Article 2 provides that:

> "[t]he human person is the central subject of development and should be the active participant and beneficiary of the right to development."

[138] Walker C "Elusive equality: Women, property rights and land reform in South Africa" (2009) 25 *SAJHR* 467—490 471.

[139] However, in *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Others* 2012 (2) SA 104 (CC) para 92 ('*Blue Moonlight Properties*'), Van der Westhuizen J held that it should not generally be assumed that private developers only evict occupiers from land for commercial reasons. Nor do local authorities pursue eviction only for reasons of safety. Since the research problem and questions in this thesis are confined to a situation where a development application is made, the prospect of non-commercial land attracting impositions for inclusionary housing does not arise.

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housing.[140] The *FNB* test for non-arbitrariness seemingly overlooks this point because it does not tell us how to assess the depriving measure from the point of view of the number of people that it is projected to benefit. Nevertheless, local authorities will probably need to show that a reasonable relationship exists between the extent of the housing need within their respective jurisdictions and the conditions imposed on developers. This presupposes the availability of clear data showing the affordable housing backlog in the locality, as well as the "opportunity map"[141] within that locality. Housing need should ideally be determined, not just by assigning an arbitrary numerical target to the housing backlog, but also by establishing what kind of houses are needed in relation to such factors as family size and employment prospects.[142] The personal circumstances of inhabitants should be considered in determining what the housing need in a local authority jurisdiction is.[143] Given the nature of some residential areas in South Africa,[144] especially in rural towns and informal settlements, such data has not always been available.

This affects inclusionary housing impositions because it calls into question the kind of evidence that is necessary to show that the imposition is sufficiently reasoned. SPLUMA addresses this issue by requiring the establishment of Spatial Development Frameworks ('SDF) at the national, provincial and local spheres of government. [145]

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[140] Robertson *Planning for affordable housing* 58.

[141] Due to innovations in geographic information systems technology, it is possible to represent opportunity in terms of its relation to specific land uses. Different variables such as unemployment rates, graduation rates, proximity to libraries, and student-teacher ratios can be used to produce these maps.

[142] See section 21 (e)—(h) of SPLUMA.

[143] In the eviction context, the Constitutional Court has stated that personal circumstances are important in working out a reasonable housing programme. See *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 44 ('*Grootboom*'); *Blue Moonlight Properties* paras 89—92. This is a position that affects both negative and positive protections of the housing right. The latter would include inclusionary housing programmes. It is notable that in *Blue Moonlight Properties* the personal circumstances of the occupants only came to light pursuant to the High Court's order in the matter requiring the City of Johannesburg to conduct a survey of the occupiers' circumstances. See *Blue Moonlight Properties* para 6, n 9.

[144] For example, in *Electoral Commission v Mhlope* 2016 (5) SA 1 (CC) para 40, Madlanga J stated:

> "The parties are in agreement that certain places where some voters reside defy description in the 'conventional' sense. For example, this is the case with most rural areas under traditional leaders where there will only be the name of the rural village with no street names, numbers or other identifiers denoting individual homes. More accurately, in some – if not most – instances, there are no streets at all. This is also true of some informal settlements in the urban areas. The best one can do to shed light on where one lives would be to give the name of the rural village or informal settlement and a description referencing an identifiable landmark. But in some instances there may be a sea of homes with no distinctive landmark in close proximity."

[145] Section 12 (1) of SPLUMA.

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These SDFs must contain information that will guide all planning decisions and facilitate coherent spatial development across the country.[146] SDFs must also promote predictability in land development to encourage investment.[147] In terms of section 21 of SPLUMA, a municipal SDF must contain estimates of the demand for various types of housing across different socio-economic categories.[148] This provision satisfies the Constitutional Court's decision in *Grootboom* that a reasonable housing programme must include diverse housing needs conceptualised in terms of the different economic levels in society.[149] In addition, municipal SDFs are required to address the "location requirements" such as services provision in respect of future development needs for the next five years,[150] as well as identify areas where inclusionary housing may be implemented.[151]

Therefore, if property deprivation is based on the provisions of a municipal SDF, there ought to be data showing the housing need of the moderate-income households within the municipality, as well as the development densities and locations that are necessary to fulfil this need.[152] In this way, sufficient reason for the deprivation can be established. It is also instructive that although MPTs must align their decisions with the applicable municipal SDF, they are empowered to depart from the provisions of SDFs where "site-specific circumstances" require such a departure.[153] This gives SDFs some flexibility. This satisfies the flexibility requirement for reasonableness as explained by Yacoob J in *Grootboom*.[154]

In *California Building Industry Association v City of San Jose*,[155] ('*CBIA*') the City of San Jose had enacted an inclusionary housing ordinance that required all new residential housing projects of 20 units or more to reduce their selling price by about 15%. Californian developers, represented by the California Building Industry

[146] Section 12 (1) (f) of SPLUMA.
[147] Section 12 (1) (l) of SPLUMA.
[148] Section 21 (1) (f) of SPLUMA.
[149] *Grootboom* para 35.
[150] Section 21 (h) of SPLUMA.
[151] Section 21 (i) of SPLUMA.
[152] Section 21 (f) of SPLUMA.
[153] Section 22 (1) and (2) of SPLUMA.
[154] *Grootboom* para 43.
[155] 351 P.3d 974 (Cal. 2015).

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Association ('CBIA') challenged this ordinance on the ground that there was no evidence:

> "[T]o demonstrate a reasonable relationship between any adverse public impacts or needs for additional subsidized housing units in the City ostensibly caused by or reasonably attributable to the development of new residential developments of 20 units or more and the new affordable housing exactions imposed on residential development by the ordinance."[156]

In other words, the CBIA's argument would require a local authority to prove a causal link between the developer's conduct and the specific housing problem sought to be rectified. If the developer's project does not contribute to the specific social ill giving rise to the imposition, then the imposition in question would amount to a taking under the U.S. Constitution.[157] The California Supreme Court rejected this argument because the imposition in question did not flow from a discretionary decision in a development application.[158] Instead, this was a general legislative requirement affecting all property developers in the City of San Jose.[159]

Under South African property law, the CBIA's position would be echoed in the argument that a development condition requiring developers to dedicate a portion of their property to affordable housing amounts to a development contribution.[160] That argument can, however, be met along the same line of reasoning adopted in *CBIA.* This is because section 43 (1) of SPLUMA does not place any limitation on the power of a Municipal Planning Tribunal ('MPT')) to impose conditions (determined by itself or otherwise prescribed) on a proposed development.[161] The MPT can impose any conditions that are in line with the development principles outlined in SPLUMA, including the principle of spatial justice.[162] This would include the construction of

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[156] *CBIA* 977.
[157] This has been a common argument against inclusionary housing programmes in the U.S. See Padilla LM "Reflections on inclusionary housing and a renewed look at its viability" (1995) 23 *Hofstra L. Rev.* 539—626 541.
[158] *CBIA* 1031.
[159] *CBIA* 1031.
[160] Development contributions are discussed under para 2.4.2 below.
[161] Section 43 (1) of SPLUMA provides:
"An application may be approved subject to such conditions as:
a) are determined by the Municipal Planning Tribunal; or
b) may be prescribed."
[162] Section 7 (a)—(vi) of SPLUMA.

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socially and economically integrated, affordable housing. In this regard, an important spatial justice principle contained in SPLUMA is that the MPT's exercise of discretion should not be restricted solely on the ground that the value of property will thereby be affected.[163] However, there is an apparent contradiction in that the principles of spatial sustainability and efficiency point to a need for the MPT to consider the economic impact of any decision that it makes. Under the principle of spatial sustainability, the parties' current and future expenses must be considered.[164] The principle of efficiency requires the MPT to minimize negative financial impacts when making a decision.[165] These two principles contradict the idea that the MPT's discretion should not be restricted on the ground that the value of property will be affected.

The prevailing methodology of the non-arbitrariness test means that although the legitimacy of inclusionary housing programmes is unlikely to be seriously questioned, the means and ends analysis of such programmes will inevitably raise serious questions. An inclusionary housing programme typically spells out what proportion of the housing project is required for affordable housing and what level of affordability should be observed. A developer may wish to challenge an imposition stipulating that 30% of the project should consist of affordable units. Alternatively, it may be that the proportion imposed is only 15%, but the law requires that these affordable units should only be sold or rented at not more than 65% of what is charged for the market rate units. A developer may therefore wish to challenge the latter aspect of such a law.

Although the starting point of the means and ends analysis in such a case is the *FNB* non-arbitrariness test, the judicial discretion created by this test has resulted in inconsistent reasoning regarding the level of scrutiny to be adopted.[166] In *Mkontwana,* the Constitutional Court departed from the *FNB* test by essentially restating it to focus on two main questions: first, whether the government purpose to be served by the deprivation is legitimate and compelling. Secondly, whether it would not be unreasonable to impose the burden in question on the owner.[167] Van der Walt argues that this is a radically different test to the one stated in *FNB*, and that the *Mkontwana*

[163] Section 7 (vi) of SPLUMA.
[164] Section 7 (b) (v) of SPLUMA.
[165] Section 7 (c) (ii) of SPLUMA.
[166] This, by itself, is not surprising because the *FNB* test envisages a wide judicial discretion.
[167] *Mkontwana* para 51.

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test reflects the Court's choice of rationality as the standard of scrutiny for arbitrariness in this case.[168] Although the Court in *Mkontwana* acknowledged that the deprivation in question was substantial,[169] it nevertheless determined that there was sufficient reason for it. The deprivation was minor in that it affected only one incident of ownership (the right to alienate property)[170] and was temporary insofar as it was restricted to a period of two years.[171] As Van der Walt observes, the Court in *Mkontwana* did not in fact establish that the purpose of the deprivation was compelling, because the language it used suggested instead that the purpose need only be laudable.[172] The Court stated that the deprivation "has the potential to encourage regular payments of consumption charges, contributes to the effective discharge by municipalities of their obligations and encourages owners of property to fulfil their civic responsibility."[173] The standard of scrutiny adopted in this case was therefore one that merely required the state to show that there was a rational connection between means and ends.

In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government and Another*[174] ('*Reflect-All*') the Constitutional Court reverted to the proportionality-type standard contained in the *FNB* test for non-arbitrariness. This case concerned the proclamation of proposed roads in terms of legislation. The proclamation had the effect of sterilising the properties for a long time, even though some of the proclaimed roads might never be built. Sections 10 (1) and 10 (3) of the Gauteng Transport Infrastructure Act[175] severely restricted the rights of landowners whose properties were affected by proclamation. The effect of these provisions was that the properties were frozen, and owners could not obtain any relief until the Member of the Executive Council in charge of transport had published notification of a preliminary design. At that point, owners could apply to have the preliminary design amended. The Constitutional Court agreed with the applicants that this provision impaired their right to use, enjoy and exploit their property.[176]

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[168] Van der Walt *Constitutional property law* 3 ed 250.
[169] *Mkontwana* para 51.
[170] *Mkontwana* para 45.
[171] *Mkontwana* para 45.
[172] Van der Walt *Constitutional property law* 3 ed 251.
[173] *Mkontwana* para 52.
[174] 2009 (6) SA 391 (CC).
[175] Act 8 of 2001.
[176] *Reflect-All* para 38.

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Regarding substantive arbitrariness,[177] especially the relationship between the means adopted and the ends sought, it was held that the deprivation was serious enough to warrant a proportionality-type analysis.[178] The Court agreed that the purpose of the deprivation was important. Unlike the Court *a quo*, Nkabinde J (writing for the majority)[179] noted that the deprivation in this case had the effect of indefinitely freezing land use in respect of the affected portions of the applicants' property.[180] Nevertheless, she found that the freezing effect of the law was not disproportionate because owners could still obtain permission to mature their land in terms of the Act.[181] In addition, she held that the road designs could be reviewed under different mechanisms in terms of the Act.[182] On this point, O'Regan J dissented.[183] Although she agreed with the majority's assessment that the deprivation in this case required a proportionality-type analysis,[184] she disagreed with the conclusion that the means chosen were proportional to the ends sought, noting that the prospect of an owner overturning a preliminary design was slim, as piecemeal variation would go against the orderly conduct of the planning process.[185] O'Regan J further referred to three significant aspects of the deprivation in this case which affected the arbitrariness analysis. First, there was no temporal limit on the deprivation as the Infrastructure Act made no provision for future periodic review of the preliminary designs. Secondly, hundreds of landowners were affected by the deprivation. In the view held by O'Regan J this increased the severity of the deprivation in this case.[186]

The decision in *Reflect-All* provides a useful background for considering how inclusionary housing would be implemented under SPLUMA. It seems that if landowners retain the ability to exploit their land, then the majority decision in *Reflect-All* would consider this as substantively non-arbitrary. The deprivation merely affects

[177] The majority and minority judgments in this case concurred that the deprivation in question was not procedurally unfair. See *Reflect-All* para 97 (per the dissenting judgment of O'Regan J).
[178] *Reflect-All* para 49.
[179] Moseneke DCJ, Mokgoro J, Ngcobo J and Skweyiya J concurred with Nkabinde J's judgment.
[180] *Reflect-All* para 69.
[181] *Reflect-All* paras 53, 58.
[182] *Reflect-All* para 70.
[183] Cameron J and Van der Westhuizen J concurred with the minority judgment.
[184] *Reflect-All* para 98.
[185] *Reflect-All* para 105.
[186] *Reflect-All* para 107.

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how much profit landowners can make from the exploitation of their property. In addition, the valid concerns raised by O'Regan J in *Reflect-All* are addressed in SPLUMA. For example, section 27 (1) of SPLUMA requires a municipality to review its Land Use Scheme every 5 years to ensure that it is consistent with its MSDF. Moreover, although section 22 of SPLUMA states that an MPT may not, in its decision, depart from the provisions of the applicable MSDF,[187] it allows the MPT to depart from the MSDF for "site-specific circumstances."[188] This amounts to a recognition that the MSDF should simply guide the MPT rather than limit its discretion when adjudicating a development application.

2.3.3 Conclusion

The decision to impose inclusionary housing obligations on an owner is a reasonable exercise of the police power. Nevertheless, it raises concerns over possible arbitrary deprivation of property. Two distinct property forms are at stake for the landowner. In the first place, landownership is affected when an owner cannot dispose of her property as she pleases because a cap has been placed on the price that she may charge for the property. Secondly, to the extent that they have already vested, the earnings that the landowner expects in respect of developing the land are also negatively affected by inclusionary housing.

In *FNB*, the Constitutional Court opted for a wide definition of deprivation which currently seems to be given more credence by the Court than its own narrower definition in *Mkontwana*. In *FNB*, the Court stated that "any interference with the use, enjoyment or exploitation of private property involves some deprivation in respect of the person having title or right to or in the property concerned."[189] Going by this definition, it is clear that any development condition by which a landowner is prevented from disposing of her landownership or exploiting her land as she pleases amounts to deprivation. If one were to instead adopt the *Mkontwana* approach of requiring "substantial interference" then inclusionary housing might not amount to a substantial interference with property because there is an element of choice that is retained by a landowner who applies for development permission. She can decide not to comply

[187] Section 22 (1) of SPLUMA.
[188] Section 22 (2) of SPLUMA.
[189] *FNB* para 57.

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with the development condition imposed, and therefore not to develop her property. However, the Court in *Mkontwana* correctly observes that this kind of choice is not realistic because when an owner's ability to alienate property is taken away, there is deprivation regardless of whether she is expressly required to make a payment.[190]

The *FNB* test for non-arbitrariness looks at a complex pattern of relationships and factors to determine whether sufficient reason has been provided for the deprivation. The purpose of inclusionary housing is not just to provide affordable housing but also to bring about social and economic integration within communities. Therefore, one must look at whether the law in question achieves both objectives, and not just the one or the other.

2.4. The normative basis for the payment of financial incentives

2.4.1 Introduction

To adequately address developers' concerns regarding the infringement of property rights inherent in inclusionary housing, it is necessary to investigate the use of financial incentives as a panacea for these concerns. Financial incentives raise constitutional questions about the authority of public bodies to spend public funds. Incentives are invariably derived from the fiscus; therefore it must be clear that the public body in question can properly account for the decision to employ public funds in any incentive programme.[191] In contrast to coercive methods often used by the state to achieve policy objectives, there is a lack of scholarly focus on the legal regulation of the use of financial incentives for the same purpose.[192] Just as coercive methods are subjected to constitutional controls to ensure that state regulation of property does not "go too far"[193] there is a case to be made for a similar inquiry with regard to incentives. This section considers the use of financial incentives to spur the development of

[190] *Mkontwana* para 33.
[191] Webb K "Thumbs, fingers, and pushing on string: Legal accountability in the use of federal financial incentives" (1993) 3501—535 505 ('Webb "Accountability in the use of incentives"') (defines financial incentives as "disbursements of public funds or contingent commitments to individuals and organizations, intended to encourage, support or induce certain behaviours in accordance with express public policy objectives. They take the form of grants, contributions, repayable contributions, loans, loan guarantees and insurance, subsidies, procurement contracts and tax expenditures").
[192] Webb "Accountability in the use of incentives" 505.
[193] *Penn Central Transportation Corporation v City of New York*, 438 U.S. 104 (1978).

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inclusionary housing under the single system of law governed by the South African Constitution.

2.4.2 The Constitution

The South African Constitution establishes distinct mandates for the national, provincial and local spheres of government.[194] This distinction in mandates is supposed to ensure that there is no undue interference in one sphere by another, although the Constitution also envisages that the different spheres of government will function according to the principle of co-operative governance.[195] In *Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others*[196] the Constitutional Court stated the following:

> "This court's jurisprudence clearly establishes that (a) barring exceptional circumstances, national and provincial spheres are not entitled to usurp the functions of local government; (b) the constitutional vision of autonomous spheres of government must be preserved, and (c) While the constitution confers municipal planning responsibilities on each of the spheres of government, those are different responsibilities based on what is appropriate to each sphere."[197]

The Constitutional Court has further held that courts, too, are not authorised to interfere with the functions of municipalities "except in the clearest of cases." [198] Significantly, the Court has clarified that the imposition of rates and taxes by municipalities constitutes a special responsibility which must be undertaken with the greatest of attention to the values of the Constitution. The nature of the regulation of this power was clarified in *Howick District Landowners Association v Umngeni Municipality and Others*[199] ("*Howick*") where the Supreme Court of Appeals stated that

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[194] Sections 151—154, 156 of the Constitution. See also Du Plessis A "The readiness of South African law and policy for the pursuit of sustainable development goal" (2017) 21 *L.D.D.* 239—262 249 ('Du Plessis "South African law and sustainable development"'); De Visser J "Institutional subsidiarity in the South African constitution" (2010) 21 *Stell. L. Rev.* 90—115 110.

[195] This principle requires consultation, co-ordination, and mutual support between the different spheres of government. See sections 40 and 41 of the Constitution; Broekhuijse I & Venter R "Constitutional law from an emotional point of view: Considering regional and local interests in national decision-making" (2016) *J. S. Afr. L.* 236—254 238. Also see section 4 of the Intergovernmental Relations Framework Act 13 of 2005.

[196] 2014 (1) SA 521 (CC).

[197] *Lagoonbay* para 46.

[198] *City of Tshwane Metropolitan Municipality v Afriforum* 2016 (9) BCLR 1133 (CC) para 43; See also *National Treasury and Others v Opposition to Urban Tolling Alliance and Others (Road Freight Association as applicant for leave to intervene)* 2012 (6) SA 223 (CC) paras 89—91.

[199] 2007 (1) SA 206 (SCA).

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parliament has the constitutional authority to regulate by statute the municipalities' authority to levy rates.[200] This power to impose rates is a legislative rather than executive one, necessitating public participation in the process.[201] Section 229 of the Constitution empowers municipalities to impose rates, while section 14 of the Rates Act governs the process of imposing rates through a municipal council vote and resolution.

The Constitution also envisages a developmental role for municipalities. This role implicates the pursuit of economic growth, *inter alia*, through the strengthening of property rights, although this must be understood as part of a wider strategy to enhance social well-being.[202] The strengthening of property rights must be done in the context of satisfying the most basic human needs such as water and sanitation.[203] Property rights must play this developmental role of enabling the satisfaction of other, non-economic needs.[204] There is, therefore, a constitutional basis for the argument that municipalities have an important role to play in the regulation of the use of property so that property owners can enjoy their property rights in terms of the Constitution, while the public derives some benefit from property and its regulation. To this end, the Constitution enables parliament to enact legislation for a variety of local government-related purposes.

2.4.3 Local Government: Municipal Finance Management Act[205]

Section 67 of the Act appears to be relevant to the issue of payment of the financial incentives by municipalities.[206] According to Webb, incentives are public-law oriented

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[200] *Howick* para 5.
[201] *Liebenberg NO v Bergrivier Municipality* 2013 (8) BCLR 863 (CC) para 127. See also *Brittania Beach Estate (Pty) Ltd v Saldanha Bay Municipality* 2013 (11) BCLR 1217 (CC) para 19; *South African Property Owners' Association v Council of the City of Johannesburg* 2013 (1) SA 420 (SCA) para 9.
[202] White Paper on Local Government (1998) para 2 ('White Paper on Local Government').
[203] White Paper on Local Government para 2. See also the *National Framework for Municipal Indigent Policies* para 2.1, available online at https://www.westerncape.gov.za/text/2012/11/national_framework_for_municipal_indigent_policies.pdf (accessed on 2 October 2019).
[204] Du Plessis "South African law and sustainable development" 252.
[205] Act 56 of 2003.
[206] Section 67 provides as follows:
> "(1) Before transferring funds of the municipality to an organisation or body outside any sphere of government otherwise than in compliance with a commercial or other business transaction, the accounting officer must be satisfied that the organisation or body-
> (a) has the capacity and has agreed-
> (i) to comply with any agreement with the municipality;

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mechanisms for the achievement of social goals such as the objectives of local government.[207] In the South African context, these include land reform and the promotion of access to South Africa's natural resources as directed by the Constitution. Section 67 makes it clear that payments from municipalities to private bodies are allowed, but the section applies only if the underlying transaction is not essentially commercial (commercial transactions are governed by separate provisions). The requirements in subsection (1) do not apply to organizations serving the poor, which means that such organizations can continue to receive municipality assistance without having to comply with the strict reporting requirements in that subsection. However, this section is too vaguely phrased to be the source of any authority to make payments that are essentially incentive in nature simply because of the strict reporting requirements imposed on the recipient of any such payments under the section. Ideally, the law must provide a different framework in terms of which payments can be made to developers as assistance. The only form of municipality assistance contemplated by the financial framework governing municipalities is subsidies to the indigent in respect of municipal services.[208]

(ii) for the period of the agreement to comply with all reporting, financial management and auditing requirements as may be stipulated in the agreement;
(iii) to report at least monthly to the accounting officer on actual expenditure against such transfer; and
(iv) to submit its audited financial statements for its financial year to the accounting officer promptly;
(b) implements effective, efficient and transparent financial management and internal control systems to guard against fraud theft and financial mismanagement; and
(c) has in respect of previous similar transfers complied with all the requirements of this section.
(2) If there has been a failure by an organisation or body to comply with the requirements of subsection (1) in respect of a previous transfer, the municipality may despite subsection (1)(c) make a further transfer to that organisation or body provided that-
(a) subsection (1)(a) and *(b)* is complied with: and
(b) the relevant provincial treasury has approved the transfer
(3) The accounting officer must through contractual and other appropriate mechanisms enforce compliance with subsection (1)
(4) Subsection (1) (a) does not apply to an organisation or body serving the poor or used by government as an agency to serve the poor, provided-
(a) that the transfer does not exceed a prescribed limit; and
(b) that the accounting officer-
(i) takes all reasonable steps to ensure that the targeted beneficiaries receive the benefit of the transferred funds; and
(ii) certifies to the Auditor-General that compliance by that organisation or body with subsection 1 (a) is uneconomical or unreasonable."

[207] Webb K "Thumbs, fingers, and pushing on string: Legal accountability in the use of federal financial incentives" (1993) 31 *Alberta L. Rev.* 501—535 501.

[208] See *National Framework for Municipal Indigent Policies* paras 5.4 & 7.1. The latter paragraph states that:

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2.4.4 Conclusion

The constitutional and statutory framework in which South African municipalities operate emphasizes the need for assistance to the poor. The provision of services must be done with the plight of the poor in mind; this may require the rendering of municipal services free of charge. This framework is not suited for the provision of monetary assistance to property owners or developers in cases where property regulation affects them unfairly. This contradicts the principle of developmental local governance which underpins the constitutional functions of municipalities in South African law. I argue that municipalities have a role in promoting economic growth, *inter alia*, through the strengthening of property rights. This should include the payment of financial incentives to property owners especially where they are burdened by property regulation. However, an appropriate balance must be struck between strengthening existing property rights and encouraging new entrants into the property market.[209] The appropriate balance can be struck by allowing municipalities to render monetary assistance to property owners and developers, while subjecting this power to public participation requirements.

2.5. A consideration of devices for implementing inclusionary housing in South Africa

2.5.1 Introduction

Although comparative discussions of U.S. and other foreign law are undertaken in Chapter 4, it is important to draw upon U.S. experience in describing some of these methods and highlighting the problems that they raise for constitutional property doctrine. Although U.S. and South African property law operate from vastly different ideological premises, it is useful to consider the various methods by which U.S. law has implemented the inclusionary housing requirement. In this section, I focus on how

> "Targeting the poor requires that something which costs the municipality, or its external services providers, money to provide must be made available free (i.e. with no revenue raised directly from the indigent consumer receiving the service.)"

[209] In *FNB* para 50, the Court noted that: "The purpose of section 25 has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions." Furthermore, in *Agri SA CC* para 60 Mogoeng CJ explained that the constitutional property clause recognizes the importance of opening economic opportunities to all South Africans as part of nation-building and reconciliation.

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development contributions (exactions) and impact fees might operate within the South African constitutional framework.

2.5.2 Development Contributions

Development contributions (exactions in U.S. law) are a common method of proceeding with applications for development permission under South African planning law. Van der Walt explains development contributions by distinguishing between two ways in which local authorities acquire land for public roads and public places.[210] The first is by expropriation, which is governed by section 25 (2)—(3) of the Constitution, while the second is by the non-expropriatory regulation and deprivation of property under section 25(1) of the Constitution. The first method is the default manner of proceeding in the normal course of providing public infrastructure,[211] and it entails an obligation to pay compensation. The second method applies in cases where the development of land is at stake, which often necessitates the sub-division of that land. Here, no compensation is legally required. Under this method a local authority may require a developer to dedicate a certain portion of her land to the provision of public roads or other public spaces based on the need to address the impact of the contemplated development. This is a development contribution, which is a legitimate exercise of the state's regulatory powers.[212] Nevertheless, it raises questions regarding the property rights of the developer or landowner and the need for compensation.

Development contributions can be used to implement inclusionary housing objectives such as inclusion, affordability, and the provision of locational advantage for city dwellers. Although affordable houses are not public roads, they are "public spaces" to the extent that they provide security of tenure and access to land to the public. They are also public to the extent that landowners give up the right to exclude persons or to determine who will have access to these houses.[213] The first problem in the South

[210] Van der Walt AJ "Constitutional property law" (2014) *ASSAL* 195—215 199. See also *Arun Property Development (Pty) Ltd v City of Cape Town* 2015 (2) SA 584 (CC) paras 31 & 35.
[211] Section 5 (1) of the Infrastructure Development Act 23 of 2014 mandates the Presidential Infrastructure Coordinating Commission to expropriate "land or any right in, or over or in respect of land" for purposes of implementing a Strategic Infrastructure Project. Expropriation must be done in terms of the Expropriation Act 63 of 1975.
[212] Van der Walt *Constitutional property law* 273, 290—292.
[213] Of course, a landowner may to a limited extent determine who may have access to housing in the context of rental housing, for example. This is subject to control in terms of the Rental Housing Act 50

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African legal context is the uncertain basis upon which courts have awarded compensation to developers affected by development contributions. The second problem is uncertainty regarding the level of scrutiny applicable to governmental impositions of development contributions. This latter issue is obviously related to the first, in that the level of scrutiny will determine or influence whether compensation is paid in each case.

Van der Walt observes that the South African law of development contributions is based on different doctrinal foundations to those that apply to U.S. law on exactions.[214] In the first instance, although both development contributions and exactions contemplate a demonstrable link between the condition imposed and the intended development, different consequences attach to the failure to demonstrate this link under both.[215] In U.S. law, an exaction that goes too far in the sense that it imposes an unfair burden on a developer is treated as a regulatory taking which involves the duty to pay compensation. In South African law, such a development contribution is simply *ultra vires* and invalid.[216] The affected developer is therefore restricted to administrative law remedies and may have the condition set aside. The payment of compensation is therefore irrelevant. However, this certain legal position has seemingly been thrown into doubt by the Constitutional Court's decision in *Arun Property Developments (Pty) Ltd V City of Cape Town*[217] ('*Arun*'). The Court's decision to award compensation in this case effectively blurred the distinction between invalid and compensable breaches of the property clause. Although the Court's decision was

of 1999 and the Constitution. In the non-residential property context, controlling access to property may depend on the nature of the property. In *Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner of the Western Cape and Others (Legal resources Centre as* Amicus Curiae*)* 2004 (4) SA 448 (C) it was sought to permanently exclude a beggar from waterfront property which also housed several buildings of significance to the public, such as a post office and a charge office. Desai J explained (at 450) that due to this unique character of the property, the owner could not permanently exclude an individual from the property as this would be a violation of the right to freedom of movement. It is noteworthy that access by the public does not change the private nature of the property. See *Pruneyard Shopping Centre v Robins* 447 US 74, 64 L Ed 2d 741 at 752. See also Dhliwayo P & Dyal-Chand "Property in law" in Muller *et al* (eds) *Transformative property law* 295—317 311—313.

[214] Van der Walt AJ "Constitutional property law" (2014) *ASSAL* 200.

[215] Van der Walt AJ "Constitutional property law" (2014) *ASSAL* 200.

[216] Van der Walt AJ "Constitutional property law" (2014) *ASSAL* 200; *South Peninsula Municipality v Malherbe* 1999 (2) SA 966 (SCA) at 984 ('*South Peninsula Municipality*').

[217] 2015 (2) SA 584 (CC).

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mainly based on the provisions of section 28[218] of the Land Use Planning Ordinance[219] ('LUPO'), its underlying reasoning suggests a trend that bears wider implications for municipalities and developers.[220] The Court saw the vesting of excess land in the municipality as "statutory expropriation" for which compensation should be paid.[221] In this way, the Court seemingly re-opened the debate as to whether the notion of "constructive expropriation" should be recognized in South African law.[222] Moseneke DCJ reasoned that the vesting had been effected in terms of a provision that sanctioned *ex lege* transfer of ownership of land, and thus had the same effect as expropriation.[223]

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[218] Section 28 of LUPO provides that:

> "The ownership of all public streets and public places over or on land indicated as such at the granting of an application for subdivision under section 25 shall, after the conformation of such subdivision or part thereof, vest in the local authority in whose area of jurisdiction that land is situated, without compensation by the local authority concerned if the provision of the public streets and public places is based on the normal need therefor arising from the said subdivision or is in accordance with a policy determined by the Administrator from time to time, regard being had to such need."

[219] Ordinance 15 of 1985.

[220] Van Wyk argues that, following the enactment of the SPLUMA, provincial planning statutes have effectively (not expressly) been repealed. The SPLUMA framework nevertheless allows local authorities to enact planning by-laws. Van Wyk points out that subsequent municipal by-laws have omitted the type of protection for developers contained in the "normal needs" proviso in section 28 of LUPO. See Van Wyk J "Planning and Arun's (not so straight and narrow) roads" (2016) 19 *PELJ* 1—29 24. While Van Wyk sees this as a problem from a property protection perspective, I see the "normal needs" standard as implying that the restriction of property rights should only be undertaken when necessary. The danger is that this may hamper spatial transformation, because satisfying the "normal needs" requirement presupposes that one cannot propose far-reaching changes to the prevailing spatial relations. One would first need to demonstrate that such changes are strictly necessary.

[221] "Statutory expropriation" is a legal term which signifies the expropriation of designated property by the mere act of promulgating legislation. This certainly was not the spirit in which LUPO was enacted. Therefore, the Court's use of this term can fairly be said to have been novel given the facts of the case and has been criticized. See Van der Walt AJ "Constitutional property law" (2014) *ASSAL* 210. Furthermore, expropriation usually takes place by means of compulsion, without the cooperation of the owner, and results in the state acquiring the property concerned. See Marais EJ & Maree PJH "At the intersection between expropriation law and administrative law: Two critical views on the Constitutional Court's *Arun* judgment" (2016) 19 *PELJ* 1—54 6, 7.

[222] It must be noted that commentators have not ruled out the possibility that the doctrine of constructive expropriation might be adopted in South African law. See Mostert H "The distinction between expropriations and deprivations and the future of the 'doctrine' of constructive expropriation in South Africa" (2003) 19 *SAJHR* 567—592 568 ('Mostert "Deprivations and expropriations"'). The countervailing view is that this is unlikely, as the effect would be to hamper land reform efforts and introduce uncertainty. See *Steinberg* v *South Peninsula Municipality* 2001 (4) SA 1243 (SCA) para 8. Van der Walt is not convinced by the land reform argument, arguing that constructive expropriation is much more likely to feature in commercial property matters as opposed to land reform matters. He adds that, even in land reform matters, constructive expropriation should still be considered on a case by case basis to determine whether compensation should be paid, or the deprivation should be invalidated. See Van der Walt *Constitutional property law* 233.

[223] *Arun* para 73. It should be noted that in South African law expropriation is a formal process that must take place only in terms of authorizing legislation. As Slade observes, no such authorization is contained in the provisions of LUPO. See Slade BV "Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City*" (2016) 19 *PELJ* 1—25 23.

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The decision to award compensation in *Arun* goes against the fairly settled binary logic of the property clause.[224] The clause requires compensation only in the case of expropriation, while mere deprivation of property does not attract compensation. However, Moseneke DCJ's reasoning exposes the fact that the property clause can be read in ways that avoid this binary. One way is by focusing on the effect of a property limitation to see whether the result is akin to expropriation, in which case compensation should be paid. This is the approach that Moseneke DCJ took. However, this reasoning suffers from the defect that it is a strained attempt to force a property limitation into the expropriation pigeonhole to provide compensation. A more plausible argument would be one that reads the property clause as a provision that implicitly allows for compensation even in cases where the limitation in question does not amount to expropriation *per se.*

2.5.3 Linkage fees (housing linkage) and impact fees

The use of linkage fees in U.S. law has been described as a form of exaction.[225] This option requires a developer of downtown office space to subsidise low-and-middle-income housing.[226] There is an affordability rationale for this requirement, because it is assumed that office developments lead to the arrival of new workers in an area.[227] This in turn increases the demand for, and thus the price of, housing.[228] The developer is effectively made to pay for this price effect, ostensibly as part of the state's police

[224] This binary logic leads to concerns that are not unique to South African law. For example, in *Dolan v City of Tigard* 512 U.S. 374 (1994) ('*Dolan')*, the U.S. Supreme Court introduced a distinction between legislative and administrative exactions. This distinction has similarly resulted in some confusion because of what the Court said about the level of scrutiny that attached to each type of exaction. Administrative exactions are subject to heightened scrutiny, which means that proportionality-type reasons are required to justify such exactions. This distinction has been criticized. Jacob finds it unconvincing because, contrary to the reasoning in *Dolan*, he argues that legislative exactions pose a higher risk to property rights than administrative risks. In the case of the latter, developers can at least present their case and be heard, whereas they cannot vote for or against a legislative action. See Jacob KJS "*California Building Industry Association v City of San Jose*: The constitutional price for affordable housing" (2016) 7 *Calif. L. Rev.* 20—29 24.

[225] Henning JA "Mitigating price effects with a housing linkage fee" (1990) 78 *Calif. L. Rev.* 721—754 722 ('Henning "Mitigating price effects"'); Alterman R "Evaluating linkage and beyond: Letting the windfall recapture genie out of the exactions bottle" (1988) 34 *J. Urban & Contemp. L.* 3—49 7.

[226] Henning "Mitigating price effects" 722.

[227] Henning "Mitigating price effects" 722.

[228] Henning "Mitigating price effects" 722. See also Kayden JS & Pollard R "Linkage ordinances and traditional exactions analysis: The connection between office development and housing" (1987) 50 *Law & Contemp. Probs.* 127—138 128.

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power.[229] However, cynics argue that a proper exercise of the police power in the land use context requires that the regulation should be geared towards addressing a true externality,[230] and that housing linkages do not perform this function. They argue that housing linkages are not a true exercise of the police power but are instead a thinly-veiled tax that targets rich developers in order to redistribute wealth to the poor.[231] The foregoing critique of housing linkages reflects one of the abiding difficulties of devising social policy. This is that even when a problem has been identified, it is often difficult to venture outside the framework that underpins that problem in searching for solutions. The problem of market failure cannot be addressed by looking to the market framework for solutions.[232] The logic of externality analysis proceeds from the premise that one's solutions for market failure must be found in the market framework itself that privileges the attainment of profit over other uses of property. Needham argues that the market in property rights must be "appropriate."[233] It must acknowledge the history and pattern of ownership and must contain mechanisms to redress the imbalances in this regard.[234]

The most important policy reason for resorting to linkage obligations is that development changes the character of neighbourhoods, often with negative consequences for the social and economic fabric of the local community. [235] It has also been argued that developers often use local characteristics to market their developments, and that they should be required to pay for this marketing through linkage obligations.[236] According to Schukoske, linkage programmes are easy to

[229] Schukoske JE "Housing linkage: Regulating development impact on housing costs" (1991) 76 *Iowa L. Rev.* 1011—1065 1039—1040 ('Schukoske "Housing linkage"'). For a contrary view, see Henning "Mitigating price effects" 722—723.
[230] An externality is a form of market failure that results in a "spill-over" effect. This effect is external to the normal operation of the system and must therefore somehow be compensated for by the party that introduced it for the system to function properly. The argument goes that price variation is an inherent part of the operation of the market, for which developers should not have to pay. In *Diamond Producers* (paras 53, 60—62) Khampepe J stresses the point that market variability is a fact of life which inevitably affects pricing. On externalities generally, see Boudreaux DJ & Meiners R "Externality: Origins and classifications" (2019) 25 *Nat. Res. J.* 1—34 3—4.
[231] Henning "Mitigating price effects" 724.
[232] Section 2 (1) (e) (v) of the Housing Act 107 of 1977 commits South Africa to a framework that is based on market efficiency in the housing development process.
[233] Needham B *Planning law and economics* (2006) 3.
[234] See the remarks of Madlanga J in *Daniels v Scribante* 2017 (4) SA 371 (CC) para 1 to the effect that the dispossession of the land of blacks by whites resulted in blacks living and working on land that now belonged to whites.
[235] Schukoske "Housing linkage" 1023.
[236] Schukoske "Housing linkage" 1064.

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justify so long as it can be shown that they are rationally related to promoting affordable housing.[237] On the face of it, the idea of housing linkage is an attractive one for South African law because it represents the recognition of a fundamental feature of spatial development in South Africa, namely, that housing and labour are interlinked.[238] Historically, the provision of housing for poor black labourers was meant to only serve the interests of whites and not of those of the resident worker.[239] Strauss states that apartheid-era planners assumed that blacks would live with their nuclear families and would keep their places of work and residence separate.[240] These unsuitable planning models resulted in unsafe living conditions and overcrowding. Since these living patterns persist to date, housing linkage therefore offers an opportunity for planners to wrest some value from property developers who obviously benefit from marketing a locality and attracting workers to the locality. However, the difficulty with linkage obligations is that it is misleading to speak of a single development as having changed the character of a neighbourhood.[241] Total office growth should be calculated cumulatively and not according to individual office developments.[242]

Linkage obligations can, at least partially, be used to implement inclusionary housing.[243] Where a developer opts to build housing to comply with a linkage obligation, she must sell or rent the property to middle-income households. However, linkage does not enable the goal of social and economic integration to be achieved because most linkage obligations require office developers to fund housing without demanding that such housing be situated near the centre of the city.[244] Although housing linkage can lead to affordable housing, it does not have any relation to social and economic integration. Housing linkage simply replicates what social housing is designed to do, because there is an emphasis on affordable housing situated near job opportunities for the benefit of workers. Moreover, housing linkage requires a

[237] Schukoske "Housing linkage" 1047. See also *Holmdel Builders Association v Township of Holmdel* 121 N.J. 550 581 (1990).
[238] Muller G *The impact of section 26 of the Constitution on the eviction of squatters in South African law* (2011) 9. Also see Terreblanche S *A history of inequality in South Africa 1652—2002* (2002) 6.
[239] Strauss M *A right to the city for South Africa's urban poor* (2017) 23 ('Strauss *Right to the city for SA*').
[240] Strauss *Right to the city for SA* 28.
[241] Schukoske "Housing linkage" 1026.
[242] Schukoske "Housing linkage" 1026.
[243] Alterman "Evaluating linkage and beyond" 8.
[244] Henning "Mitigating price effects" 728. See also Alterman "Evaluating linkage and beyond" 25—27.

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developer to build residential housing when permission to build office space has been sought. This is unfair because, as has been argued,[245] it is difficult to attribute housing burdens to a single development. The assessment of a housing linkage should therefore be done in terms of proportionality analysis as opposed to a mere rationality test. O'Regan J's dissenting opinion in *Reflect-All* arguably points to the proper way to approach this issue because she spelt out several considerations for assessing the impact of a deprivation in comparison to Nkabinde J's majority judgment. It seems to be persuasive because it addresses the real-life scenario that a property owner faces while attempting to obtain an amendment to a road design. In contrast, the majority found that section 10 (3) of the Infrastructure Act, in making provision for an owner to seek an amendment, strikes a balance between the interests of the state and those of the owner.[246] The majority's approach does not go far enough in honouring the contextual nature of the *FNB* non-arbitrariness inquiry. Moreover, the majority judgment ruled out the need for a periodic review of the road designs because this would frustrate the purpose of the Infrastructure Act.[247] This rigid approach necessitates review applications brought by individual landowners, resulting in costly delays.

In the South African local government legal framework, any linkage programmes would have to be authorised by legislation. If linkage is imposed in the form of fees, it could arguably amount to a municipal tax.[248] It must, therefore, comply with the provisions of the Municipal Fiscal Powers and Functions Act.[249] Section 4 of the Act empowers the minister in charge of local government to authorise a municipal tax either on his own accord or upon application by a municipality. Section 5 of the Act spells out what any application under section 4 must contain. Interestingly, this includes the reasons for the tax and the purposes for which the tax will be used. The fact that the Act makes a distinction between these two matters suggests that the policy of the Act is to impose heightened scrutiny upon any tax measure in terms of the Act.[250] Secondly, the impact of any municipal tax is a crucial factor in the approval

[245] See text accompanying note 241 above.
[246] *Reflect-All* para 58.
[247] *Reflect-All* para 70.
[248] Henning "Mitigating price effects" 723.
[249] Act 12 of 2007.
[250] This is further bolstered by the requirement that the application must state the particulars of the tax's compliance with section 229 (2) (a) of the Constitution. The first two subsections of section 229 provide:

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process, because the applicant municipality must address the economic impact of the mooted tax on individuals and businesses and on economic development generally. Because of all these justifications that a municipality must make in imposing a tax, and since it may not impose value added tax in any event,[251] it is unlikely that municipalities will make use of linkage fees.

Impact fees are generally imposed along the same lines as linkage fees, except that they are not specifically linked to office developments. The fees can then be utilised for the construction of affordable housing or the mitigation of an environmental problem caused by the development. For example, in *Koontz v. St. Johns River Water Management District*[252] ('*Koontz*') a permit condition was imposed to offset the impact of a project on the environment. This option would have required the permit applicant to fund an offsite environmental rehabilitation project owned by the Water Management District. The court noted that this option was "functionally equivalent" to other exaction requirements,[253] and that it must comply with the nexus and rough proportionality requirements.[254] It was also held that monetary exactions should meet the nexus and rough proportionality standards enunciated in *Nollan*/*Dolan*.[255]

The difficulty with the impact fees concept is that, like housing linkage, it envisages an off-site mitigation strategy in that the developer can comply by simply paying the fee, but without any assurance that the fee will be utilised for its intended purpose. Paying impact fees linked to an inclusionary housing programme has no direct correlation with affordable housing or socio-economic integration. While the fees may, in principle, be

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"(1) Subject to subsections (2), (3) and (4), a municipality may impose—
(a) rates on property and surcharges on fees for services provided by or on behalf of the municipality; and
(b) if authorised by national legislation, other taxes, levies and duties appropriate to local government or to the category of local government into which that municipality falls, but no municipality may impose income tax, value-added tax, general sales tax or customs duty.
(2) The power of a municipality to impose rates on property, surcharges on fees for services provided by or on behalf of the municipality, or other taxes, levies or duties—
(a) may not be exercised in a way that materially and unreasonably prejudices national economic policies, economic activities across municipal boundaries, or the national mobility of goods, services, capital or labour; and
(b) may be regulated by national legislation."

[251] Section 229 (1) (b) of the Constitution.
[252] 133 S. Ct. 2586 (2013).
[253] *Koontz* 2599.
[254] See *Nollan v California Coastal Commission,* 483 U.S. 825 (1987) and *Dolan.* These two cases are discussed in Chapter 4, paragraph 4.2.1.3.
[255] *Koontz* 2599.

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utilised in constructing affordable housing elsewhere, the state would have lost an opportunity to compel the developer to include such housing within a market-rate project, thus simply exacerbating socio-economic exclusion.[256]

2.5.4 Conclusion

Development contributions, housing linkages and impact fees constitute some of the ways in which development conditions may be imposed upon developers seeking to erect buildings. In principle, these instruments can be used to provide affordable housing that is not part of the intended development.[257] They are not suited for inclusionary housing obligations where the intention is to provide not just affordable housing but also opportunities for social and economic integration. In terms of the non-arbitrariness test, these instruments only partially meet the requirement that there must be an appropriate relationship between the means adopted and the ends sought. Even where it can be shown that these instruments will result in some kind of affordable housing, the argument in their favour will be weakened by the fact that they simply duplicate the objectives of existing programmes such as social housing. In U.S. law, the imposition of impact fees on developers has been met with benefit-extraction taking analysis, thus defeating schemes that were meant to house the poor or shelter the homeless.[258] Here the argument is that although the end sought by the measure is laudable, the burden should be shared by the public generally through public spending.[259]

2.6. Conclusion

The idea of owning property seems to entail a common expectation that the law will in future provide guidance and protection for the property owner in relation to her

[256] The City of Johannesburg's inclusionary housing policy requires that inclusionary housing units be built on the same site as the market units. See City of Johannesburg *Inclusionary housing: Incentives, regulations, and mechanisms* (2019) para 3.4.2, available online at http://housingfinanceafrica.org/documents/south-africa-city-of-johannesburg-inclusionary-housing-policy-of-2019/ (accessed on 16 August 2020).
[257] Schukoske "Housing linkage" 1024.
[258] See *Garneau v City of Seattle*, 897 F. Supp. 1318 (W.D. Wash. 1995) and *Guimont v Clarke*, 854 P. 2d 1 (Wash 1993) which involved the payment of cash relocation assistance to poor households. However, in some cases exactions involving some sort of fees were upheld. See, for instance, *Commercial Builders of N. California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991).
[259] See Ziegler & Laitos "Property rights, housing, and the American Constitution: The social benefits of property rights protection, government interventions, and the European Court of Human rights' *Hutten-Czapska* decision)" (2011) 21 *Indiana Int'l. & Comp. L. Rev.* 25—46 36.

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property. Property ownership also carries with it an expectation of economic reward.[260] Hardly any property owner would accept the notion that their ownership of property is devoid of any economic significance. However, progressive property advocates insist that making money off property cannot be the only point of property ownership.[261] Instead, they point to the need for property ownership to be based on some sense of obligation towards the public. South Africa's property clause seems to be couched in these progressive terms since it emphasizes that property ownership must respect the land reform programme, and that the state may take steps to provide previously excluded people with much needed support in accessing land.[262] However, there is often tension within the property clause itself insofar as the protection of property might clash with the land reform agenda of the Constitution, or with the "higher values" that the Constitution seeks to achieve.

The interpretation of section 25 of the Constitution in *FNB* blunted the categorical distinction between deprivations and expropriations,[263] instead opting for an approach which treated expropriations as a subset of deprivation. The proportionality test for arbitrariness in *FNB* is context-sensitive and will depend on the type of property in question. While commercial property must be subjected to relatively rigorous regulation, property such as housing and other personal effects which is necessary for self-fulfilment will be regulated less rigorously. This grading approach justifies treating developers' expected earnings in the same manner as other impersonal property by imposing a stricter regulation regime on such earnings (assuming that they have already vested). Therefore, although the regulation of property generally is normal and inevitable, this is even more so in the case of impersonal, intangible property such as expected earnings related to housing development.

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[260] Brophy AL "Hernando de Soto and the histories of property law" in Barros DB (ed) *Hernando de Soto and property in a market economy* (2010) 51—60 58.
[261] In *Shoprite Checkers* paras 4, 36, and 50 Froneman J reasoned that the property clause is meant to "secure living a life of dignity in recognition of the dignity of others" as opposed to the maximization of economic wealth "or the satisfaction of individual preferences." It is notable that the judgment introduced the "higher values" debate into the property protection equation. It is also significant that Froneman J alluded to the point that the level of protection a property interest receives will depend on the kind of property in question, so that protection should be stronger where the property is important for the fulfilment of other provisions in the Bill of Rights (para 50). There is a strong link between this point and the German grading approach, except that the German approach emphasizes that where the property is important for personal fulfilment then it should receive heightened protection.
[262] Section 25 (4) and (8) of the Constitution.
[263] See *Harksen v Lane NO* 1998 (1) SA 300 (CC) paras 31 & 32; *Beckenstrater v Sand River Irrigation Board* 1964 (4) SA 510 (T) at 515 A—C.

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From an inclusionary housing perspective, the limitation of the right to property is further justified under the housing clause because the latter only enshrines the right of access to housing and not housing *per se*.[264] Therefore the extent of the limitation goes only as far as enabling access to housing. This approach leaves the owner or developer of housing in control of her ownership entitlements in relation to the housing, thus ensuring that the limitation is proportional to the type of housing benefit that is targeted. In contrast, the owner or developer of social housing stock must contend with a difficult regulatory environment where this stock cannot be sold without permission. Furthermore, the inclusionary housing property limitation can be made subject to a time limit so that it is deemed that the purpose of the property limitation has been achieved after a certain period. This chapter also illustrates that the use of financial incentives can facilitate the attainment of some of the goals of the property clause. If inclusionary housing requirements are accompanied by such incentives, the likelihood is that developers will be more willing to participate in the schemes.

Since one of the aims of inclusionary housing is to encourage social and economic integration, careful thought must be given to the different mechanisms at the state's disposal. The use of some of these devices, such as off-site developments, may prove counterintuitive and negate the very purpose of the property clause and the values that underlie the Constitution. Allowing a developer to situate affordable housing far away from the market-related units removes such housing from the location rationale that underlies the idea of access to adequate housing. Furthermore, the use of density bonuses may clash with building regulations that, for instance, restrict land use in areas underlain by dolomite (a bedrock of limestone).[265] This may lead to the formation of sinkholes. Therefore, prohibiting the use of such strategies in some cases ought to pass the proportionality test for arbitrariness because social and economic integration, and environmental protection, constitute sufficient reasons both for the limitation on the use of property.

[264] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 28.
[265] Regulation AZ2, National Building Regulations (Schedule to the National Building Regulations and Standards Act 103 of 1977.

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The principle of spatial justice contained in SPLUMA states that the value of land or property should not, by itself, impede or restrict an MPT in performing its duties when considering an application for development permission.[266] This serves as an indication that property must play a wider role than that of serving as the owner's asset to use as she pleases. In the development process, it is still important to have regard to other factors such as what role the applicant's property can play in enhancing access to secure tenure and the incremental upgrading of informal areas.[267] The provisions of section 21 of SPLUMA are significant in that they mandate a municipality to collate information that is crucial for the implementation of inclusionary housing. This information would be critical for the non-arbitrariness test set out in *FNB* because it would show the current need for inclusionary housing in the municipality, economic activity, the unemployment rate, as well as the designated areas where inclusionary housing may be implemented. Therefore, the MSDF constitutes an important document for carrying out non-arbitrariness analysis about inclusionary housing. It would provide sufficient data supporting the need for inclusionary housing as well as connecting the means chosen (deprivation of the developer's property right) and the end sought (affordable, well located housing that can support social and economic integration).

[266] Section 7 (vi) of SPLUMA.
[267] Section 7 (v) of SPLUMA.

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An analysis of affordability and location as characteristics of adequate housing in the South African property law context

3.1 Introduction

According to the United Nations ('UN'), the inclusion of socio-economic rights in national constitutions is one of the clearest indications of a commitment to protecting these rights.[1] South Africa's Constitution sets out a Bill of Rights in Chapter 2 of the document, which includes the right of access to adequate housing. The right to adequate housing is considered the most litigated in South Africa, a fact that seems to confirm the UN's prognosis. However, unless housing is affordable and well-located, the constitutional promise of access to adequate housing can only have a hollow ring to it.

This reality was subsequently acknowledged in *Government of the Republic of South Africa v Grootboom*[2] ('*Grootboom*') where the Constitutional Court, for the first time, authoritatively interpreted section 26 of the Constitution to provide guidance on the state's obligations *vis-a-vis* housing. In this case an elderly widow, Mrs Irene Grootboom, together with several others, moved onto and occupied privately owned land after the living conditions in their previous locality became untenable. They had no access to clean water, electricity, or sewerage services. Their shacks were in a deplorable state as they leaked in wet conditions. Most of these people had been on a waiting list for low cost housing. When it became apparent that their wait would drag on for much longer, they occupied the privately owned land which had been designated for low-cost housing, and subsequently faced eviction therefrom. They were forcefully removed from the land when a magistrate's court granted an eviction order. They then sought a High Court order compelling the city of Cape Town to provide them with temporary basic shelter in terms of section 26 of the Constitution. The High Court declined to grant this relief.

[1] UN Housing Rights Project, Habitat and the Office of the High Commissioner for Human Rights *Housing rights legislation: United Nations Housing Rights Programme Report No. 1* (2002) 104.
[2] 2001 (1) SA 46 (CC) para 25. Also see Slarks HK "Where human rights and development politics meet: Housing rights in South Africa" (2010) 3 *U. C. L. Hum. Rts. Rev.* 164—198 164.

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The issue before the Constitutional Court was the nature of the state's obligation to fulfil the housing right enshrined in section 26 of the Constitution. Yacoob J held that this obligation is not absolute or unqualified since section 26 only requires the state to take reasonable measures, within the available resources, to progressively realize this right.[3] What is reasonable in a given case depends on the resources available.[4] The programme implemented by the Cape Metro in this case was not reasonable because it failed to provide relief to those in desperate need of housing, the Court found.[5] It therefore ordered the Cape Metro to implement measures to assist those in desperate need of housing by, *inter alia*, instituting, funding, and supervising such measures.[6] It is now widely acknowledged in academic circles that while *Grootboom* was expected to precipitate a major shift in the state's orientation towards the provision of housing, little has in fact changed.[7] The problems of inadequate resourcing, poor planning and lack of capacity to deliver housing at the required numbers continue to bedevil housing provision.[8] Because of the focus on delivering housing to so many people, it has unfortunately become less important to consider whether such housing is affordable and well-located. The result is that many who have ostensibly been housed through government's public housing programmes continue to suffer from inadequate housing because their lived experience fits the "bricks and mortar" description.[9] They lack access to basic sanitation, water, and electricity.[10] Moreover, the National Planning

[3] *Grootboom* para 38.
[4] *Grootboom* para 46.
[5] *Grootboom* para 69.
[6] *Grootboom* para 96 and para 99.
[7] The impact of the decision in *Grootboom* is a contested topic. Liebenberg provides an analysis of what the impact of the *Grootboom* decision was expected to be, concluding that the decision is sufficient guidance for the implementation of social assistance programmes. See Liebenberg S "The right to social assistance: The implication of *Grootboom* for policy reform in South Africa" (2001) 17 *SAJHR* 232—257 256 ('Liebenberg "Right to social assistance and *Grootboom*"'). However, the decision has failed to translate into real improvement of the housing situation. For example, the different tiers of government still struggle to provide emergency housing assistance when needed. See Schneider D "The constitutional right to housing in South Africa: *The Government of the Republic of South Africa v Irene Grootboom*" (2004) 2 *Int'l. J. Civ. Soc.* 45—62 61. Furthermore, Muller argues that since it rejected the notion of a minimum core of the right to housing, *Grootboom*'s impact is unclear because there is no way of gauging the scope of the right. See Muller G *The impact of section 26 of the Constitution on the eviction of squatters in South African law* (2011) 17 76 ('Muller *The impact of section 26 on eviction*'). See, further, Strauss M *A right to the city for South Africa's urban poor* (2017) 187 ('Strauss *A Right to the city for SA*').
[8] Tissington K *A resource guide to housing in South Africa 1994—2010: Legislation, policy, programmes and practice* (2011) 8 ('Tissington *Resource guide to SA housing*'); Jenkins P & Smith H "An institutional approach to analysis of state capacity in housing systems in the developing world: Case studies in South Africa and Costa Rica" (2001) 16 *Housing Studies* 485 —507 496; Muller *The impact of section 26 on eviction* 14.
[9] *Grootboom* para 35.
[10] Tissington *Resource guide to SA housing* 5.

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Commission ('NPC') has stated that achievement of spatial justice through the development of socially and economically integrated, well-located and affordable housing continues to be elusive.[11]

In his novel, *Graceland*,[12] Chris Abani sketches a powerful image of city life in post-colonial Nigeria. The chief protagonist, Elvis, is a young man who moves from his rural village to settle in Lagos in search of better economic opportunities. Elvis slowly adapts to city life with some difficulty. Elvis endured a rough childhood with little opportunities for self-fulfilment. In Lagos, he learns to negotiate the rough edges of slum life which, he notices, is in direct contrast to the opulence of the suburbs, characterised by manicured gardens and gleaming swimming pools, and happy inhabitants with a lot of time on their hands.[13] Amidst the emerging confusion, Elvis intermittently loses hope for a better future. Significantly, he observes the symbiotic nature of the relationship between these two contrasting sides of Lagos. While the rich suburban dwellers depend on the poor for cheap labour, the poor slum inhabitants are dependent on the rich suburban residents for their economic sustenance. One of Elvis' associates, Redemption, finds that this symbiotic relationship offers a glimmer of hope for Lagos "because though dey hate us, de rich still have to look at us. Try as dey might, we won't go away."[14]

This vivid description of urban life as experienced by the poor in Lagos fits into the general picture of the realities of post-apartheid urban life for most South Africans.[15]

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[11] NPC *National Development Plan: Vision for 2030* (2012) 260 ('NDP'); Todes A "Housing, integrated urban development and the compact city debate" in Harrison P, Huchzermeyer M & Mayekiso M (eds) *Confronting fragmentation: Housing and urban development in a democratising society* (2003) 109—121 110 ('Todes "Housing and the compact city"'); Strauss *Right to the city for SA* 5.

[12] Abani C *Graceland* (2004). A review of this book is undertaken in Harrison SK "'Suspended city': Personal, urban and national development in Chris Abani's *Graceland*" (2012) 43 *Research in African Literatures* 95—114.

[13] *Graceland* 7.

[14] *Graceland* 137.

[15] An example of the legal complexities involved in Lagos' urban setting can also be seen in *The Social and Economic Rights Action Group & the Centre for Economic and Social Rights v Nigeria SERAC v Nigeria* Communication 155/96, Ref. ACHPR/COMM/A044/1 (27 May 2002) ('*SERAC v Nigeria*'). Here the wholesale displacement of a community was violently executed at the peak of the rainy season. The communication in the case described Maroko as a sprawling settlement on the outskirts of Lagos located adjacent to the main business and financial centres of the city. It further alleged that wealthy homeowners in Lagos colluded with government officials to evict the residents of Maroko. The perils of life in Maroko mirror the desperation of residents of South African informal settlements who are often faced with forced eviction, especially during the winter season. See generally Birbalsingh FM "Urban experience in South African fiction" (1984) *Presence Africaine* 111—121. Furthermore, Soja describes

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The housing situation of the urban poor is one where daily survival has become difficult because these people mostly live in makeshift structures with no access to proper sanitation, clean water, electricity, healthcare and education opportunities.[16] They suffer humiliation, hunger and disease daily. In addition, these makeshift shelters are located far away from job opportunities.[17] The individuals that are lucky to have any kind of job face insurmountable difficulties reaching their places of employment. They often deplete their meagre earnings commuting to work.[18]

In this chapter, I address what I perceive to be a gap in the legal and policy framework for delivering housing that is economically and socially integrated. I argue that housing affordability and location are intertwined concepts which should not be developed separately. Apart from highlighting the policy inconsistencies referred to in Chapter 1, I explain that policy, statutory and judicial responses to the housing crisis in South Africa appear to emphasize affordability more than they do location. This makes it difficult for South Africa to implement inclusionary housing because policy and legal incoherence will lead to property owners and developers avoiding their social obligations more easily.

Recognizing that positive housing obligations under section 26 (2) of the Constitution are more relevant to inclusionary housing than negative obligations, my intention in discussing the negative obligations under section 26 (3) is simply to focus on how the

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the South African urban experience as characterized by a "citadel-ghetto polarity." This mirrors Elvis' experience of Lagos. See Soja E *Seeking spatial justice* (2010) 40. Finally, Akintayo's study shows that the manifestations of poverty in South Africa and Nigeria are characterized by extreme wealth and extreme poverty. This leads to similarities in terms of the situation of the urban poor in both countries. See Akintayo AE *Socio-economic rights, political action, judicial conceptions of democracy and transformation: South Africa and Nigeria* (2014) 15 ('Akintayo *Democracy and transformation: SA and Nigeria*').

[16] Department of Housing (DOH) *White Paper: A new housing policy and strategy for South Africa*, General Notice 1376 of 1994, Government Gazette 16178, 23 December 1994, para 3.1.2 ('WPH').

[17] Liebenberg "Right to social assistance and *Grootboom*" 235; Muller *The impact of s26 on eviction* 12. Also see WPH para 3.2.1. It is, moreover, notable that courts have attempted to highlight the daily struggles that these individuals face. For example, see *Sailing Queen Investments v The Occupants La Colleen Court* 2008 (6) BCLR 666 (W) para 4; *Lingwood and Another v The Unlawful Occupiers of R/E of Erf 9 Highlands* 2008 (3) BCLR 325 (W) para 5; *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) para 169 ('*Residents of Joe Slovo*'). Also see Muller *The impact of section 26 on eviction* 22.

[18] A Statistics South Africa ('Stats SA') Household Survey for 2018 shows that roughly 33% of South African households use private transport to work, followed by taxis at 24% and walking at 20%. See Stats SA *Household Survey 2018* p 59, available online at http://www.statssa.gov.za/publications/P0318/P03182018.pdf (accessed 1 February 2020).

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courts have understood the significance of location and affordability in fulfilling the right to housing. This is important because the right of access to adequate housing must be viewed in the context of the creative tension that exists between it and the right to property. This creative tension is mediated by the courts as part of the Constitution's commitment to transformative constitutionalism. Although it is recognized that inclusionary housing calls for the taking of positive measures by the state under section 26 (2) of the Constitution, my discussion in this section proceeds from the premise that lessons can be drawn from the eviction cases to enrich the implementation of section 26 (2). Moreover, it is necessary to consider the jurisprudence under section 26 (3) because many landowners will find that they must deal with the unlawful occupation of their property before they can consider applying for development permission.

This chapter begins by outlining the constitutional framework for the realisation of the right of access to adequate housing as set out in section 26 of the Constitution. I spell out the positive and negative obligations of the state regarding the realisation of this right. I then proceed to a consideration of the policy and legislative frameworks, showing the relationship between the two frameworks. The objective is to establish whether the judicial interpretation of section 26 of the Constitution has enabled the consideration of affordability and location as factors for achieving adequate housing in South Africa.

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3.2 The constitutional context of the right of access to adequate housing

3.2.1 Introduction

In *Grootboom*, the Constitutional Court stated that the right of access to adequate housing entailed "more than bricks and mortar."[19] It also rejected the notion that this right contained a "minimum core obligation" for the state, stating that the establishment of a minimum core in each case requires technical information that a court does not typically have access to.[20] Instead, the Constitutional Court adopted a reasonableness review approach[21] as the appropriate standard by which the state's compliance with its section 26 obligations should be measured.

The Constitutional Court should have been guided by *General Comment 4: The Right to Adequate Housing (Art. 11(1))*[22] ('*General Comment 4*') in which the Committee on Economic, Social and Cultural Rights ('CESCR') identified the key characteristics of adequate housing. These include legal security of tenure;[23] availability of services, materials, facilities and infrastructure;[24] affordability;[25] habitability;[26] accessibility;[27] location;[28] and cultural adequacy.[29] Owing to the reluctance to define the substantive content of the right of access to adequate housing, it has become difficult to identify any specific duty on the state's part to provide amenities such as water, electricity and refuse removal as part of its section 26 obligations. Nevertheless, *Grootboom* can be credited with setting out the broad structure of the right of access to adequate housing as well as the interpretive approach to section 26 of the Constitution in view of South Africa's social and historical context.[30] In this section I describe how this structural and

[19] *Grootboom* para 35.
[20] *Grootboom* para 33.
[21] See para 3.2.2.1 below.
[22] UN Doc E/C 1992/23.
[23] Para 8 (a).
[24] Para 8 (b).
[25] Para 8 (c).
[26] Para 8 (d).
[27] Para 8 (e).
[28] Para 8 (f).
[29] Para 8 (g).
[30] The *Grootboom* judgment has been lauded for declaring socio-economic rights justiciable. However, the judgment's failure to engage with the minimum core of the right of access to adequate housing also raises questions regarding the Constitutional Court's "aspirational impulse" of addressing deep inequalities in South Africa. See Dugard J "Beyond *Blue Moonlight*: The implications of judicial avoidance in relation to the provision of alternative housing" (2014) 5 *Const. Ct. Rev.* 265—279 265;

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interpretive function of section 26 provides the normative basis for emphasizing the centrality of affordability and location in the housing development process. *Grootboom*'s requirement that the state should formulate, fund, and supervise an appropriate programme for those most in need should be taken as establishing the principle that where there is an apparent need for housing of a certain type, the state must address that need through appropriate programmes.[31] I demonstrate that "need" is therefore an elastic concept that extends to the housing requirements of those that can pay some money for it (middle-income households). The programmes that the state should implement therefore include inclusionary housing, which justifies the limitation of the property rights of private developers.

3.2.2 Positive obligations

In terms of section 26 (2) of the Constitution, the state has a positive obligation to take reasonable legislative and other measures to progressively realise the right of access to adequate housing. This provision must always be read together with section 26 (1) of the Constitution which establishes the scope of this right.[32] In *Grootboom*, Yacoob J stated that section 26 (2) does not impose an absolute or unqualified obligation on the state to provide housing.[33] The state's obligation only goes as far as taking reasonable legislative and other measures within its available resources to progressively realise this right.[34] Below, I link this provision to the discussion on the regulation of property undertaken in chapters 2 and 4. I set out the constituent elements of section 26 (2) to show that this provision sanctions the regulation of property rights.

Ray B "Evictions, aspirations and avoidance" (2014) 6 *Const. Ct. Rev.* 173—232 173. Ray explains the paradox that is the Constitutional Court's record. Although the Court has often made pro-poor judgments in the sense that the results of these cases have favored the poor in the aggregate, the Court has continued to struggle to substantively develop the rights of these people. Also see Liebenberg *Socio-economic rights* 480.

[31] See also section 9 (1) (f) of the Housing Act 107 of 1997 which requires every municipality to "initiate, plan, co-ordinate, facilitate, promote and enable appropriate housing development in its area of jurisdiction."

[32] *Grootboom* para 34.

[33] *Grootboom* para 38.

[34] *Grootboom* para 38.

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3.2.2.1. Reasonable legislative and other measures

The Court in *Grootboom* noted that the opportunities for fulfilling the right of access to adequate housing varied considerably.[35] In stating this, it acknowledged that one could not adopt a broad-brush approach in analysing the various housing needs that exist. Legislative and other measures put in place by the state must exhibit certain characteristics to fulfil the reasonableness review standard. First, they must be comprehensive and co-ordinated so that they clearly allocate responsibilities and tasks to all spheres of government.[36] Secondly, they must be capable of facilitating the realisation of the right.[37] Thirdly, both their conception and implementation should be reasonable.[38] Lastly, the measures must be balanced and flexible.[39] Yacoob J stated that flexibility required the measure under review to make provision for short, medium, and long-term needs.[40]

In *Grootboom*, the Court found the housing programme constitutionally inadequate because it left out those who were most in need of housing.[41] The programme was not reasonable because it failed to provide for the funding, implementation and supervision of measures designed to lead to housing for the neediest sections of the population. The Court's declaratory order was therefore targeted at the implementation of such a specific programme in terms of section 26 (2) of the Constitution. Since the Court has reasoned that section 26 (2) must always be read together with section 26 (1) of the Constitution,[42] it has become difficult to distinguish between the content of the right of access to adequate housing, on the one hand, and the reasons for its limitation, on the other.

It will be recalled that inclusionary housing is a housing delivery strategy where developers are obliged or encouraged to include affordable units in their market-

[35] *Grootboom* paras 32—33. Also see *City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn (Vrygrond Development)* 2003 (6) SA 140 (C) 150G; Van Wyk J "The complexities of providing emergency housing assistance in South Africa" (2007) *J. S. Afr. L.* 35—55 40; Terminski B "The right to adequate housing in international human rights law: Polish transformation experiences" (2011) 22 *Revista Latinoamerica de Derechos Humanos* 219—241 227.
[36] *Grootboom* paras 39—40. Also see sections 3, 7 and 9 of the Housing Act 107 of 1997.
[37] *Grootboom* para 41.
[38] *Grootboom* para 42.
[39] *Grootboom* para 43.
[40] *Grootboom* para 43.
[41] *Grootboom* para 65 & 95.
[42] *Grootboom* para 34.

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related housing developments. The aim of this programme is to increase the supply of affordable housing units and to facilitate social and economic integration in housing. The question is whether imposing inclusionary housing obligations on developers is reasonable in the South African legal context. The answer to this question must consider the current housing need in respect of individuals who are able to pay for housing but are unable to adequately access it. Currently, such individuals are assisted through the social housing programme which is implemented through the Social Housing Act.[43] This Act governs the building of affordable housing in designated "restructuring zones"[44] that are close to job opportunities and other development networks. Accredited Social Housing Institutions ('SHIs') are responsible for delivering social housing. The Act recognizes the ownership rights of SHIs in relation to the built units. However, to ensure a steady supply of social housing stock, the Act regulates the owner's right to sell these housing units.[45] The Act also provides that the proceeds of any sale must be ploughed back into a social housing project. This extensive control of ownership rights is therefore directed at the *ius disponendi* and is quite remarkable in its breadth because it implies that a developer who decides to participate in social housing provision cannot divest from the business.[46]

In terms of the research questions for this thesis, social housing responds to the affordability and location of housing. It also envisages that the beneficiaries of this programme would be individuals who are able to pay for housing in the form of rent. The scope of social housing is such that it excludes the possibility of ownership of housing. For these reasons, social housing is not designed to address the specific

[43] Act 16 of 2008.
[44] Section 1 of the Social Housing Act defines a restructuring zone as:
> "A geographic area which has been (a) identified by the municipality, with the concurrence of the provincial government, for purposes of social housing; and (b) designated by the Minister in the Gazette for approved projects."

[45] Section 14 (1) (i) of the Act obliges the SHI to:
> "[S]eek permission from the Regulatory Authority for the sale of any properties in their ownership on the basis that such sale will not endanger the security of tenure of existing residents meeting the conditions of their tenancy and that the grant component of the proceeds receipt (*sic*) from such sale will be used to provide social housing."

[46] Apart from the right to sell this stock, the reversion of the stock's ownership from the private owner to the state at the conclusion of the project is another remarkable feature of the Act. Maass argues that this is an unusual provision from a comparative law perspective. Consequently, she questions the likelihood that private developers will participate in social housing projects, given that these projects are designed to be wholly charitable and therefore give little return on investment. She argues that this may amount to arbitrary deprivation of property. See Maass S "The South African social housing sector: A critical comparative analysis" (2013) 29 *SAJHR* 571—590 578 580.

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problems that emanate from the use of private property to lock out individuals from meaningful housing opportunities and property ownership. According to the Presidency, the use of private property to impoverish and disenfranchise blacks pre-dates the apartheid era.[47] For instance, the Glen Grey Act[48] established strict control over blacks by stipulating the property requirements that would qualify one to vote. This, in turn, meant that white domination over blacks would continue. Blacks were only tolerated in urban white areas to provide cheap labour.[49]

Against this backdrop, the idea behind inclusionary housing is to change the ownership patterns, not only over land, but also over immaterial property interests the ownership of which has previously been used to lock the needy out of certain areas that were reserved for whites. Although many of the restrictions that were used to lock blacks out of certain areas have formally been removed, access to housing finance is still a major stumbling block.[50] Bateman argues that the advent of readily accessible microcredit has in fact compromised South Africa's already weak economic infrastructure through the informalization of the economy.[51] He explains that while microcredit has been made easily accessible to the majority black population for consumption spending (which virtually ensures that dependency on microcredit will be perpetual), there has been no comparable enthusiasm for extending credit for purposes of long-term, property-generating endeavours.[52] The result of this insidious practice is that the concentration of poverty continues to be a major problem especially in the townships.[53] A possible solution to this problem is to encourage inclusionary housing which will ensure that more people access opportunities such as healthcare and education that can pull them out of the poverty trap.[54] Finance institutions seem

[47] Presidency *Twenty-year review: South Africa (1994—2014)* (2014) 2, available online at https://www.dpme.gov.za/news/Documents/20%20Year%20Review.pdf (accessed on 11 August 2020) ('Presidency *Twenty year review*').
[48] Act 25 of 1894.
[49] Presidency *Twenty-year review* 2.
[50] *Grootboom* para 36.
[51] Bateman M "South Africa's post-apartheid microcredit-driven calamity" (2014) 18 *LDD* 92—135 93. ('Bateman "Post-apartheid microcredit"')
[52] Bateman "Post-apartheid microcredit" 120, 121, 125.
[53] NDP 263.
[54] Recent Cases "Takings Clause: Affordable housing- California Supreme Court upholds residential inclusionary zoning ordinance- *California Building Industry Ass'n v City of San Jose*, 351 P.3d 974 (Cal. 2015)" (2016) 129 *Harvard L. Rev.* 1460—1467 1460.

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to be refusing to fund loans for home ownership in certain designated areas.[55] This has led to a phenomenon known as "redlining." Metlae explains that redlining happens when "Banks reject loan capital for homes in underprivileged areas, which they regard as risky."[56] The establishment of inclusionary housing's legitimacy is straightforward in these circumstances, because the existing economic environment has effectively commodified land and housing thus making well-located housing unaffordable.

Although the Court in *Grootboom* stated that a reasonable housing programme should not ignore a significant segment of society,[57] it does not follow that the constitutional validity of a housing programme depends on the number of people who benefit from it. The right of access to adequate housing must be enjoyed by all, including those who may not necessarily qualify to be regarded as extremely poor. Statistically, inclusionary housing would have no significant impact on the housing backlog because not many individuals can afford to make some payment for their housing needs. It would nevertheless be unreasonable to deny such individuals a chance to access adequate housing simply because they are not the neediest or because they are not in the majority.[58] In turn, this means that inclusionary housing is likely to affect relatively few private developers in the housing market. The question is how this should affect the assessment of the programme's reasonableness.

It has been observed above[59] that the requirement to set aside a portion of a housing development project for affordable housing impacts the developer's right to property in the form of landownership and expected earnings. In *Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*[60] ('*Reflect-All*'), O'Regan J (writing for the minority) stated that where hundreds of landowners are unable to seek permission to develop their land in an otherwise rapidly urbanizing environment, this would be an indication that the

[55] See also Van Wyk J "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26—41 28.
[56] Metlae MC *Analysis of Community Reinvestment Bill and its impact on the low-cost housing in South Africa: The case of Alexandra East Bank and Yeoville, Johannesburg* (2004) 46.
[57] *Grootboom* para 43.
[58] Even if this were the case, it would not by itself make the housing programme reasonable. See *Grootboom* para 44.
[59] Para 2.2.2.1 above.
[60] 2009 (6) SA 391 (CC).

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deprivation in such a case is significant.[61] In contrast, inclusionary housing allows developers to seek planning permission but merely restricts how they will use their property upon completion. In addition, inclusionary housing should be subjected to a standard of scrutiny that is lower than proportionality analysis because of its land reform characteristics. Because of its focus on social and economic integration, inclusionary housing qualifies as a land reform measure in terms of section 25 (8) of the Constitution.[62]

In *Mkontwana*,[63] a property owner challenged the constitutionality of section 118 (1) of the Local Government: Municipal Systems Act[64] which prohibits the transfer of immovable property unless it has been certified that all consumption charges due in respect of the property during a period of two years before the date of issue of the certificate had been paid. The South Eastern Cape Local Division of the High Court found this provision to contravene section 25 (1) of the Constitution which prohibits the arbitrary deprivation of property.[65] In the Constitutional Court, it was further argued that section 118 of the Act was inconsistent with section 26 of the Constitution as it impeded the right of access to adequate housing.[66] The contention was that the provision contradicted the state's obligation to take reasonable legislative and other measures to realise the right of access to adequate housing. Yacoob J accepted that section 118 of the Act could affect the right of access to adequate housing where the property in question was acquired for purposes of housing.[67] In his view, the difficulty

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[61] *Reflect-All* para 107.

[62] Section 25 (8) of the Constitution provides as follows:

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

[63] *Mkontwana v Nelson Mandela Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KZN Law Society and Msunduzi Municipality as* Amici Curiae) 2005 (1) SA 530 (CC) ('*Mkontwana*').

[64] Act 32 of 2000.

[65] At the time that this matter was decided by the High Court, there existed a judgment by the Kwa-Zulu Natal High Court which upheld the constitutionality of section 118 (1) and 118 (3) of the Act. This was the decision in *Geyser and Another v Msunduzi Municipality and Others* 2003 (5) SA 18 (N). This decision held that the deprivation occasioned by these provisions was not arbitrary.

[66] *Mkontwana* para 70.

[67] *Mkontwana* para 70. The notion that an owner requires her property to be used for personal housing, or to put it to some other form of productive use, is a common feature of South African evictions jurisprudence. See the discussion on the Extension of Security of Tenure Act 62 of 1997 at para 3.3.3.2 below. In *Hattingh and Others v Juta* 2013 (3) SA 275 (CC) para 42 ('*Hattingh*'), the Constitutional Court adopted a utilitarian approach that privileged the owner's use of space over that of the occupiers in that

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in this case was caused by the previous occupiers' and the owners' failure to pay, and not by the state.[68] In so holding, Yacoob J appeared to disregard his own explanation in *Grootboom* that the right of access to adequate housing includes the right of access to land and services for those who cannot afford to pay for them.[69] The *Grootboom* principle means that the state's obligations under section 26 include the institution of legislative and other measures whose aim is to make services more affordable.[70]

As explained above,[71] inclusionary housing encompasses the rental option. It is therefore conceivable that the *Mkontwana* decision might affect how a court resolves the issue of unpaid charges in the inclusionary housing context. This would be the case, for example, in a "holding-over" matter where the initial occupation was lawful, but the tenant unlawfully refuses to vacate the premises.[72] The implication of *Mkontwana* is that if a landlord in an inclusionary housing project faces the prospect of having to pay consumption charges in respect of a tenant, the landlord can request the municipality to turn off all water and electricity connection in respect of the property. This question relates to the affordability focus of this chapter and how that affects a landowner's rights to property.

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case. Also see *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC); *City of Johannesburg v Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA) n 23; and *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC); Strydom J & Viljoen S "Unlawful occupation of inner-city buildings: A constitutional analysis of the rights and obligations involved" (2014) 17 *PELJ* 1206—1261 1210 (n 11).

[68] *Mkontwana* para 70.

[69] *Grootboom* paras 35—36.

[70] The White Paper on Social Welfare identified the lack of housing and basic services as some of the causes of instability and insecurity in families. This negatively impacts social integration, which happens to be one of the goals of inclusionary housing. See Department of Welfare *White Paper for social welfare: Principles, guidelines, recommendations, proposed policies and programmes for developmental social welfare in South Africa* (1997) para 13, available online at https://www.gov.za/documents/social-welfare-white-paper-0 (accessed on 2 March 2020).

[71] See para 1.5 above.

[72] According to the Supreme Court of Appeal decision in *Ndlovu v Ngcobo; Bekker v Jika* 2003 (1) SA 113 (SCA) 119 F—G, a lessee whose lease has terminated but who refuses to vacate the premises is an unlawful occupier. Also see Hawthorne L "The nature of the claim for holding over: South African law" (2010) 16 *Fundamina* 52—63 60.

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3.2.2.2. Progressive Realization

The positive obligation imposed upon the state in terms of section 26 of the Constitution entails that this right should be progressively realised. In keeping with the notion that housing is an "access" right, the Court in *Grootboom* explained that the right of access to adequate housing cannot be demanded immediately.[73] Muller notes that the concept of progressive realization is derived from the International Covenant on Economic Social and Cultural Rights ('ICESCR').[74] Article 2 (1) of the ICESCR provides:

> "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

The flexibility of the progressive realization principle allows states to select the most appropriate methods for complying with Article 2 of the ICESCR. This approach recognises the unique circumstances of each State Party, including their different stages of economic development. Similar thinking prompted Yacoob J in *Grootboom* to state that progressive realization is linked to the state's duty to make provision for everyone's basic needs.[75] He explained that, *inter alia*, financial hurdles to accessibility to basic needs must be lowered over time.[76]

In line with the central argument of this thesis and the expansive conception of the police power on which I rely, a municipality may impose inclusionary housing conditions on developers seeking to erect buildings on their own property. However, insofar as the positive measures undertaken under section 26 (2) may limit property rights, it is submitted that such measures may only be implemented gradually.

[73] *Grootboom* para 45.
[74] 993 UNTS 3. The Covenant was adopted by the General Assembly of the United Nations on 16 December 1966 and came into force on 3 January 1976. As at 1 March 2020, the Covenant has been ratified by 170 countries. South Africa signed the Convention on 4 October 1994 and ratified it on 12 January 2015.
[75] *Grootboom* para 45.
[76] *Grootboom* para 45.

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Progressive realization therefore ensures that property owners are cushioned against the effects of the precipitous implementation of measures under section 26 (2) of the Constitution. One way to achieve this is to limit the number of beneficiaries participating in the programme and to gradually increase this number based on evidence that social and economic integration has taken place. Allowing too many people to participate in the programme at once could create "income cliffs" and further delay the prospect of real integration.[77]

The progressive realization of the right of access to adequate housing connects with the idea of imposing restrictions on the rights of landowners in a non-arbitrary manner.[78] In the inclusionary housing context, the *FNB* non-arbitrariness test implies that the law in question should shield landownership and vested expected earnings from undue interference because landowners are not directly responsible for the dire housing situation that South Africa experiences. There is no "relationship between the purpose of the deprivation and the person whose property is affected."[79] However, there is a link between denying developers a part of their expected earnings (if they have already vested) and the purpose of bringing about social and economic integration through affordable, well located housing. This is because the denial of expected earnings is necessary to ensure that those who have previously been excluded from certain areas (to protect the property values in these areas) have access to the opportunities that these areas offer. On the other hand, since landownership is another property interest that is affected by inclusionary housing, one needs to demonstrate a more compelling reason for deprivation in respect of landownership than in respect of the expected earnings affected.[80] There is an even stronger relationship between the said purpose and landownership in that land scarcity

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[77] The term "income cliff" refers to the gap between the incomes of the well-off and the poor within a given residential area. The income cliff does affect the affordability and sustainability of services for residents. The South African Property Owners Association ('SAPOA') states that: "The starker the difference between the price of affordable and market units, the greater the so-called 'income-cliff' and feasibility pitfalls for private developers." See SAPOA *Inclusionary housing: Towards a new vision in the City of Johannesburg and Cape Town metropolitan cities* (2018) 41, available online at https://www.sapoa.org.za/media/2948/inclusionary-housing_revised.pdf (accessed on 3 March 2020) ('SAPOA *Inclusionary housing*').

[78] In *Blue Moonlight Properties* para 34, the Constitutional Court stated:

> "The protection against arbitrary deprivation of property in section 25 of the Constitution is balanced by the right of access to adequate housing in section 26 (1) and the right not to be evicted arbitrarily from one's home in section 26 (3)."

[79] *FNB* para 100.

[80] *FNB* para 100.

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is a direct cause of the housing crisis bedevilling South Africa. Although the law requires a compelling reason for the deprivation of landownership, Van der Walt makes the valid point that all that the Constitutional Court has required in some cases is a laudable reason for deprivation.[81] Bearing this in mind, it seems that rationality review should be the appropriate standard applicable to inclusionary housing impositions. Inclusionary housing is essentially a land reform measure since it aims to improve access to land for the previously excluded sections of the population. Land reform measures are based on section 25 (8) of the Constitution. Roux states as follows: "The normative force of s 25 (8) would justify weakening the standard of review …even where the measure deprived the complainant of ownership of land."[82]

The question arises as to the relationship between the concept of the progressive realization of the housing right and the principle of spatial justice. In other words, does spatial justice facilitate or impede progressive realization? It must be recalled that spatial justice is a direct response to the existence of spatial injustice. Spatial injustice manifests itself in the unequal distribution of resources, power, and space.[83] These injustices result in the denial of the human dignity of those who are not able to access adequate housing. Owing to the power that property owners typically wielded (and continue to wield) against non-owners, one would have thought that time is of the essence in addressing these imbalances. One should not have to wait for one's dignity to be progressively realized.[84] Despite this dignity argument, it must be accepted that the poor endure worse denials of dignity than those who are able to pay for housing

[81] For example, in *Mkontwana* para 52 the Court reasoned that the deprivation in that case had the "potential to encourage regular payments." This argument clearly leaves room for the possibility that the deprivation in question may not lead to regular debt payments. The reason for the deprivation was therefore laudable but hardly compelling. See Van der Walt *Constitutional property law* 3 ed 251. However, it must be noted that the deprivation in *Mkontwana* was in respect of a different ownership entitlement, namely, the right to alienate property, rather than the right to exploit it.

[82] Roux T "Property" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa* 2ed (Revision Service 5, January 2013) 46-1—46-37 46-28.

[83] Strauss M *A right to the city for South Africa's urban poor* (2017) 58; Van Wyk J "Can legislative intervention achieve spatial justice?" (2015) 48 *CILSA* 381—400 382; Strauss M & Liebenberg S "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428—448 429—430.

[84] Principle 22 of *The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights* (1987) states as follows:

> "Some obligations under the Covenant require immediate implementation in full by all States parties, such as the prohibition of discrimination in article 2(2) of the Covenant."

My argument is that human dignity is one of the values underpinning the South African Constitution and should similarly be regarded as part of the approach embodied by Principle 22.

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yet still fail to access it. The beneficiaries of inclusionary housing are middle-income households who can pay some money for housing but cannot afford well located housing. It appears that the principle of spatial justice ranks their housing needs lower than those of the poor.

The approach adopted by SPLUMA on the question of spatial justice is noteworthy because it demonstrates that the Act's conceptualization of spatial justice cannot lead to real inclusivity. Although section 7 of SPLUMA refers to the need for Spatial Development Frameworks at all spheres of government to address the "inclusion of persons and areas that were previously excluded"[85] it is clear that the overall scheme of section 7 envisages an element of rootedness.[86] The provision expressly requires that emphasis be placed on informal settlements, former homeland areas, and areas characterized by poverty.[87] In other words, although this provision speaks of the inclusion of the previously excluded, this only refers to their inclusion in the SDFs and policies. Real inclusion requires the breaking down of property law- inspired barriers which have impeded access to the "islands of enclosure"[88] that provide better access to opportunities such as healthcare, education, and jobs.[89] The version of spatial justice advocated by SPLUMA enables the decision maker to consider various factors such as redressing past imbalances and redressing access to land by disadvantaged communities and persons. It does not commit to the immediate attainment of these objectives, because the principle of spatial justice must be read together with the principles of spatial sustainability, efficiency, spatial resilience (which, *inter alia*, seeks to shield those likely to suffer the impact of economic shock)[90] and good governance.

[85] Section 7 (a) (ii) of SPLUMA.
[86] The concept of rootedness is addressed at para 3.4.2 below.
[87] Section 7 (a) (ii) and (iv) of SPLUMA.
[88] MacLeod G "From urban entrepreneurialism to a 'Revanchist City'? On the spatial injustices of Glasgow's renaissance" (2002) 34 *Antipode* 602—624 602.
[89] Strauss *Right to the city for SA* 246.
[90] Section 7 (d) of SPLUMA.

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3.2.2.3. Available resources

The state's positive obligations in terms of section 26 (2) of the Constitution are qualified by the availability of resources to carry out specific tasks.[91] In *Grootboom*, Yacoob J stated as follows:

> "…both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources."[92]

According to Liebenberg, this language is an indication that the resources set aside for social programmes are a determining factor in assessing the reasonableness of the state's measures.[93] The notion of available resources, like that of progressive realization discussed above, is inspired by Article 2 of the ICESCR which generally recognizes that States Parties to the Convention have conflicting priorities and budgets that must somehow be reconciled when complying with the obligations imposed by the Convention.[94] The ICESCR envisages that States Parties will prioritise the needs of the most vulnerable by devising programmes whose implementation does not require the committal of significant resources.[95]

Housing development impacts the production of space. According to Lefebvre, space is a *sine qua non* for transforming social relations. At the same time, space is formed through social relations. In its multidimensional form, space can determine the way members of society perceive each other and the things around them. It can also act as a force for social control, enabling certain forms of usage of space to dominate others.[96]

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[91] *Occupiers of 51 Olivia Road, Berea Township, and 197 Main Street, Johannesburg v City of Johannesburg and Others* 2008 (3) SA 208 (CC) para 18 ('*Occupiers of 51 Olivia Road*').
[92] *Grootboom* para 46. Also see *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 (1) SA 765 (CC) para 11.
[93] Liebenberg S "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty?" (2002) 6 *Law, Democracy & Development* 159—192 173.
[94] *General Comment No 3* para 11. See Muller *The impact of section 26 on eviction* 92.
[95] *General Comment No 3* para 12.
[96] Strauss *Right to the city for SA* 80; Butler C "Reading the production of suburbia in post-war Australia" (2005) 9 *Law Text Culture* 11—33; Pindell N "Finding a right to the city: Exploring property and community in Brazil and in the United States" (2006) 39 *Vanderb. J. Transnat'l. L.* 435—480 439 ('Pindell "Right to the city in Brazil and the U.S."')

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The availability of resources is not restricted to the financial capital that is necessary to take positive obligations under section 26 (2) of the Constitution. Stated differently, resource availability is not simply a question of examining the municipality's bank balance. Instead, it entails priority-setting and budgeting processes that ensure that proactive steps are taken to enhance housing development. Although it has been claimed that inclusionary housing does not involve the expenditure of public resources,[97] Chapter 2 shows that inclusionary housing depends, to some extent, on the use of financial incentives to assist developers.[98] This means that the availability of resources is relevant to inclusionary housing. However, I maintain that financial incentives are not relevant to the constitutional validity of inclusionary housing under section 26 (2) of the Constitution. It is acknowledged that there will be cases where the size and type of project in question call for some form of incentive if it is to succeed. The extent to which a landowner is deprived of property, either in the form of landownership or expected earnings, should determine whether a financial incentive should be extended to the landowner. For example, in *California Building Industry Association v City of San Jose*,[99] the use of financial incentives was structured in such a way as to encourage the development of affordable housing units alongside market-rate units.[100] The prospect of constructing off-site developments was thus avoided, resulting in a more socially integrated housing project.

The concept of spatial justice and its subsidiary development principles require us to seriously reflect on the sustainability and efficiency of state intervention measures when development applications are considered and when permitted housing developments are implemented. This is the net effect of SPLUMA.[101] In addition, Principle 27 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights[102] states as follows:

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[97] Kautz BE "In defense of inclusionary housing: Successfully creating affordable housing" (2002) 36 *U. S. F. L. Rev.* 971—1032 983.
[98] Also see Amicus Curiae's brief in City of San Jose, available online at https://www.beacontn.org/amicus-brief-california-building-industry-assn-vs-city-of-san-jose/ (accessed on 23 July 2020)
[99] 351 P.3d 974 (Cal. 2015).
[100] §5.08.020; §5.08.450 of the San Jose Municipal Code.
[101] Section 7 (b) (v) of SPLUMA.
[102] *The Limburg Principles on the Implementation of The International Covenant on Economic, Social and Cultural Rights*, UN Doc E/CN4/1987/17, Annex, reprinted in 9 *Human Rights Quarterly* (1987) 122—35.

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> "In determining whether adequate measures have been taken for the realization of the rights recognized in the Covenant attention shall be paid to equitable and effective use of and access to the available resources."

The use of financial incentives can lead to unsustainable outcomes by placing public resources under tremendous strain, especially where development conditions are imposed on many private developers. It is submitted that this will depend on the nature of the imposition, as a mandatory inclusionary housing programme is more likely to raise questions about sustainability (although it may be effective in ensuring that more affordable housing units are built).

3.2.3 Negative obligations

Section 26 (1) of the Constitution requires the state, organs of state and private individuals to desist from preventing or impairing the right of access to adequate housing.[103] This negative obligation is further underscored by section 26 (3) of the Constitution which provides that no one may be evicted from their home, or have their home demolished, without a court order.[104] A court order will only be issued upon the court considering all the relevant circumstances.[105] In *Pheko v Ekurhuleni Metropolitan Municipality*[106] ('*Pheko*') the Constitutional Court held that a court order is required in

[103] *Grootboom* para 34. The Court had previously held in *Certification Judgment, Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 para 78 that socio-economic rights could, at a minimum, be "negatively protected from improper invasion." Also see *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) paras 33 & 34 ('*Jaftha*').

[104] De Vos states that the negative obligation is inspired by respect for the autonomy of the individual, and that it corresponds to the traditional view of rights as shields against government interference. See De Vos P "The right to housing" in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* (2005) 85—106 92 ('De Vos "The right to housing"').

[105] The nature of the court's obligation in establishing the relevant circumstances in each case was explained in cases such as *Port Elizabeth Municipality v People's Dialogue on Land and Shelter* 2000 (2) SA 1074 (SECLD) 1081 D-E where it was stated that in an eviction matter the court must balance the competing interests of the owner and the occupier. Subsequently, in *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 36 Sachs J stated that "active judicial management" may be necessary to assist the court to gather the relevant circumstances. As a result of the requirement to consider all relevant circumstances, certain trends have emerged in judicial decisions regarding the connection between PIE and relevant circumstances. Similar concerns have been raised about the process of adjudication and its ability to establish relevant circumstances in England. In this regard, there have been calls to reform this process, especially insofar as the mental health of the parties may be a concern. See Bright S & Whitehouse L *Information, advice & representation in housing possession cases* (2014) 3. Also see Fertig AR & Reingold DA "Public housing, health, and health behaviors: Is there a connection?" (2007) 26 *Journal of Policy Analysis and Management* 831—859 835; Magidimisha HH & Mapungu L "Unconventional housing provision: Reflections on health aspects- a case study of Zimbabwe" (2011) 26 *J. Hous. & Built Envir.* 469—485 475.

[106] 2012 (2) SA 598 (CC).

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effecting eviction even where the eviction is authorised by statute.[107] This principle, coupled with the narrow reading of statutory provisions authorising eviction, ensure that the protection against homelessness afforded by section 26 (3) of the Constitution is not rendered ineffective.[108]

To illustrate the interconnection between this obligation and the positive obligation discussed above, it has been argued that the negative obligation may entail the state's failure to take positive action. Liebenberg argues that prevention or impairment of the right of access to adequate housing can flow from the state's failure to take positive action.[109] The negative obligation has featured prominently in cases concerning debt and mortgage foreclosures, prompting the courts to explain how section 26 (3) can be violated not just by the state but also private individuals. In *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others*[110] ('*Jaftha*') the question was whether the execution of a warrant for the payment of a debt could take place without a court's supervision. The two applicants in the case were poor women who resided in Prince Albert. Their homes had been sold pursuant to warrants of execution for extraneous debt.[111]

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[107] *Pheko* para 35.

[108] In *Pheko* paras 37—38, the Court therefore interpreted the term "evacuation" in accordance with the above-mentioned principles. Section 55 (2) of the Disaster Management Act 57 of 2002 provides:

> "If a local state of disaster has been declared in terms of subsection (1), the Municipal Council concerned may, subject to subsection (3), make by-laws or issue directions, or authorize the issue of directions, concerning:
> …
> (d) the evacuation or temporary shelters of all or part of the population from the disaster-stricken or threatened area if such action is necessary for the preservation of life."

As a result of the Court's interpretation of this provision, an evacuation can only be undertaken when individuals are removed to a place of safety.

[109] Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (2010) 214 ('Liebenberg *Socio-economic rights*'); Muller *The impact of section 26 on eviction* 93. This approach is similar to that adopted by the European Court of Human Rights ('ECtHR') which has often recognized that the obligation to respect human rights entails not just the duty to abstain from interference, but also the duty to take positive steps. See Langford M "The justiciability of social rights: From practice to theory" in Langford M (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 3—45 14.

[110] 2005 (2) SA 140 (CC).

[111] A *nulla bona* return had been issued by the Sheriff to signify that there was insufficient movable property to satisfy the judgment debt. In terms of section 66 (1) (a) of the Magistrates' Court Act 32 of 1944, the clerk of the Court is obliged to issue a warrant of execution if the Sheriff issues a *nulla bona* return. Furthermore, if the warrant is not set aside and the debtor fails to enter an Appearance to Defend, the clerk may enter judgment in favour of the creditor.

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As Brits notes, the traditional position had always been to ignore personal circumstances when adjudicating mortgage disclosures.[112] This position is reflected in the maxim *ubi ius ibi remedium* (where there is a right there is a remedy).[113] All that the debtor needed to show was that the debt was due and payable, whereupon she was entitled to a judgment in the full outstanding amount. Section 26 of the Constitution was meant to considerably alter this position, allowing courts to consider extraneous matters in the mortgage foreclosure process. Mokgoro J emphasised that section 26 of the Constitution draws a link between the right of access to adequate housing and the inherent dignity of all human beings.[114] The Court recognized that a limitation was imposed upon a homeowner's right of access to adequate housing by a sale in execution of her home as provided for by the Magistrates Courts Act.[115] However, it stated that this could only be done if a court supervised the process. It was significant in this case that the debt was relatively small, and that it had not been secured by mortgage bond.

Mokgoro J approached this case from the standpoint of property law even though she admitted that it posed a welfare problem.[116] This insightful remark illustrates that there may well be cases whose facts cry out for a property-law-related remedy. Brits argues that homelessness cannot be addressed fully if it is approached as purely a welfare issue.[117] The implication of this position is that property law is relevant to the determination of the issue whether a person's security of tenure is threatened by a statutory provision. However, the question to be answered in this chapter is whether

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[112] Brits R *Mortgage foreclosure under the constitution: Property, housing and the National Credit Act* (2012) 63 ('Brits *Mortgage foreclosure under the Constitution*').
[113] *Nedcor Bank Ltd v Kindo* 2002 (3) SA 185 (C) 186—188.
[114] *Jaftha* para 21; *PE Municipality* paras 10, 12, 15, 41 and 42; *Daniels v Scribante and Others* 2017 (4) SA 341 (CC) paras 29, 30—34 ('*Daniels*'). Marais and Muller argue that the reliance by the Court in *Daniels* on human dignity (section 10 of the constitution) was inappropriate in view of the single-system-of-law approach that has been established by the jurisprudence of the Court (see *Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa* 2000 (2) SA674 (CC) para 44). They argue that the Court used human dignity as a general right to provide a remedy, seemingly ignoring specialized common law rules on unjustified enrichment. This amounted to an arbitrary choice of legal sources which ignored the more structured approach proposed by the subsidiarity principles. See Marais EJ & Muller G "The right of an ESTA occupier to make improvements without an owner's permission after *Daniels*: *Quo vadis* statutory interpretation and development of the common law?" (2018) 135 766—798 781, 783 ('Marais & Muller "The right of an ESTA occupier to make improvements"').
[115] Act 32 of 1944.
[116] *Jaftha* para 30.
[117] Brits *Mortgage foreclosure under the Constitution* 60.

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property law is also relevant to the realization of affordable, well-located housing.[118] It must be emphasised that the forms of property claim that are often made in this context transcend the ownership model, extending to non-ownership aspects of people's lives and their connections to the places where they live, work, and love.[119] Therefore, property theory fully supports the assertion of people-place relations that would not otherwise be recognized within the ownership model. The Constitutional Court stated in *PE Municipality* that statutory and common law rights enforcement cannot alone form the basis upon which the re-organization of the urban form will be achieved.[120] Insistence on the enforcement of legal rights can lead to social exclusion.[121] Instead, what is required is a commitment to new forms of claims to urban space based on equity and justice. This seems to be what the notion of "just and equitable" in section 26 (3) was calculated to achieve.[122] However, the potential for the full realization of this property, non-ownership ethos for space production has been limited because courts continue to reinforce the rights language in their consideration of justice and equity concerns. The focus on rights continues to privilege economic growth at the expense of forging people-place relations, with the landowner effectively assuming the role of planner.[123]

It must be stated that justice and equity are limited in terms of the role they can play in land use law because no overarching principle privileges the right not to be evicted over other public purposes or values pursued by the Constitution.[124] The Supreme

[118] These are the two relevant parameters for adequate housing that form the basis of this chapter. Together with security of tenure and four other factors, they are mentioned in General Comment 4 para 8. See para 3.2.1 above.
[119] Van Wagner E *The place of private property in land use law: A relational examination on Ontario's quarry conflicts* (2017) ii, 21, 22 ('Van Wagner "Property in land use law"').
[120] It is important to stress that South Africa's peculiar circumstances and the homelessness and landlessness that is experienced are partly a result of the apartheid regime's policy of influx control. This policy aimed at limiting Africans' occupation of urban land. See *Grootboom* para 6; De Vos "The right to housing" 85. The policy was implemented through a raft of oppressive statutes, including the Prevention of Illegal Squatting Act 52 of 1951 ('PISA'). Sections 1 and 2 of the Act criminalized the act of entering and remaining on land or buildings without any lawful reason. This was later supplemented by the Black Laws Amendment Act 54 of 1952 (amending section 10 of the Black (Urban Areas) Consolidation Act 25 of 1945) which stated that blacks could only remain in urban areas for 72 hours without a permit. Furthermore, the Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952 consolidated previous pass laws and obliged all black males to carry a reference book at all times, while the Black Service Levy Act 64 of 1952 provided for the taxation of employers to fund the provision of housing and services in the townships. See Muller *The impact of section 26 on eviction* 55.
[121] *PE Municipality* paras 22 & 23. Also see Strauss Right *to the city for SA* 233.
[122] Strauss *Right to the city for SA* 211—212.
[123] Van Wagner "Property in land use law" 334.
[124] *Malan v City of Cape Town* 2014 (6) SA 315 (CC) para 57.

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Court of Appeal has cautioned that one's home does not necessarily receive greater constitutional protection than other rights.[125] In *Lester v Ndlambe Municipality and Another*[126] ('*Lester*') the Court rejected an attempt to invoke section 26 (3) of the Constitution to aid a property owner who had erected a holiday home illegally.[127] The Court stated that to interpret section 26 (3) of the Constitution one had to bear in mind the history of evictions in South Africa and the purpose for which they were conducted.[128] Evictions were meant to enforce the policy of racial segregation. Section 26 (3) should therefore be seen as an attempt to break from that unfortunate past.[129] Quoting Mokgoro J in *Jaftha*,[130] Masjiedt JA stated that section 26 (3) was connected to the realization of security of tenure for the most vulnerable in society.[131] The Court decided that Lester had to show that he would not be in a position to afford alternative accommodation if a demolition order was granted against him. Since his house was essentially a luxury home, he could not fulfil this requirement.[132]

The property, non-ownership ethos of space production is supported by the notion that the South African Constitution does not recognize the absolute ownership of property.[133] Property ownership must be based on a sense of what is in the public

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[125] Viljoen S "Property and 'Human Flourishing': A reassessment in the housing framework" (2019) 22 *PELJ* 1—27 10 ('Viljoen "Property and human flourishing"').
[126] 2015 (6) SA 283 (SCA).
[127] Ndlambe Municipality had applied for a demolition order in terms of section 21 of the National Building Regulations and Building Standards Act 103 of 1977. It was apparent that Lester's building had been erected without approved building plans which were required by section 4 (1) of the Act. Before the SCA, Lester had launched a counterapplication for alteration of the building, expressly relying on section 26 (3) of the Constitution. Masjiedt JA held that the reliance on section 26 (3) was misplaced.
[128] Similar sentiments were expressed by Mokgoro J in *Jaftha* para 25. Further, see Muller G "The legal-historical context of urban evictions in South Africa" (2013) 19 *Fundamina* 367—396 369 ('Muller "Legal-historical context of evictions"'); Van der Walt AJ *Constitutional property law* 2 ed (2005) 413; Van der Walt AJ "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation" (2002) 2 *J. S. Afr. L.* 254—289 258 ('Van der Walt "South African land reform legislation"'); Van der Walt AJ "Dancing with codes: Protecting, developing, limiting and deconstructing property rights in the constitutional state" (2001)128 *SALJ* 258—311 265—279.
[129] By implication, subsections (1) and (2) of section 26 must also be read in accordance with this principle since all these subsections must be read together.
[130] At para 29, Mokgoro J stated as follows:

> "Section 26 must be seen as making that decisive break from the past. It emphasises the importance of adequate housing and in particular security of tenure in our new constitutional democracy."

[131] *Lester* para 17.
[132] *Lester* para 17. The Court cited its previous decision in *Standard Bank of South Africa v Saunderson* 2006(2) SA 264 (SA) para 17 to the effect that executing a writ against a luxury home does not raise the issue of the right of access to adequate housing in terms of section 26 of the Constitution.
[133] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) para 49 ('*FNB*').

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interest.[134] The Constitution does not sanction the individualistic idea that property interests are purely private, or that they are trumps against all public goals.[135] The Constitution supports the idea of recognising the social or use value of space, instead of property *per se*.[136] As Dhliwayo puts it, "ownership and the right to exclude allow for the existence of limitations as a matter of course."[137] Furthermore, Froneman J stated in *Daniels v Scribante and Others* [138] ('*Daniels*') that the idea of absolute ownership is contrary to the purposes for which political and economic freedom were established in South Africa.[139] Coggin cautions that the dominant discourse continues to be one that privileges the propertied interests that exist in the city despite a clear constitutional commitment to a different paradigm.[140] For example, he notes Harvey's statement that "the rights to private property and the profit rate trump all other notions of rights we can think of."[141]

3.2.4 Conclusion

Since inclusionary housing is based on the need for affordable housing but also on the imperatives of social and economic integration, there must be a nuanced approach to applying the non-arbitrariness test to measures that deprive landowners of their property. Where a measure is likely to achieve the affordability of housing but fails to ensure that the integrative objectives are attained, it will amount to an arbitrary deprivation of property.

The positive housing obligations imposed upon the state by section 26 (2) of the Constitution must be analysed alongside the specific requirement in section 25 that a

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[134] *FNB* para 49.
[135] Coggin T "Redressing spatial apartheid: The law of nuisance and the transformative role of social utility and the right to the city" (2016) 133 *SALJ* 434—451 434, 435 ('Coggin "Redressing spatial apartheid"').
[136] On social or use value, see Purcell M "Excavating Lefebvre: The right to the city and its urban politics of the inhabitant" (2002) 58 *GeoJournal* 99—108 103; Butler C *Henri Lefebvre: Spatial politics, everyday life and the right to the city* (2012) 145; Strauss *Right to the city for SA* 93—94.
[137] Dhliwayo P *A constitutional analysis of access rights that limit landowners' right to exclude* (2015) 242 ('Dhliwayo *Landowner's right to exclude*')
[138] 2017 (4) SA 341 (CC) para 136. Also see Michelman FI & Marais EJ "A constitutional vision for property: *Shoprite Checkers* and beyond" in Muller G, Brits R, Slade BV & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ Van der Walt* (2018) 121—146 145.
[139] Also see the remarks of Ackermann J in *FNB* para 50. He stated:

> "The purpose of section 25 [of the constitution] has to be seen both as protecting existing private property rights as well as serving the public interest, mainly in the sphere of land reform but not limited thereto, and also as striking a proportionate balance between these two functions."

[140] Coggin "Redressing spatial apartheid" 434.
[141] Harvey D *Rebel cities: From the right to the city to urban revolution* (2012) 3.

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law imposing a deprivation of property should not be arbitrary. In this section, I have discussed the concepts of reasonable legislative and other measures, progressive realization, and the availability of resources in conjunction with the *FNB* non-arbitrariness test. Several points in this section allude to the nuances of relating the non-arbitrariness test to the 3 elements of section 26 (2). First, the reasonableness of the legislative or other measures taken to fulfil the housing right does not depend on the statistical impact it will have on the housing backlog. Reasonableness should depend on whether a distinct housing need has been identified. If so, then it would be unreasonable to overlook it simply because relatively few individuals would benefit from it. Secondly, the progressive realization of the housing right assists in ensuring that property owners are cushioned against the impact of undue government interference with their property rights. In the inclusionary housing context, although the statistical impact of the programme is already quite limited, it is useful to further restrict the number of potential beneficiaries. This can be achieved by ensuring that only those who can afford the housing and associated services such as water and electricity are selected. This section stresses that the progressive realization of the housing right is consistent with the principle of spatial justice as defined by SPLUMA. Although spatial justice aims at the inclusivity of the preciously excluded, this cannot happen immediately but over time. Thirdly, the concept of the availability of resources means that any housing programme (such as inclusionary housing) that heavily depends on financial subsidies must be carefully considered. Although it has been claimed in some jurisdictions that inclusionary housing does not involve the spending of public resources, the idea of housing development in South Africa is, to some extent, inherently bound to the expenditure of public resources.[142]

[142] Section 2 (k) of the Housing Act requires all spheres of government to “stimulate” private investment in housing development using public money that is available for the purpose. Similarly, section 2 (2) (e) of SPLUMA requires municipalities to encourage the implementation of SDFs through incentives.

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3.3 The policy and legislative frameworks for housing

3.3.1 Introduction

The recognition that the lack of adequate housing calls for policy and legislative intervention can be traced to the Constitution itself. As previously discussed, section 26 of the Constitution requires the state to take reasonable "legislative and other measures" to give effect to the right of access to adequate housing. However, this provision gives no indication of the extent to which the right to private property may be regulated through legislative and other measures (which include policy) to fulfil this obligation. It must be emphasized that the most relevant property types that need to be regulated in implementing inclusionary housing are landownership and expected earnings. This section therefore attempts to clarify how the policy and legislative frameworks on the right of access to adequate housing can influence the recovery by developers of the costs of housing provision. I connect the policy and legislative frameworks to section 26 of the Constitution, arguing that these frameworks fail to address the need to regulate property rights while implementing section 26 of the Constitution.

3.3.2 Housing policy

The importance of policy lies in the fact that it constitutes a flexible, adaptable mechanism through which the ground rules on the attainment of governmental goals can be established.[143] In terms of housing, it has already been shown that the decision in *Grootboom* acknowledges that the opportunities for the attainment of this right will vary greatly depending on the circumstances of each case. Graddy and Bostic illustrate the connection between policy and housing by stating:

> "In places facing affordable housing challenges, the rents and sales prices needed for a development project to cover construction and other development costs far

[143] Fuo distinguishes between "political" policy and "executive" policy. The former consists of "plans of action adopted by a political party or the government in power and presented to the public as a series of value preferences" to be implemented. The latter is typically derived from political policy and translated into legislation before guidelines for the implementation of the legislation are adopted. See Fuo ON "Constitutional basis for the enforcement of executive policies that give effect to socio-economic rights in South Africa" (2013) 16 *PELJ* 1—44 5, 6 ('Fuo "Executive policies and socio-economic rights in SA"). Also see Hattingh J *Governmental relations: A South African perspective* (1998) 55; Cloete J *Public administration and management. New constitutional dispensation* (1994) 94; De Coning C "The nature and role of public policy" in Cloete F & Wissink H (eds) *Improving public policy* (2000) 3—22 7.

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> exceed those that can be afforded by lower income (and sometimes middle-income) households. As a consequence, intervention is needed to fill this gap between rents dictated by construction costs and the affordable rents needed by lower income households and to, thus, encourage the production of affordable housing."[144]

The connection was acknowledged in *Grootboom* where the Court emphasized that a reasonable measure under section 26 of the Constitution must cater for different housing needs. The use of policy in the South African legal context has an unfortunate history as the apartheid government resorted to policies such as separate development and influx control[145] to enforce the segregation of blacks. The contemporary role of policy is therefore to reverse the decades of enforced racial segregation that have led to the majority of the South African population living in unaffordable, poorly located housing to date. Below, I consider three key policies that would materially impact the implementation of inclusionary housing in South Africa.

3.3.2.1. White Paper on Housing[146]

The White Paper on Housing ('WPH') was formulated in 1994 to deal with the then existing housing challenges. South Africa had just emerged from decades of apartheid rule, characterised by the forced removal of blacks from land that they considered home. The WPH estimated that there would be 8.3 million households in 1995.[147] It also estimated that 66% of the population were "functionally urbanised."[148] This presented serious challenges for governance because it meant that at the dawn of democracy, two thirds of the population lived in urban areas with virtually no access

[144] Graddy EA & Bostic RW "The role of private agents in affordable housing policy" (2010) 20 *J. Publ. Admin. & Research* 81—99 83.
[145] Influx control measures were also known as "pass laws" and were based on statutes such as the Natives (Urban Areas) Act 21 of 1923 and the Natives (Urban Areas) Consolidation Act 25 of 1945. The net effect of these laws was to severely restrict rural—urban movement. Although these laws were abolished by the Abolition of Influx Control Measures Act 68 of 1986, this has not resulted in any meaningful change in the logic of apartheid spatial planning. For a detailed description of the implementation of the influx control policy, see *Ex Parte Western Cape Provincial Government and Others: In Re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* 2000 (4) BCLR 347 (CC) paras 41—47. Also see Muller *The impact of section 26 on eviction* 52—57; Pienaar JM "Land reform and housing: Reaching for the rafters or struggling with foundations?" (2015) 30 *SAPL* 1—25 5 ('Pienaar "Land reform and housing"').
[146] Department of Housing (DOH) *White Paper: A new housing policy and strategy for South Africa*, General Notice 1376 of 1994, Government Gazette 16178, 23 December 1994.
[147] Para 3.1.1 of the WPH.
[148] Para 3.1.1 of the WPH.

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to water, electricity or sanitation services.[149] Furthermore, the WPH noted concerns over the dwindling housing stock, which meant that an increasing number of people sought accommodation in informal settlements.[150]

A key feature of the strategy proposed by the WPH was that communities should pay for the operational and maintenance costs of the services provided to them.[151] The WPH discourages the use of national uniform tariffs, proposing instead a system of regional variations in tariffs. While the WPH charges local authorities with the responsibility of providing external bulk and connector services, it requires developers to provide internal infrastructure at their own cost.[152] Finally, the WPH notes that the high costs of housing provision impede housing affordability, and proposes subsidies as a way to contain such costs. Notably, the WPH envisages that the focus of subsidies should be housing provision for those most in need.

3.3.2.2. Breaking New Ground Policy[153]

The Breaking New Ground Policy ('BNG') aims to eradicate informal settlements by incorporating them into mainstream residential areas. In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes*[154] ('*Residents of Joe Slovo*') Ngcobo J explained that the purpose of the BNG was to ensure that the growth of informal settlements is halted.[155] This has to be done by upgrading these settlements and constructing adequate housing.

[149] Para 3.1.4 of the WPH.
[150] Para 3.1.3 of the WPH.
[151] Para 5.8.4 of the WPH.
[152] Similar wording has subsequently been adopted by section 49 of the Spatial Planning and Land Use Management Act 16 of 2013 which provides that a developer is responsible for the installation of "internal infrastructure" while the municipality is responsible for "external infrastructure." Graham and Berrisford observe that there is a need for the precise definition of bulk, connector and link services, and how these will be charged for. See Graham N & Berrisford S "Development charges in South Africa: Current thinking and areas of contestation" (2015) 1—15 14, available online at https://www.imesa.org.za/wp-content/uploads/2015/11/Paper-1-Development-charges-in-South-Africa-Current-thinking-and-areas-of-contestation-Nick-Graham.pdf (accessed on 25 February 2020) ; Van Niekerk B "Housing as urbanism: A policy to discourage urban sprawl and provide well-located and affordable housing in South Africa" (2018) 3 *Town & Regional Planning* 68—82 73.
[153] *Breaking New Ground: A Comprehensive Plan for the Development of Sustainable Human Settlements* (2004), available online at http://www.capegateway.gov.za/Text/2007/10/bng.pdf (accessed on 6 May 2017).
[154] 2010 (3) SA 454 (CC).
[155] *Residents of Joe Slovo* para 203.

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The BNG envisages the continued use of subsidies to increase the affordability of housing. However, in line with its goal of regulating the entire housing market, the BNG notes that although subsidies were previously restricted to households earning less than R3500 per month, this had led to a disjuncture between subsidised and non-subsidised housing in South Africa. The BNG therefore introduced a new subsidy mechanism that would also benefit medium-income households (earning between R3500 and R7000 per month). Furthermore, the BNG notes that the prevailing subsidy mechanism typically only applied in respect of new housing ("supply side delivery model"),[156] meaning that many people were locked out of housing opportunities simply because they could not raise the money to acquire housing.[157] The new subsidy mechanism was therefore meant to solve this problem by promoting a "demand side delivery model" to enable individuals to acquire housing.[158] The demand side delivery model will focus on the state's role in determining the location and nature of housing, whereas previously that function was exclusively performed by private developers.[159]

The BNG acknowledges that housing location is important and notes the sad reality that apartheid spatial planning detrimentally affected housing projects in terms of location.[160] The policy proposes that the acquisition of land for housing development should be done by first focusing on public land before resorting to private land.[161] The acquisition of private land should preferably be done through negotiation, after which

[156] A key assumption of this thesis is that inclusionary housing can only apply in respect of new housing. This is because it relies on building controls as one of the two mechanisms for its implementation. The other is rent controls. See paras1.3 and 1.5 above.
[157] Para 2.4 of the BNG.
[158] Para 2.4 of the BNG. On demand-side and supply-side housing development, see Huchzermeyer M "Addressing segregation through housing policy and finance" in Harrison P, Huchzermeyer M & Mayekiso M (eds) *Confronting fragmentation: Housing and urban development in a democratising society* (2003) 211—227 222, 223. It is notable that several other subsidy programmes have been instituted to give individuals and families an opportunity to acquire housing. The National Housing Code (first published in 2000) was published in line with the Housing Act 107 of 1997. Several changes have been introduced to the Code to bring it in line with the BNG. A revised version of the Code was published in 2009. It spells out various types of subsidies. For example, institutional subsidies are mainly targeted at Social Housing Institutions and are meant to provide them with capital grants to build affordable rental housing within approved restructuring zones in terms of the Social Housing Act. See Department of Human Settlements *A simplified guide to the National Housing Code* (2009) Part 1 para 6.1. ('DHS *Guide to the Housing Code*'). The Individual Subsidy Programme is aimed at properties that are not part of the national housing programmes but which are linked to a construction contract. Qualifying households who wish to acquire a house or a serviced stand can apply for this subsidy which will be administered either as a credit-linked or non-credit-linked facility, depending on whether the applicant can afford mortgage loan finance. See DHS *Guide to the Housing Code* para 8.1 & 8.3.
[159] Tissington *Resource guide to SA housing* para 6.4.2.1.
[160] Para 3.4 of the BNG.
[161] Para 3.4 of the BNG.

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the state may resort to expropriation.[162] Lastly, the use of fiscal incentives to develop well-located land is also envisaged.

The approach adopted by the BNG is therefore heavily weighted towards state acquisition of land for housing development. It proposes to enhance housing location through the divestment of some of the incidents of ownership of property from private owners, such as the right to exclude. Fiscal incentives are only intended for the development of well-located land that has been acquired from private owners in line with the negotiation and expropriation mechanisms mentioned above. The BNG therefore lacks the capacity to encourage greater locational justice through simply regulating the owner's right to economically exploit her property, even if she does not intend to dispose of it.

3.3.2.3. Framework for an Inclusionary Housing Policy[163] ('IHP Framework')

In September 2005, a Social Contract for Rapid Housing Delivery was signed between the government and players in the housing development market, including property owners. The Social Contract stipulated that "[e]very commercial development including housing developments that are not directed at those earning R1500 or less, spend a minimum of 20% of project value." No formal legislation followed from this Social Contract. However, in 2007, the Framework for IHP was drafted. The framework document outlines the international experiences relating to the implementation of inclusionary housing, noting that there are two distinct objectives for implementing the programme, namely, affordable housing and social/economic inclusivity. It then proceeds to sketch the South African context for implementing inclusionary housing.

The framework document notes the high levels of income inequality in South Africa, which would hamper the proper functioning of inclusionary housing because steep "income cliffs"[164] are not ideal for economic integration.[165] This makes it harder to blend income inclusivity and project viability in South Africa than elsewhere in the world.[166]

[162] Para 3.4 of the BNG.
[163] *Framework for an inclusionary housing policy in South Africa* (2007), available online at http://abahlali.org/files/Framework%20for%20an%20Inclusionary%20Housing%20Policy%20in%20SA.PDF (accessed on 23 February 2020).
[164] See SAPOA *Inclusionary housing* 40.
[165] IHP Framework 7.
[166] IHP Framework 7.

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Secondly, the document notes that race and class still define the housing development process. It notes that a schism has developed between the building process in respect of the poor and the rich. While the government largely builds homogenous, poorly located housing for the poor (mainly black) section of the population, the private sector develops high-end homes in gated suburbs for the rich (mainly white) section of the population.[167] Against this backdrop, the document states that some clarification is needed with regard to the use and development rights of landowners if inclusionary housing is to operate optimally.[168] It suggests that the "existing rights" paradigm should not apply to inclusionary housing because modern multi-unit housing developments are usually preceded by an application for rezoning or sub-division.[169] This presents an opportunity to create new rights through the imposition of inclusionary housing requirements.[170]

3.3.2.4. Conclusion

When the WPH was devised at the dawn of democracy, it was clear that the immediate problem was the rapid urbanization that had been taking place in South Africa, which had led to many people migrating to urban centres in search of a livelihood. This led to the proliferation of informal settlements with little or no access to services such as water, electricity and refuse collection. South Africa emerged from a past of forced removals, influx control and the racially directed social engineering of the urban space that sought to deny blacks access to land, housing and services. Because of this history, the WPH mainly focused on encouraging a culture of payment for services rendered to communities while allowing local authorities to set the tariffs that would be applied. The WPH also noted that subsidies should be utilised to reduce the costs associated with housing provision. However, the WHP did not directly address the need for financial assistance to developers to off-set these costs. The BNG subsequently noted the need for increased state involvement in determining the location and type of housing developed,[171] which naturally would mean increased state regulation of private property rights. This can be understood as referring to location

[167] IHP Framework 8.
[168] IHP Framework 16.
[169] IHP Framework 16.
[170] IHP Framework 16.
[171] Paras 2.4 and 5.2 of the BNG.

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and affordability of housing, two characteristics of adequate housing identified by *General Comment 4*.[172] In this way, the BNG sets the stage for the regulation of property rights in the interest of location and affordability of housing, although it does not suggest how this should be achieved. The policy framework seems largely directed at security of tenure. It does not sufficiently ensure that the right of access to adequate housing set out in section 26 of the Constitution will be realised through the provision of affordable, well-located housing.[173]

3.3.3 Legislation

3.3.3.1 Introduction

Apartheid's strategy of legislating against the occupation of mainly urban areas by blacks was carried out mainly against the background of parliamentary supremacy where the Legislature's enactments could not be questioned against a constitutional standard.[174] No consideration was given to the actual housing needs of blacks. Instead, housing development and planning were carried out for an overtly political purpose, namely, to restrict blacks to impoverished living spaces, and to render them dependent on the minority white population for employment.[175] This rationale

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[172] See para 3.2.1 above.

[173] In *Minister of Health and others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 99, the Constitutional Court stated the following:

> "Where state policy is challenged as inconsistent with the constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the constitution to say so."

[174] The situation was remarkably like that in India as discussed in Chapter Four. This saw the Indian Legislature and the Indian Supreme Court fighting a turf war over, *inter alia*, the right to property under the Indian constitution.

[175] Turok I "Urban planning in the transition from apartheid: Part 1: The legacy of social control" (1994) 65 *The Town Planning Review* 243—259 243 ('Turok "Urban planning"'). Also see Van der Walt "South African land reform legislation" 263—264. Further, for a comprehensive discussion of the implementation of the Black Service Contract Act 24 of 1932, see Muller *The effect of section 26 on eviction* 10; and *Residents of Joe Slovo* para 150, where the Court referred to the Coloured Labour Preference policy which led to a "deliberate stance that no housing would be provided for Africans in Cape Town in order to stem or minimise African presence and family life in Cape Town." Referring specifically to the Black Land Act 27 of 1913 and its role in enabling the exclusion of blacks from land, Bundy states:

> "What the 1913 Act attempted was to legislate out of existence the more independent forms of tenure and to perpetuate instead the most dependent. Its intention was to outlaw cash-paying tenants, and in the Orange Free State to forbid all sharecropping agreements. The Act was intended to reduce cash tenants and sharecroppers to the status of labour tenants or wage labourers."

See Bundy C "Land, law and power" in Murray C & O'Regan C (eds) *No place to rest: Forced removals and the law in South Africa* (1990) 3—12 6. Also see *Grootboom* para 6; O'Regan C "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act" (1989) 5 *SAJHR* 361—

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permeated all decision making regarding the allocation of space, at least for blacks. Of course, this contrasted with the situation for the white segment of the population: prime living spaces, relatively superior amenities, and job reservations in their favour.[176] The domination of whites over blacks was the lynchpin of the apartheid system, and this had a veritably spatial manifestation in the form of separate living conditions and different opportunities available to whites and blacks.[177] Against this background, the holding of the first democratic elections and the introduction of a new constitutional dispensation were momentous. Not only was South Africa committed to achieving equal opportunities for all, but access to land[178] and natural resources[179] was to be underpinned by a clearly defined land reform programme,[180] which would, *inter*

394 374; Hindson D *Pass controls and the urban African proletariat* (1987) 87; Muller "Legal-historical context of evictions" 371.

[176] Turok "Urban panning" 243.

[177] Turok "Urban planning" 243. Also see the remarks of Sachs J in *PE Municipality* para 10 where he stated the following:

> "Differentiation on the basis of race was accordingly not only a source of grave assaults on the dignity of black people. It resulted in the creation of large, well-established and affluent white urban areas co-existing side by side with crammed pockets of impoverished and insecure black ones."

Also see *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) para 19, per Langa DP (as he then was).

[178] Pienaar and Brickhill note the difference between the Interim Constitution of 1993 and the Final Constitution of 1996 regarding access to land. This is that the Interim Constitution only granted rights to land restitution, which is one of the three planks of the land reform programme (the others being land redistribution and land tenure reform). See Keightley R "The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property" (1999) 15 *SAJHR* 277—307 277 ('Keightley "ESTA and vindication of immovables"'); Viljoen S & Strydom J "Tenure security and the reform of servitude law" in Muller G, Brits R, Slade BV & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ Van der Walt* (2018) 96—120 99). The Final Constitution provides for all three components of land reform. See Pienaar J & Brickhill J "Land" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa* 2ed (Revision Service 5, January 2013) 48-1—48-68 48-4.

[179] Access to natural resources is provided for in sections 24 and 25 of the Constitution. Section 24 provides:

> "Everyone has the right—
> (a) to an environment that is not harmful to their health or wellbeing; and
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—
> (i) prevent pollution and ecological degradation;
> (ii) promote conservation; and
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

Section 25 (4) provides:

> "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…"

Van der Linde and Basson illustrate the connection between the environment and the enjoyment of other rights, including the right to property. See Van der Linde M & Basson E "Environment" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa* 2ed (Revision Service 5, January 2013) 50-1—50-68 50-11. I add housing to this list because the environment may directly affect habitability, one of the characteristics of adequate housing. See *General Comment 4* para 8 (d).

[180] Section 25 (8) of the Constitution provides:

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alia, ensure sustained access to better housing opportunities and better living conditions for all.[181] Henceforth, South Africa's housing programme would be based on a foundation of human rights, as opposed to the whims of an unpopular, undemocratic and oppressive state and its machinery. Hell's logic had been supplanted[182] and South Africa could claim its rightful place as a member of the international community.[183] This further meant that South Africa had embraced the international community's normative standards of democratic transformation and the enforcement of the Bill of Rights.[184] There was a commitment to addressing the plight of every human being living within South Africa, regardless of whether they could be described as legal "citizens."[185]

The decision to embrace a human rights culture in the provision of housing was not fortuitous. It was based on the experience of international and foreign law.[186] The Constitution, as the supreme law of the land, would guide this human rights approach to produce what would be an acceptable housing environment that catered for affordable and well-located housing.[187] The courts have explicitly recognized that

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

[181] Strauss M & Liebenberg S "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428—448 433.

[182] See Davis M "Afterword - A logic like hell's: Being homeless in Los Angeles" (1991) 39 *U.C.L.A. L. Rev.* 325—332.

[183] Liebenberg *Socio-economic rights* 101.

[184] Liebenberg *Socio-economic rights* 101.

[185] The preamble to the Constitution states: "We the people of South Africa…believe that South Africa belongs to all those who live in it." In *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development* 2004 (6) SA 505 (CC) para 46 ('*Khosa*'), the Constitutional Court accordingly had to interpret certain provisions of the Social Assistance Act 59 of 1992 (specifically sections 3 (c) and 4 (b) (ii) and 4B (b) (ii), as amended by the Welfare Laws Amendment Act 106 of 1997). The Court held that the term "everyone" in section 27 (1) (c) of the Constitution includes South African permanent residents who were not citizens.

[186] Section 39 (1) (c) of the Constitution states that a court, tribunal, or forum may consider foreign law when interpreting the Bill of Rights. This provision forms the basis of the comparative chapter of this thesis (Chapter Four).

[187] Some commentators note the inadequacy of premising housing provision on human rights. For example, Williams asserts that:

> "Human rights discourse on its own provides little analytical assistance when addressing the difficult economic and institutional questions that must be faced in order to make housing rights a reality."

See Williams LA "The right to housing in South Africa: An evolving jurisprudence" (2014) 45 *Colum. Hum. Rts. L. Rev.* 816—845 822 ('Williams "Housing in SA"'). Also see Alexander LT "Occupying the constitutional right to housing" (2015) 94 *Nebr. L. Rev.* 245—301 255. Nevertheless, the human rights approach has been a prominent feature of various legal initiatives aimed at eradicating homelessness. It is in line with various key international treaties, including the Universal Declaration of Human Rights

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housing is about much more than just bricks and mortar.[188] However, the question is whether they have simultaneously fostered a dialogue on the importance of reforming property relations if the dream of adequate housing is to be realized.[189] It is important to focus on the ways in which the various statutes underpinning housing provision regulate incidents of ownership other than the right to exclude, while also supporting the realization of affordable and well-located housing (and not just tenure security).[190] Van der Walt describes land reform as an egalitarian programme whose main aim is to change the landholding patterns of the apartheid-era.[191] Land reform calls for the right balance between the interests of the landowner and those of the occupier.[192] The simultaneous protection of the landowner's and the occupier's interests leads to a tension between stability and change.[193] Since the Constitution is a transformative document, it seeks to alter the common-law logic of evictions that allowed the displacement of mainly black people for political reasons. Ownership gave the owner the right to do as she pleased with her property. This was the "normality assumption" that served as a potent tool, assisting the apartheid regime to perpetrate spatial injustices against a section of the population on racial grounds.[194] The plaintiff in an eviction case only needed to allege that she was the owner of the property, and that the defendant occupied the property.[195] The only way to defeat this assumption was to demonstrate the existence of "a counter-veiling common law right in the property."[196]

The changes effected by the Constitution severely restricted the common-law normality assumption. Henceforth, the only requirement for any form of regulation of

(UN General Assembly Resolution 217 A (III)) ('UDHR'). Article 25(1) of the UDHR enjoins the States Parties to ensure an adequate standard of living within their respective territories. This standard encompasses adequate provision of housing, access to health facilities, jobs and other social amenities. Other non-binding instruments that provide guidance on the right to housing include the Istanbul Declaration on Human Settlements (UNA/CONF 165/14 7 August 1996) and the Habitat Agenda (Adopted at the 18th plenary meeting, on 14 June 1996 of the UN Conference on Human Settlements). See, further, *General Comment 4* para 8; De Vos "Right to housing" 90—91.

[188] See *Grootboom* para 34; *PE Municipality* para 17.

[189] Pienaar "Land reform and housing" 1.

[190] See *General Comment 4* para 8, discussed at section 3.2.1.

[191] Van der Walt "South African land reform legislation" 254.

[192] Van der Walt "South African land reform legislation" 255.

[193] Van der Walt "South African land reform legislation" 255.

[194] Van der Walt "South African land reform legislation" 257; Wilson S "Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126 *SALJ* 270—290 270 ('Wilson "Evictions and a new normality"').

[195] See *Chetty v Naidoo* 1974 (3) SA 13 (A); *Marcus v Stamper and Zoutendijk* 1910 AD 58 72; *Krugersdorp Town Council v Fortuin* 1965 (2) SA 335 (T); *Akbar v Patel* 1974 (4) SA 104 (T) 109H; *Ontwikkelingsraad Oos-Transvaal v Radebe* 1987 (1) SA 878 (T) 886I—887D; *Ncangayi v Von Broembsen* 1920 CPD 538 539; *Vulcan Rubber Works v SAR&H* 1958 (3) SA285 (A) 289.

[196] Wilson "Evictions and a new normality" 270.

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property rights would be non-arbitrariness.[197] The statutes that were enacted to give effect to section 26 (3) of the Constitution are considered next. I focus on the Extension of Security of Tenure Act[198] ('ESTA'), and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act[199] ('PIE').[200] I briefly set out the purposes of these statutes, after which I discuss how they can be interpreted to focus on housing affordability and location.

3.3.3.2 ESTA

The ESTA was enacted with the aim of extending the rights of occupiers while giving due recognition to the rights, duties, and legitimate interests of owners. It is a constitutionally inspired statute. The Act regulates the eviction of "vulnerable occupiers" who have occupied rural land with consent. People earning more than R5000 or who intend to use the land for mining, commercial farming or industry do not qualify for protection under ESTA.[201] Keightley characterises the ESTA as a statute that provides short-term security of tenure in the sense that it protects people who are already residing on the land but whose tenure is precarious under the common law.[202] The ESTA also facilitates long-term security of tenure by obliging the minister in charge of land reform to disburse funds in the form of subsidies[203] and other assistance designed to promote the rights provided for in the ESTA.[204] In line with section 26 (3) of the Constitution, a court must consider all relevant circumstances, including the availability of alternative accommodation, when considering eviction under the ESTA.[205]

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[197] Wilson "Evictions and a new normality" 271.
[198] Act 62 of 1997.
[199] Act 19 of 1998.
[200] Act 50 of 1999.
[201] Section 1 (1) (x) (c) of ESTA; Pienaar J & Brickhill J "Land" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa* 2ed (Revision Service 5, January 2013) 48-1—48-68 48-28.
[202] Keightley "ESTA and vindication of immovables" 278.
[203] Section 4 of ESTA.
[204] Section 2 (3) of ESTA.
[205] In *Pitout v Mbolane* 2000 2 All SA 377 (LCC) para 20 and *Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons* 2000 3 All SA 279 (LCC) para 13, the Land Claims Court came to a different conclusion. It stated that the availability of alternative accommodation and the hardship caused by eviction should not be considered as relevant to the factors applicable under section 10 of ESTA. This was especially the case since the employees in both cases had voluntarily resigned. However, these decisions should now be regarded as having been overruled by *Valley Packers Cooperative Ltd v Dietloff* 2001 2 All SA 30 (LCC) para 8. Furthermore, in *Baron and Others v Claytile (Pty) Ltd and Another* LCC 21R (2014) (unreported) para 10, Meer AJP held that the availability of alternative accommodation was "undoubtedly" an important consideration under section 10 of ESTA. This was also confirmed by the Constitutional Court in *Baron CC* para 17.

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Section 4 (1) of the ESTA empowers the minister to grant subsidies for several purposes.[206] These purposes may be categorised into two groups. The first category of subsidies is targeted at people who wish to acquire land or rights in land for long-term tenure security.[207] The second group applies to the planning and development of on-site and off-site developments. This second group of purposes is consistent with the notion that these subsidies may be granted, *inter alia*, to private developers.[208]

The broader power to make funds available for the promotion of the rights provided for in the Act raises the question of what these rights are. The ESTA provides for certain fundamental rights for the benefit of owners, persons in charge and occupiers.[209] They include the right to family life,[210] the right to freedom of religion and burial rights and the right to legal representation. Additionally, the Act protects the occupiers' rights not to be denied or deprived of access to water,[211] educational or

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[206] Section 4 (1) of ESTA provides:

> "(1) The Minister shall, from moneys appropriated by Parliament for that purpose and subject to the conditions the Minister may prescribe in general or determine in a particular case, grant subsides—
> (a) to facilitate the planning and implementation of on-site and off-site developments;
> (b) to enable occupiers, former occupiers and other persons who need long-term security of tenure to acquire land or rights in land; and
> (c) for the development of land occupied or to be occupied in terms of on-site or off-site developments."

[207] According to Behrens and Wilkinson, individual subsidies account for 10% of all approved subsidies. See Behrens R & Wilkinson P "Housing and urban passenger transport policy and planning in South African cities: A problematic relationship?" in Harrison P, Huchzermeyer M & Mayekiso M (eds) *Confronting fragmentation: Housing and urban development in a democratising society* (2003) 154—174 155—156 (Behrens & Wilkinson "Housing and transport policy in SA"')

[208] Project-linked subsidies account for the bulk of approved subsidies (approximately 83%). See Behrens & Wilkinson "Housing and transport policy in SA" 155—156.

[209] Section 5 of ESTA provides:

> "Subject to limitations which are reasonable and justifiable in an open and democratic society based on human dignity equality and freedom, an occupier, an owner and a person in charge shall have the right to—
> (a) human dignity;
> (b) freedom and security of the person;
> (c) privacy;
> (d) freedom of religion, belief and opinion and of expression:
> (e) freedom of association; and
> (f) freedom of movement,
> with due regard to the objects of the Constitution and this Act."

[210] Section 6 (2) (d) of ESTA provides:

> "(2) Without prejudice to the generality of the provisions of section 5 and subsection (1) and balanced with the rights of the owner or person in charge an occupier shall have the right—
> …
> (d) to family life in accordance with the culture of that family: provided that this right shall not apply in respect of single sex accommodation provided in hostels erected before 4 February 1997."

[211] Section 6 (1) (e) of ESTA.

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health services.[212] From an adequate housing perspective, the right to family life corresponds to the cultural adequacy component of the housing right as identified in *General Comment 4*. The exercise of this right is qualified in some important respects by the ESTA. For instance, the right to bury on the owner's land must be consistent with an established practice in that regard.[213] The right not to be denied or deprived of water and related services corresponds to the characteristic of availability of services, materials, facilities and infrastructure.[214] The achievement of affordable, well-located housing is not prioritised in this arrangement because although occupiers may not be deprived of water and related services, there is no positive obligation on the owner to make these services available or to ensure that they are affordable.

[212] Section 6 (1) (f) of ESTA.
[213] *Nhlabathi v Fick* 2003 (7) BCLR 806 (LCC); Pienaar J & Brickhill J "Land" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional law of South Africa* 2ed (Revision Service 5, January 2013) 48-1—48-68 48-34.
[214] *General Comment 4* para 8 (b).

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3.3.3.3 PIE

The Act governs the prohibition of unlawful eviction and the procedures for the eviction of unlawful occupiers.[215] Its provisions apply to all land in South Africa (whether rural or urban, privately owned or state-owned).[216] The PIE was enacted, *inter alia*, to repeal the Prevention of Illegal Squatting Act[217] and other laws which had hitherto formed the basis of forced removals and the dispossession of land from blacks. The purpose of the PIE is limited to ensuring that eviction conforms to justice and equity and is carried out in a humane manner.[218] Substantive fairness and due process requirements are now at the heart of the inquiry into eviction.[219] A court must ensure that the balance that it strikes between the interests of the landowner and those of the occupier "promote[s] the constitutional vision of a caring society based on good neighbourliness and shared concern."[220] In this way, the PIE is a departure from the common law normality assumption that provided the main justification for the wanton eviction of people from private and public land.

The PIE defines an "unlawful occupier" as a person who occupies land without the express or tacit consent of the owner or the person in charge, or without any other right in law to occupy.[221] This definition excludes those persons who qualify as occupiers in terms of the ESTA, or whose informal rights to land are protected by the

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[215] Long Title, PIE.
[216] Section 2 of PIE. It is important to highlight that O'Regan J took issue with the term "unlawful occupiers" (as used in PIE) in *Residents of Joe Slovo* para 291. She saw the term as a relic of the old order and inconsistent with the dignity that is promised to all by the Constitution. Nevertheless, this definition gave rise to some early uncertainty as to what kind of occupation it encompassed. A narrow approach which signified squatting, and a broad approach that included all forms of unlawful occupation, emerged. In *Absa Bank Ltd v Amod* [1999] 2 All SA 423 (W), the High Court held that PIE only applied to the occupation of vacant land and not to housing. This interpretation was approved in *Ross*, *Betta Eiendomme v Ekple-Epoh* 2000 (4) SA 468 (W) and *Ellis v Viljoen* 2001 (5) BCLR 487 (C). However, the Supreme Court of Appeal explained in *Ndlovu v Ngcobo; Bekker and Another v Jika* 2003 (1) SA 113 (SCA) paras 11—16 that PIE applied to all land.
[217] Act 52 of 1951.
[218] Van der Walt *Constitutional property law* 327; Muller *Impact of section 26 on evictions* 104.
[219] Van der Walt *Constitutional property law* 419.
[220] *PE Municipality* para 37. Also see *Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele* 2010 (9) BCLR 911 (SCA) para 10 ('*Occupiers, Shulana Court*'); Muller *Impact of section 26 on evictions* 117; Boggenpoel ZT "Does method really matter? Reconsidering the role of common law remedies in the eviction paradigm" (2014) 25 *Stell. L. Rev.* 72—98 87 ('Boggenpoel "Common law remedies in eviction"').
[221] Section 1 (xi) of PIE.

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Interim Protection of Informal Land Rights Act.[222] It then regulates eviction according to whether private land or public land is involved. In terms of eviction from private land, the PIE states that an occupier whose occupation has lasted less than 6 months should only be evicted if the court is of the opinion that it is just and equitable to do so.[223] All the relevant circumstances must be considered, including "the rights and needs of the elderly, disabled persons and households headed by women."[224] On the other hand, if the occupation has lasted more than six months, the PIE requires that, in addition to the requirements stated with regard to less than six months of occupation, the court must consider "whether land has been made available or can reasonably be made available by a municipality or other organ of the state or another landowner for the relocation of the unlawful occupier."[225] Therefore, an inquiry into the justice and equity of the eviction is required regardless of the period of occupation. In other words, the length of occupation no longer determines the nature of the court's obligation towards the occupiers and the landowners.[226] The factors stated in section 4 (6) of the PIE are not meant to be exhaustive. In *Occupiers, Shulana Court*,[227] Theron AJA held that a court considering section 4 (6) of PIE must have regard to all the relevant circumstances.[228] The result of the disappearance of this distinction is that the locational advantage enjoyed by occupiers in their current places of residence can continue to be enjoyed *in situ*, or elsewhere (provided that the alternative spaces allocated to them carry the same advantages as their previous spaces).

Unfortunately, locational advantage has not played a prominent role in PIE cases, or in eviction jurisprudence in general. For example, the Constitutional Court has often failed to properly conceptualise what significance unlawful occupiers attached to their current places of abode, and how relocation would negatively affect their housing rights. In *Residents of Joe Slovo*, the residents who faced eviction complained that the

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[222] Act 31 of 1996.
[223] Section 4 (6) of PIE.
[224] Section 4 (6) of PIE.
[225] Section 4 (6) of PIE.
[226] Williams "Housing in SA" 825.
[227] 2010 (9) BCLR 911 (SCA) para 13.
[228] *Occupiers, Shulana Court* para 13. Also see *Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others* 2012 (2) SA 337 (CC) para 16 (per Yacoob J):

> "While this distinction is important, I do not think it is decisive to the justice and equity enquiry. This is because, if a court has before it a case in which the land occupation falls short of six months, it is obliged to consider all relevant circumstances. In an enquiry of this kind, a court should determine what the relevant circumstances are."

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proposed relocation site in Delft would be too far from their places of work, and from their children's schools. The relocation would have meant that the residents would double the amount they spent on commuting from their homes to work. The new relocation site did not have any social amenities such as community halls and clinics, or provide employment opportunities for the residents.[229] The relocation site corresponded to "green-field" housing that is typically tucked away on the periphery of urban centres and fails to provide sustenance for residents.[230] The relocation plan therefore spelt economic and social disaster for most of these residents, even though the houses at the relocation site were of better quality than their current homes in Joe Slovo.[231] In their judgments, most of the justices stressed the fact that the residents were being moved to enable the construction of better houses in Joe Slovo.[232] Ngcobo J stated that the relocation was for the benefit of the residents.[233] He added that, in any event, section 26 of the Constitution did not entitle one to "a right to housing at government expense at the locality of his or her choice."[234] Ngcobo J saw a limited role for PIE in cases such as this because he proceeded from the premise that the state enjoyed a wide discretion regarding what methods to adopt in complying with its obligations under section 26 of the Constitution.[235] It was not for the Court to second-guess this choice once it had been made, and the fact that there may be other ways to upgrade Joe Slovo without moving the residents to Delft did not mean that the decision to move them was unreasonable.[236]

Moseneke DCJ stated that a court should not lightly grant an eviction order where residents faced being uprooted to new neighbourhoods "distant from employment, schooling and other social amenities."[237] He also noted that the occupiers in the

[229] *Residents of Joe Slovo* para 254.
[230] Watson V "Planning for integration: The case of Metropolitan Cape Town" in Harrison P, Huchzermeyer M & Mayekiso M (eds) *Confronting fragmentation: Housing and urban development in a democratising society* (2003) 140—153 151; Socio-Economic Research Institute ('SERI') *Edged out: Spatial mismatch and spatial justice in South Africa's main urban areas* (2016) 69, available online at https://www.seri-sa.org/images/SERI_Edged_out_report_Final_high_res.pdf (accessed on 12 February 2020 ('SERI *Spatial justice in SA*').
[231] Wilson S & Dugard J "Taking poverty seriously: The South African Constitutional Court and socio-economic rights" in Liebenberg S & Quinot G (eds) *Law and poverty: Perspectives from South Africa and beyond* (2012) 222—240 236 ('Wilson & Dugard "Taking poverty seriously"').
[232] *Residents of Joe Slovo* para 254. This kind of justification was also made in *Baron CC* para 33.
[233] *Residents of Joe Slovo* para 254.
[234] *Residents of Joe Slovo* para 254.
[235] *Residents of Joe Slovo* para 253.
[236] *Residents of Joe Slovo* para 253.
[237] *Residents of Joe Slovo* para 165. Also see para 174, per Moseneke DCJ.

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present case had never been accorded the "courtesy" of meaningful engagement before the urgent eviction application was brought.[238] Despite these sentiments, Moseneke DCJ found that eviction in this case was just and equitable, although he added that a "specified proportion" of the new houses to be built should be allocated to the occupiers.[239] In this approach, the occupiers were expected to endure an eviction that would undoubtedly expose them to locational distress, in the hope of locational advantage at some point in the future. To defer the issue of locational advantage to a later date ignores the fact that irreparable harm may be done to the residents during relocation. This harm may not be repaired by simply assigning them bigger, better built homes in the future. It may be too late to pull these people out of the hopeless situation that they have been forced into by the relocation. Although PIE contains a textual distinction based on the length of occupation and the factors to be considered in either case, the courts have relied on an understanding of justice and equity that collapses this distinction and gives the occupier a higher level of protection. However, both statutes have little to do with the affordability of housing for the occupiers, nor can the occupiers insist on living in a specific location when the question of alternative accommodation is considered, or when the development of their current premises is taking place.[240]

3.3.3.4 Conclusion

Van Wyk points out that a focus on spatial injustice involves a deliberate way of interrogating the geographical aspects of injustice.[241] This exercise aims at the equitable distribution of space.[242] She further remarks that spatial injustice has typically been addressed in many jurisdictions through programmes, policies, plans and judicial action.[243] Legislative intervention is less common but in use in jurisdictions such as Brazil, the U.S. and South Africa.[244] This section focuses on ESTA and PIE, two

[238] *Residents of Joe Slovo* para 167.
[239] *Residents of Joe Slovo* para 175.
[240] The prevailing jurisprudence of the Constitutional Court arguably offers a possible pathway through the right to human dignity. In *Daniels* it read the right to dignity into section 10 of ESTA to allow an occupier to effect improvements to her house without the owner's consent. This approach is fraught with problems and is not recommended because it goes against the single-system-of-law doctrine.
[241] Van Wyk J "Can legislative intervention achieve spatial justice?" (2015) 48 *Comp. Int'l. L. J. S. Afr.* 381—400 381 ('Van Wyk "Legislative intervention and spatial justice"').
[242] Van Wyk "Legislative intervention and spatial justice" 381.
[243] Van Wyk "Legislative intervention and spatial justice" 382.
[244] Van Wyk "Legislative intervention and spatial justice" 382.

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statutes that were enacted as part of the land reform agenda. A spatially just reading of ESTA and PIE must begin from the premise that the two statutes were meant to radically change the way the power of ownership was exercised vis-à-vis occupiers of land who have a weak claim to the land.[245]

By focusing on security of tenure, ESTA provides for funding powers to enable the minister in charge of land reform to make certain payments to those involved in developing housing for occupiers on affected land. It is significant that this funding may take the form of subsidies or other general payments. This approach indicates that the intention is, *inter alia*, to enable the state to compensate owners for the development of their land in certain cases, especially where the development is cost-effective and attempts to strike a fair balance between the interests of the owner and the occupier. ESTA also enables the state to pay owners for off-site developments, a strategy that discourages social integration because it means that an owner is not obliged to live with occupiers on the same piece of land. The focus of PIE is the eviction process, and its value for present purposes lies in the way the idea of alternative accommodation is conceptualized. Unfortunately, the quality of alternative accommodation is not dependent on the occupiers' current locational advantage, judging by the decisions in *Residents of Joe Slovo*, *Occupiers of 51 Olivia Road*, and *Baron CC* which seem to diminish the importance of location as a characteristic of adequate housing.

3.4 Spatial justice, rootedness, and mobility

3.4.1 Introduction

South African courts, principally through their eviction jurisprudence, have forged a progressive understanding of the new role that property should play in protecting the right of access to adequate housing.[246] The courts' decisions favour a context-sensitive

[245] Van der Walt AJ "Developing the law on unlawful squatting and spoliation" (2008) 125 SALJ 24—36 26 ('Van der Walt "Squatting and spoliation"); Van der Walt "South African land reform legislation" 255.
[246] An example of a case in which the continued relevance of common law remedies in the eviction context was explored is *Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality* 2007 (6) SA 511 (SCA). The occupiers in this case relied on the *mandament van spolie* after a municipality demolished their homes in the process of eviction. This case called for a solution that considered the violation of a section 26 (3) right, the contravention of PIE and the relevance of the *mandament*. The High Court and the SCA found that the *mandament* was not an appropriate remedy in the circumstances because its aim is to temporarily restore physical control of the property (para 24).

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approach that also caters for those who do not have any formal rights in property. However, I show in this section that these decisions have largely revolved around security of tenure, one of the characteristics of adequate housing contained in *General Comment 4*. My purpose for discussing evictions jurisprudence is to show how inattention to location and affordability has affected the courts' ability to effectively protect the right of access to adequate housing. I show that the alternative accommodation approach used in *Modderklip* and *Baron* CC results in the rootedness of occupiers. Although this approach is seemingly at variance with the idea of social mobility, which encourages occupiers to lift themselves out of their present circumstances and to advance their lives, I show that these two approaches can in fact be reconciled.

In this section, I consider the principle of spatial justice from the perspectives of social mobility and rootedness. I develop my argument by considering SPLUMA's approach to spatial justice, which requires an emphasis on informal settlements and former homeland areas.

It could not be invoked for purposes of rebuilding demolished structures. To fill the resulting gap, the SCA devised a new constitutional remedy. This approach has been termed "unfortunate." See Boggenpoel "Common law remedies in eviction" 76; Van der Walt "Squatting and spoliation" 27.

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3.4.2 Rootedness and the quality of alternative accommodation

3.4.2.1 Introduction

The idea of rootedness conveys a sense of connection with place.[247] This connection is underpinned by a sense of belonging to a place and identifying with the possibilities that the place holds for human development. In *Grootboom*[248] and *PE Municipality*,[249] the Constitutional Court provided the constitutional basis for imagining the notion of rootedness when it stated that a home is more than bricks and mortar, and that the law considered one's place of abode as a unique space that should be protected. Ironically, South African law can be considered to have engaged with the idea of rootedness through the procedures for eviction.[250] Rootedness manifests itself in the requirement that the court should consider all the personal circumstances of the occupiers, including whether alternative accommodation has been identified for their settlement. In this section, I explore the Constitutional Court decisions in *Modderklip* and *Baron CC* focusing on how the Court has approached the issue of alternative accommodation, especially in eviction cases.

3.4.2.2 *Modderklip CC*

In *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others as Amici Curiae)*[251] (*'Modderklip CC'*) approximately 40,000 people unlawfully occupied private property. They had been desperate for accommodation and had nowhere else to go. The property consisted of about 50 hectares of land, the occupation of which resulted in crammed living conditions that were devoid of any social amenities and services.[252] Several attempts by the owner ('Modderklip') to evict the occupiers were frustrated by the state's refusal to execute the eviction orders granted by the courts.[253] Modderklip sought a declaratory order that its section 25 (1)

[247] Fox *Conceptualising home* 155.
[248] *Grootboom* para 35.
[249] *PE Municipality* para 17.
[250] Van der Walt "South African land reform legislation" 255.
[251] 2005 (5) SA 3 (CC).
[252] *Modderklip CC* para 8.
[253] The refusal to execute the orders was based on the contention that the dispute was essentially a private matter in which the police had no role. This contention overlooked the fact that the Constitution represents a set of commitments that breach the private law/public law divide. See Van der Walt AJ "The state's duty to protect property owners v The state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *SAJHR* 144—161 146.

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rights had been violated,[254] and that the unlawful occupiers' section 26 rights had also been violated.[255]

De Villiers J in the High Court,[256] and subsequently Harms JA in the Supreme Court of Appeal ('SCA'),[257] found that the unlawful occupation of Modderklip's land amounted to a breach of its property right in terms of section 25 (1) of the Constitution. As part of the remedies, the SCA ordered the state to pay constitutional damages to Modderklip for the long-term loss suffered due to the unlawful occupation.[258] The Court further explored the possibility that a court might, in circumstances such as the present where eviction would not be just and equitable, order the state to expropriate the owner's land.[259] The SCA left this question undecided.[260]

Langa ACJ[261] clarified the position of owners *vis-a-vis* their property in two important respects. First, he stated that owners carry the primary responsibility of taking reasonable steps to protect their property. Referring to the decision in *Mkontwana*[262] regarding an owner's primary responsibility to protect her property, he stated that the facts in the present case showed that Modderklip had acted in accordance with this principle by instituting proceedings for the eviction of the unlawful occupiers.[263] Secondly, Langa ACJ was of the opinion that a private owner could not be required to

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[254] In support of its argument on the state's refusal to comply with the orders, Modderklip relied on several provisions of the Constitution, including section 41 on the principles of co-operative governance and intergovernmental relations; section 165 (4) requiring the organs of state to assist and protect the courts; and section 205 which provides for the duties of the police. See *Modderklip CC* para 12. In addition, Langa ACJ invoked section 34 of the Constitution which provides for the right of access to courts. See *Modderklip CC* para 48.
[255] *Modderklip CC* para 11.
[256] *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid Afrika* 2003 6 BCLR 638 (T).
[257] *Modder East Squatters v Modderklip Boerdery (Pty) Ltd; President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd* 2004 3 All SA 169 (SCA) ('*Modderklip SCA*').
[258] *Modderklip SCA* para 43.
[259] *Modderklip SCA* para 41.
[260] Dugard has argued, based on the SCA's suggestion in *Modderklip SCA*, that the possibility of resorting to judicial expropriation as a remedy should be explored especially in cases where private land is occupied by large numbers of people, making eviction unfeasible. See Dugard "*Modderklip* revisited" 17.
[261] Writing a unanimous judgment with the concurrence of Madala J, Mokgoro J, Moseneke J (as he then was), Ngcobo J, O'Regan J, Sachs J, Skweyiya J, Van der Westhuizen J and Yacoob J.
[262] *Mkontwana* para 59. Yacoob J stated as follows: "It is ordinarily not the municipality but the owner who has the *power* to take steps to resolve a problem arising out of the unlawful occupation of her property." (My emphasis). Elsewhere in the same paragraph, Yacoob J s casts this power in the form of a *duty* on the owner's part.
[263] *Modderklip CC* para 31.

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assume the responsibility of providing accommodation to those who had unlawfully occupied its property.[264] Instead, that responsibility is borne by the state, which must ensure that it takes appropriate steps to shelter those who need accommodation. This is one way to avoid self-help and land invasions that would pose a threat to public peace.[265] Langa ACJ reasoned that the state had failed to take reasonable steps to ensure that Modderklip was afforded effective relief and suggested that the state ought to have considered expropriating Modderklip's property to cushion Modderklip from the burden of having to provide accommodation to so many people.[266]

The approach taken by the Constitutional Court in *Modderklip CC* ensures that unlawful occupiers continue to have accommodation as well as the enjoyment of dignity and equality[267] while the owner's rights in the property are protected. The Court seems to have avoided addressing the argument regarding the state's duty to respect, promote, and fulfil the right to property as the basis of Modderklip's case. Instead, it focused on the rule-of-law angle of the case.[268] In Langa ACJ's opinion, the compensation ordered by the SCA in this case was the most appropriate relief in the circumstances. He explained:

> "It [the relief] compensates Modderklip for the unlawful occupation of its property in violation of its rights; it ensures the unlawful occupiers will continue to have accommodation until suitable alternatives are found and it relieves the state of the urgent task of having to find such alternatives."[269]

The Court declined to address the SCA's order directing the state to expropriate Modderklip's land.[270] This reluctance was based on the lack of information as to whether the state had alternative land available to it, which would have enabled it to

[264] *Modderklip CC* para 45.
[265] *Modderklip CC* para 45.
[266] *Modderklip CC* para 51.
[267] See Dhliwayo P "Consensual use rights that limit the landowners' right to exclude on the basis of the sharing model" (2017) 80 *Journal for Contemporary Roman-Dutch Law* 565—585 575, n 61.
[268] Langa ACJ's decision in *Modderklip CC* emphasized the rule of law aspect of the case in terms of section 1 (c) of the Constitution which enshrines the principle of the supremacy of the Constitution and the rule of law. It also focused on section 34 of the Constitution. Also see Dugard J "*Modderklip* revisited: Can courts compel the state to expropriate property where the eviction of unlawful occupiers is not just and equitable?" (2018) 21 *PELJ* 1—20 7 ('Dugard "*Modderklip* revisited"').
[269] *Modderklip CC* para 59.
[270] *Modderklip CC* para 64.

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fulfil its obligations towards both Modderklip and the occupiers.[271] Working on the assumption that the state could identify such alternative land, the Court held that it would not be just and equitable to then order the state to acquire "specific land" from Modderklip.[272] This approach is significant in terms of the identification of location as a characteristic of adequate housing. The Court's reasoning fundamentally impacts how the identification of alternative accommodation should be done because it implies that the state should first be given an opportunity to identify other land for accommodation before a court orders it to expropriate specific land. The specificity of location is subject to the state's failure to identify other land. In other words, the order to purchase would not be just and equitable from the perspective of the owner, because the default position must be to enable the owner to keep title to its property while the state looks for alternative land. This logic enables the law to sanction the displacement of the homeless as a first resort in favour of ownership rights, ignoring the social ties that the homeless may have to the place in which they reside. I argue that any order to expropriate should prioritise the continuity of occupation if the benefits of location as a characteristic of housing are to be realized. Furthermore, the judgment's logic helps to argue in favour of off-site development while implementing inclusionary housing; the developer can simply be required to put up affordable housing structures elsewhere, thus maintaining the exclusive character of her market-related housing. This would go against the social inclusivity objective of inclusionary housing.[273]

3.4.2.3 *Baron CC*

In *Baron and Others v Claytile (Pty) Ltd and Another*[274] ('*Baron CC*') the question arose as to whether the applicants should be evicted from the respondent's premises following their dismissal from the latter's employment. While they did not challenge their dismissal, the applicants argued that the new accommodation was too far from their places of work and their children's school. It appears from the decision that the applicants did not substantiate these claims. For instance, they failed to state where

[271] *Modderklip CC* para 64. Although doubts have been expressed (including by the SCA itself at para 41) over whether this approach is consistent with the separation of powers, my discussion here assumes the correctness of this approach.
[272] *Modderklip CC* para 64.
[273] Also see Chapter 2, para 2.4.3 above on linkage fees and impact fees, and para 2.7. above.
[274] 2017 (5) SA 329 (CC).

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they worked and what distance they would have to travel to their new accommodation.[275] The Court faulted the applicants for this lack of information.[276] Pretorius AJ effectively backtracked from the *dictum* by Sachs J in *Port Elizabeth Municipality* which had recognized the special role that courts had to play in eviction proceedings.[277] Such a role requires the court to go beyond the pleadings to get to the bottom of the dispute between the parties, often necessitating active judicial management of the evidence-gathering process. It is submitted that the Court ought to have explored the possibility of directing the parties in this matter to conduct "meaningful engagement" in a bid to find a mutually acceptable solution.[278] The potential for meaningful engagement was undercut by insistence on the centrality of pleadings in eviction proceedings.[279]

The Constitutional Court's analysis of the problem is significant in that it indicates an approach to eviction jurisprudence that is steeped in a neoliberal understanding of space production. The Court proceeded from the premise that private landowners did incur certain obligations under the Constitution that did not obtain under the pre-constitutional era.[280] Having recognized this, it proceeded to consider whether, under

[275] *Baron* para 32.
[276] *Baron* para 32.
[277] *Port Elizabeth Municipality* para 36.
[278] Meaningful engagement was first defined in *Occupiers of 51 Olivia Road* para 14 as "a two-way process in which the city and those about to become homeless would talk to each other meaningfully in order to achieve certain objectives" whereas in *Residents of Joe Slovo* para 167 Moseneke DCJ described it as a prerequisite of an eviction under PIE. However, several academic commentators have pointed out that the Constitutional Court in *Residents of Joe Slovo* granted an eviction order despite the obvious failure to comply with meaningful engagement. See McLean K "meaningful engagement: One step forward or two back?" Some thoughts on *Joe Slovo* (2010) 3 *Const. Ct. Rev.* 223—242 239. Van der Berg also slates the uncertainty created by this contradiction. See Van der Berg S "Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?" (2013) 29 *SAJHR* 376—398 388. Chenwi and Tissington argue that meaningful engagement must strive to solve both collective and individual problems. See Chenwi L & Tissington K *Engaging meaningfully with government on socio-economic rights: A focus on the right to housing* (2010) 9, available online at https://docs.escr-net.org/usr_doc/Chenwi_and_Tissington_-_Engaging_meaningfully_with_government_on_socio-economic_rights.pdf (accessed on 1 March 2020).
[279] Muller provides a powerful defence for meaningful engagement in the eviction context. First, he points out that it promotes public participation that goes beyond the requirements of the Promotion of Administrative Justice Act 3 of 2000. Secondly, it gives the occupiers a sense of the budgetary and policy considerations that inform the decisions to be taken. Thirdly, the process may yield immediate results for the occupiers in the form of a decision that they should retain their current accommodation, or that they be assisted to have access to alternative accommodation of a comparable standard. See Muller G "Conceptualizing meaningful engagement as a deliberative democratic partnership" (2011) 22 *Stell. L. Rev.* 742—758 756—757.
[280] *Baron CC* para 35.

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the Extension of Security of Tenure Act[281] ('ESTA') the respondent had an obligation to assist the applicants in obtaining suitable alternative accommodation, or alternatively, to provide such accommodation.[282] As a matter of principle, the Court assumed that any imposition of a horizontal housing obligation upon a private individual required justification.[283]

The Court's approach to the problem was to interpret section 10 of ESTA, which was the basis for the eviction sought in this case.[284] The provision is silent on who should bear the responsibility of finding alternative accommodation in the circumstances of the case.[285] The Court was prepared to accept that the state nonetheless carried the primary responsibility to find alternative accommodation.[286] On the facts before the Court, the state had engaged meaningfully with the applicants and even offered an

[281] Act 62 of 1997.
[282] *Baron* para 2.
[283] *Baron CC* para 36. It is worth noting that Section 8 (2) of the Constitution provides:
> "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

It has been argued that the application of this provision may entail the state regulating services provided by third parties so that they are not unjustifiably disconnected. See Kok A & Langford M "The right to water" in Brand D & Heyns C (eds) *Socio-economic rights in South Africa* (2005) 191—208 205. Also see CESCR *General Comment No 15: The right to water (arts 11 & 12 of the Covenant)* (29th session, 2002) [UN Doc E/C 12/2002/11] para 24.
[284] Section 10 (1) of ESTA provides:
> "10. (1) An order for the eviction of a person who was an occupier on 4 February 1997 may be granted if—
> (a) the occupier has breached section 6(3) and the court is satisfied that the breach is material and that the occupier has not remedied such breach;
> (b) the owner or person in charge has complied with the terms of any agreement pertaining to the occupier's right to reside on the land and has fulfilled his or her duties in terms of the law, while the occupier has breached a material and fair term of the agreement, although reasonably able to comply with such term, and has not remedied the breach despite being given one calendar month's notice in writing to do so;
> (c) the occupier has committed such a fundamental breach of the relationship between him or her and the owner or person in charge, that it is not practically possible to remedy it, either at all or in a manner which could reasonably restore the relationship; or
> (d) the occupier—
> (i) is or was an employee whose right of residence arises solely from that employment; and
> (ii) has voluntarily resigned in circumstances that do not amount to a constructive dismissal in terms of the Labour Relations Act."

[285] Section 10(2) of the ESTA provides:
> "Subject to the provisions of subsection (3), if none of the circumstances referred to in subsection (1) applies, a court may grant an order for eviction if it is satisfied that suitable alternative accommodation is available to the occupier concerned."

[286] *Baron CC* para 37.

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alternative site, which was rejected by the applicants because it was too far from their places of work and children's school.[287]

The Court concluded that the respondent could not be expected to accommodate the applicants in perpetuity while the latter repeatedly rejected any alternative accommodation offered to them.[288] The applicants' intransigence was against the spirit of meaningful engagement which requires parties to approach a dispute with a sense of openness to solutions suggested. As a business entity that had to keep things running, the respondent was entitled to employ replacement staff, who also required housing.[289] It would therefore have been unreasonable to prejudice the respondent by allowing the applicants to continue residing on the premises.[290]

3.4.2.4 Conclusion

A sense of belonging and rootedness through property is essential.[291] The acquisition of property, especially housing, may happen through traditional property doctrine and

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[287] *Baron CC* para 31.
[288] *Baron CC* para 43.
[289] The Court appears to have elevated the employer's own policy in this regard to the decisive factor, without weighing it against the provisions of ESTA and the Constitution. In so doing, the Court missed an opportunity to clarify the interplay between the employment relationship, on the one hand, and the provisions of ESTA and the Constitution, on the other, regarding housing.
[290] In *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC) para 40 ('*Blue Moonlight Properties*'), the Constitutional Court stated that a property owner cannot be expected to house the homeless on her property for an indefinite period. In *Baron CC* para 43, Pretorius AJ developed this principle further by stating that an owner should not be burdened indefinitely even when an offer for alternative accommodation has been made by a local authority. However, in *Daniels*, the question was whether an owner was obliged by the ESTA to take steps to ensure that an occupier lived in dignity. The judgments of Madlanga J (para 53) and Jafta J (paras 183—185) differ on what *Blue Moonlight Properties* decided about the obligations of a property owner (in particular, whether the decision meant that a positive obligation could be imposed on an owner). Madlanga J's judgment maintains that such a positive obligation can be gleaned from *Blue Moonlight Properties* and concludes that this principle equally applies to the facts in *Daniels*. This approach has been criticized. See Marais & Muller "The right of an ESTA occupier to make improvements" 781, 783.
[291] This point was underscored by Sachs J in the property context in *PE Municipality*. At para 17, he stated:

> "Section 26 (3) [of the constitution] evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquility in what (for poor people) is a turbulent and hostile world."

On the meaning of belonging and rootedness through "home," see Fox L *Conceptualising home: Theories, laws and policies* (2007) 155 ('Fox *Conceptualising home*'). Fox explains the "home" phenomenon through a series of value propositions that capture the essence of seeking a space that provides solace to the human spirit. These are: Home as a physical structure, which provides shelter from the elements; home as territory, which enables the occupants to control the space in the home and the activities in it (also see Sebba R & Churchman A "The uniqueness of home" (1986) 3 *Architecture & Behaviour* 7—24 21); and home as identity, which refers to the sense of connection

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the mechanisms of the market. This avenue has failed to have the sort of distributive effect that is necessary to change the picture of apartheid-era housing which clearly embraced a social order ethic. To change that, one needs to carve out a bigger role for location and affordability analysis. Data on location and affordability will not be optimally availed within the context of traditional litigation, where courts have a limited ability to decipher the various factors that make habitability possible. "Meaningful engagement" is important in correcting this flaw because a sense of knowledge of local conditions permeates the deliberation process between the parties concerned.[292] This environment could be used to deepen location and affordability analysis, as it enables the parties to articulate how local conditions affect the cost of living in concrete terms.

The Constitutional Court has unfortunately not treated the location dimension of eviction or relocation seriously in several cases.[293] In *Baron CC*, the consequence of relocating the employer's former workers was only considered from the backdrop of their status as former employees. If the Court had seriously considered the objections regarding distance from work and school, it might have come up with ameliorative steps such as putting the municipality to terms on the kind of assistance that should be rendered to those who would be relocated.

between occupiers and the place they inhabit (see Dovey K "Home and homelessness" in Altman I & Werner CM (eds) *Home environments* (1985) 33—64 39. Also see Fox L "The meaning of home: A chimerical concept or a legal challenge?" (2002) 9 *Journal of Law & Society* 580—610 598; Muller *The effect of section 26 on evictions* 77—79.

[292] Pieterse M "Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa" (2014) 131 *SALJ* 149—177 162; Van Marle K "Re-visioning space, justice and belonging in the capital city of Pretoria/ Tshwane" (2014) 47 *De Jure* 163—174.

[293] Wilson S & Dugard J "Taking poverty seriously: The South African constitutional court and socio-economic rights" in Liebenberg S & Quinot G (eds) *Law and Poverty: Perspectives from South Africa and beyond* (2012) 222—240 236, 237.

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3.4.3 Social mobility, affordability, and location

3.4.3.1 Introduction

The idea of social mobility implies the linking of life's opportunities in work, education, and general fulfilment to the prevailing geographical situation. In ideal terms, it stresses that a person's chances in life should be shaped by their own effort and not by the circumstances into which they are born.[294] The United Kingdom ('UK') Social Mobility & Child poverty Commission has defined a society that cares about social mobility as one where:

> "Opportunities are shared equally and are not dependent on the family you were born into, the place where you live or the school you attend. It is a society where being poor does not condemn someone to a life of poverty. Instead, it is a society where your progress in life- the job you do, the income you earn, the lifestyle you enjoy- depends on your aptitude and ability, not you background or your birth." [295]

It is clear from the foregoing that location and affordability considerations ultimately affect social mobility. This is a framework concept that involves the drawing of opportunities from the prevailing geographies within a polity, with emphasis on work, education, and general fulfilment. Social mobility is thus an enabling notion, key to the creation of an environment where life chances are accorded to all on an equal footing.[296] It is based on the realization that life's chances are shaped, mainly, by the prevailing environment.

This section discusses the link between the social mobility concept and the location and affordability of housing. It engages with the issue whether social mobility is consistent with the policy of *in situ* upgrades articulated by the National Housing Code.[297] I critique the notion of in situ upgrades to make the point that opportunity and

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[294] See Connolly M "Achieving social mobility: The role of equality law" (2013) 13 *Int'l J. Discrimination & L.* 261—291 264.
[295] UK Social Mobility & Child Poverty Commission Report *State of the nation 2015: Social mobility and child poverty in Great Britain* (2015) iii.
[296] However, some commentators have questioned whether equality jurisprudence is the best vehicle for realizing social mobility. See Connolly "Achieving social mobility" 267.
[297] Department of Human Settlements (DHS) *National Housing Code* (2000, revised 2009), available online at http:///www.dhs.gov.za (accessed on 21 February 2020). As a policy instrument, the National Housing Code presents unique interpretational issues in terms of norm ranking. A broader debate exists amongst legal scholars as to the legal basis for enforcing policies geared towards realizing socio-economic rights. See, for example, Bilchitz D "Is the Constitutional Court wasting away the time of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*" (2010) *SALJ* 591—605 598 (criticizing the Constitutional Court's approach to the interpretation of the National Housing Code in *Nokotyana*); Fuo

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movement are closely intertwined. The aim is to demonstrate that the concept of social mobility supports a housing tenure form that falls short of full ownership. This section helps me to build my argument that renting is the appropriate tenure form for implementing inclusionary housing given the unique challenges facing urbanization in South Africa.

3.4.3.2 The National Development Plan (NDP)[298]

The NDP identifies social mobility as a key concern for decision and policy making regarding urban renewal. It emphasizes that a person's chances in life should not be determined by the circumstances of their birth, such as parental income and geographic location, but by the choices that they make.[299] However, the NDP also recognizes that apartheid spatiality persists in contemporary South Africa,[300] and that efforts to reverse this must entail pro-active measures to assist those who are caught in the vicious cycle of helplessness and limited opportunity to lift themselves out of it.[301] The NDP identifies apartheid geography as a particularly pernicious problem, and geographical location as an important factor in enhancing social mobility.[302] Crucially, the NDP envisages a method of reversing apartheid geography that entails devising new norms and standards such as densifying cities, availing job opportunities near residential areas, and upgrading informal settlements.[303]

The NDP pegs social mobility on the individual being given the freedom to uplift themselves from hopelessness. This reflects the notion of performative citizenship, whose essence is the creation of conditions in which individuals are responsible for fulfilling their basic rights, as opposed to the state driving the process of fulfilment.[304] This is in line with the WPH which found that many South Africans did not want ready-

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"Executive policies and socio-economic rights in SA" 4. Also see *Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd* 2001 (4) SA 501 (SCA) para 7.

[298] National Planning Commission *National Development Plan: Vision for 2030* (2012). The NDP represents the long-term goals of the state insofar as development is concerned. It urges concerted action and extols the virtues of an inclusive society, pivotal to achieving these goals.

[299] NDP 234.

[300] NDP 233. Also see SERI *Spatial justice in SA* 1.

[301] NDP 233.

[302] NDP 234.

[303] NDP 234, 238.

[304] Isin E "Doing rights with things: The art of becoming citizens" in Hildebrandt P, Evert K, Peters S, Schaub M, Wildner K & Ziemer G (eds) *Performing citizenship: Bodies, agencies, limitations* (2019) 45—56 50.

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made, pre-fabricated housing given to them by the state. Rather, they desired a situation where the state helped them by unlocking available land and finance to enable them to build their own houses.[305] The NDP constitutes a foundation for efforts to comply with section 26 of the Constitution. It communicates the state's understanding of the obligations imposed on it by the Constitution.[306] It reflects the requirement articulated by the Constitutional Court in *Grootboom* that legislation and policies must be reasonable in fulfilling the right to housing as provided for by section 26 of the Constitution.

However, the implementation of these policies must also be reasonable, as the Court stated in *Grootboom*.[307] In the context of rampant social and economic exclusion, apartheid spatial arrangements, poverty and unemployment,[308] as well as the protection of property and housing rights in the Constitution, inclusionary housing constitutes such a reasonable, and indeed necessary, policy. To address concerns about location and its impact on the affordability of housing, one must implement an inclusionary policy that encourages social mobility.

3.4.3.3 The National Housing Code[309]

One of the contributions of the Breaking New Ground Policy ('BNG') is that it lay the groundwork for the concept of the *in situ* upgrading of informal settlements. The BNG highlights the need for upgrading informal settlements in general in the following manner:

> "Informal settlements must urgently be integrated into the broader urban fabric to overcome spatial, social and economic exclusion. The Department [of Housing] will accordingly introduce a new informal settlement upgrading instrument to support the focused eradication of informal settlements. The new human settlements plan adopts a phased *in situ* upgrading approach to informal settlements, in line with international best practice. Thus, the plan supports the eradication of informal settlements through *in situ* upgrading in desired locations, coupled to the relocation of households where development is not possible or desirable"

[305] Preamble, WPH.
[306] Fuo "Executive policies and socio-economic rights in SA" 1.
[307] *Grootboom* para 36.
[308] WPH para 3.3.4.
[309] Department of Human Settlements *National Housing Code* (2000, revised in 2009) available online at http:///www.dhs.gov.za (accessed on 16 February 2020).

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Subsequently, the details of the programme were fleshed out in the Upgrading of Informal Settlements Programme ('UISP') which forms part of the National Housing Code.[310] The UISP aims to follow a structured approach to the *in situ* upgrading of informal settlements. The two methods envisaged by the UISP are the upgrading of desired locations and the relocation of households from undesired ones.[311]

The upgrading of informal settlements is connected to the topic of this thesis because informal settlements inevitably affect the value of adjacent land. Several cases have demonstrated how planning generally affects property values.[312] The upgrading of informal settlements can help to show the law's general approach to the protection of property values in the planning process. Thereafter, specific questions can be asked about whether developers of private property should be entitled to the most profitable use of their property under inclusionary housing programmes. An interesting question arises as to the policy of the *in situ* upgrading of informal settlements contained in the National Housing Code. Social mobility conjures up images of movement and possibility because it implies the betterment of the social and economic conditions of citizens. On the other hand, *in situ* upgrades imply fixity in terms of place, even though efforts are made to improve the living conditions pertaining to the place.[313] The goal of social integration generally requires a radical re-think of the spatial patterns visible in human settlements. In *Abahlali baseMjondolo*, section 16 of the KwaZulu-Natal Elimination and Prevention of Re-emergence of Slums Act[314] ('KZN Slums Act') was the main bone of contention.[315] Among the issues raised in the Constitutional Court were the consistency of section 16 with section 26 (2) of the Constitution, and further whether section 16 was consistent with PIE, the Housing Act and the National Housing

[310] See *National Housing Policy and Subsidy Programmes: Simplified Guide to the National Housing Code, 2009* (2010)
[311] UISP para 2.3.
[312] For example, in *Rossmaur Mansions (Pty) Ltd v Briley Court (Pty) Ltd* 1945 AD 217 228, Feetham JA emphasised the link between the removal of planning conditions and the plummeting of property values.
[313] The *in-situ* upgrades programme is based on section 3(4) (g) of the Housing Act 107 of 1997. It provides as follows:

> "(4) For purposes of performing the duties imposed by sections 91) and (2) the Minister may-
> …
> (g) institute and finance national housing programmes."

[314] Act 7 of 2007.
[315] The constitutional challenges to sections 9, 11, 12 and 13 of the Act were abandoned by the applicants. See *Abahlali baseMjondolo* para 9.

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Code.[316] Section 16 obliged property owners to evict unlawful occupiers in certain circumstances.[317] This was part of a broader strategy to eliminate slums in the KwaZulu-Natal province. It was contended by the applicants that this section encouraged the eviction of occupiers other than as a matter of last resort; that it encouraged eviction procedures to be instituted outside the framework of the PIE and without observing the principle of meaningful engagement.[318] The Constitutional Court stated that the Act distinguished between slums and informal settlements.[319] In its explanation, the Court emphasized the squalid and unpleasant nature of a slum.[320] Informal settlements, on the other hand, are characterised by what the Court termed "settlements of people" without proper structures and sanitation.[321] This distinction is artificial. The Court should probably have posed the question whether informal settlements present better opportunities for self-advancement and growth than slums do. In other words, is it conceivable that a person would consider movement from a slum to an informal settlement as a milestone in her life as a housing consumer? I submit that it is not possible to answer affirmatively. The lived experience across the board is one of privation, disease, and insecurity.

3.4.3.4 Conclusion

While social mobility is clearly recognized as an important pillar of the enforcement of socio-economic rights, it is a concept whose normative force in South Africa is still evolving. It has doubtful legal underpinnings since the Constitution does not provide for a right to social mobility, although the right to freedom of movement indirectly

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[316] *Abahlali baseMjondolo* para 9.
[317] Section 16 of the Act provided:

> "(1) An owner or person in charge of land or a building, which at the commencement of this Act is already occupied by unlawful occupiers must, within the period determined by the responsible Member of the Executive Council by notice in the Gazette, in a manner provided for in section 4 or 5 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, institute proceedings for the eviction of the unlawful occupiers concerned.
> (2) In the event that the owner or person in charge of land or a building fails to comply with the notice issued by the responsible Member of the Executive Council in terms of subsection (1), a municipality within whose area of jurisdiction the land or building falls, must invoke the provisions of section 6 of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act."

[318] *Abahlali baseMjondolo* para 42.
[319] *Abahlali baseMjondolo* paras 45—48.
[320] *Abahlali baseMjondolo* para 46.
[321] *Abahlali baseMjondolo* para 47.

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protects mobility.[322] A contextual reading of the Constitution reveals a concern for the poor. The preamble to the Constitution refers to the idea of improving the quality of life of all citizens and freeing the potential of each person. Moreover, the Constitutional Court in *Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development*[323] ("*Khosa*") articulated the vision of a society where "wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole."[324] This, I argue, calls for the kind of society where the ability to exit one's present social reality and to create an even better one is seen as a matter of survival rather than mere convenience.

3.5 Conclusion

Well-located land is a scarce resource, especially in South Africa which has an unfortunate history regarding access to land for housing and other activities.[325] The racially based policies of the apartheid regime caused many people to be dispossessed of their land and to be crammed into undeveloped, unsafe and unserved spaces which they would henceforth call home. With the end of apartheid, these spatial arrangements have persisted without any meaningful steps being taken to reverse them.[326] This chapter proceeds from the premise that *General Comment 4* offers the most comprehensive and persuasive formulation of the characteristics of the right to adequate housing. Although *General Comment 4* was not followed as an interpretive guide in *Grootboom* where the right of access to adequate housing was in issue, the reasons for not following it at the time have been rendered moot since South Africa is now a State Party to the ICESCR.

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[322] Section 21 of the constitution provides:

> "(1) Everyone has the right to freedom of movement.
> (2) Everyone has the right to leave the Republic.
> (3) Every citizen has the right to enter, to remain in and to reside anywhere in, the Republic.
> (4) Every citizen has the right to a passport."

The significance of this provision for the right of access to adequate housing lies in the fact that access to private spaces can be so restricted as to limit the enjoyment of services in an area. For example, a South African study has shown that in some cases municipalities are unable to access security estates and enclosed neighborhoods to provide services such as water and electricity. See Council for Scientific and Industrial Research (CSIR) *Gated communities in South Africa: Comparison of four case studies in Gauteng* (2004) 35.

[323] 2004 (6) SA 505 (CC).

[324] *Khosa* para 74.

[325] Todes "Housing and the compact city" 116; Viljoen "Property and human flourishing" 2.

[326] Strauss *Right to the city for SA* 203.

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The first part of this chapter explores the constitutional framework for protecting the right of access to adequate housing. It concludes that the constitutional framework requires municipalities to recognize that property relations are key to the success of housing programmes. I argue that a contextual reading of section 26 of the Constitution demands that a municipality shows that it is addressing the question of property regulation. This regulation may encompass the limitation of the rights of ownership, although it also involves the incentivization of housing development. By focusing on the constituent elements of section 26, I have shown how they may be read to guide the process of property regulation. For example, the progressive realization of the section 26 right requires us to refrain from exposing property ownership to so drastic a change in the entitlements that property ownership confers. I also argue that municipalities must ensure that their budgeting and priority-setting processes are participatory, and that the available resources for complying with section 26 of the Constitution include appropriate interventions that limit the extent to which owners may use their property. A solution must be found that encompasses regulating the use of property while not doing so too drastically.

The discussion on negative obligations raises questions that are particularly relevant to the South African inclusionary housing context. The reality is that the unlawful occupation of land is a pervasive phenomenon. It stands to reason that many landowners or developers will usually have to first deal with the eviction of unlawful occupiers from their land before they can develop the land. Consideration must be given to the fact that there is existing housing on such land, and that existing housing may not be interfered with.[327] In this context, the issue of implementing inclusionary housing is particularly complex because it requires the municipality to decide how to juxtapose the intended market-rate developments alongside what would usually be informal settlements. In this situation, the gap between the two types of housing would be so wide as to render the entire project unsustainable. A possible solution would be to impose inclusionary housing requirements on the developer but facilitate a process of engagement between the developer and the occupiers so that they are temporarily relocated. The difficulty, as seen in *Residents of Joe Slovo*, is that this approach

[327] *Grootboom* para 34; *Maphango v Aengus Lifestyle Properties (Pty) Ltd* 2012 BCLR 449 (CC) para 32; *Residents of Bon Vista Mansions v Southern Metropolitan Local Council* 2002 6 BCLR (W) paras 11—21; Strauss *Right to the city for SA* 185.

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exposes the occupiers to locational distress in the meantime. They may not be able to recover from the effects of the relocation, even if they subsequently benefit from better housing in their current location. Most of these occupiers may also not meet the criteria for occupying the new housing since inclusionary housing is not designed to cater for a significant number of homeless people.[328] Nevertheless, some occupiers may benefit directly from eviction law principles, provided the issue of locational advantage is prioritised in the process of designing an inclusionary housing programme.

This chapter vindicates Muller's statement that "Location, the sixth characteristic of adequate housing, has no direct constitutional or statutory provision counterpart."[329] It is shown that housing affordability is a relatively well-referenced characteristic of housing in the policies that deal with subsidies and other cost-reducing measures, as well as legislation. Location seems to be less emphasized in such arrangements, as well as in the courts' assessment of them. Focusing on affordability without linking it to the location of housing is counterproductive since residents will be forced to spend more on transportation, healthcare, education, and other services. The courts seem to struggle to properly understand the location crisis that bedevils housing provision in South Africa. At best, they suspend the locational advantage currently enjoyed, paving the way for eviction to proceed, while promising a better future and a better home. In addition, to the extent that they perceive that location is relevant at all, it is seen as purely a matter of convenience rather than survival. This approach disregards the significance of home as identity, as the occupiers are effectively uprooted from familiar surroundings and placed in harm's way. Given this trend, it is difficult to imagine that the conditions exist for the successful implementation of inclusionary housing's twin objectives of social and economic integration. The IHP Framework correctly urges that the "existing rights" paradigm of planning law should be discarded in favour of one where a development application calls for the creation of new rights.[330] This will enable local authorities to successfully impose conditions on planning approvals that enhance social and economic integration without being unduly hindered by ownership rights.

[328] Therefore, an order such as the one crafted by Moseneke DCJ in *Residents of Joe Slovo* para 175 may not assist these occupiers. See para 3.3.3.3 above.
[329] Muller *Impact of section 26 on evictions* 170.
[330] IHP Framework 16.

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Regulating for affordability and location: A comparative study of India, U.S and ECHR building and rent regulation

4.1 Introduction

Various international instruments provide for the right to housing.[1] This right is to be enjoyed at state level through the enactment of appropriate laws and the implementation of policies in a targeted manner to ensure that individuals benefit from the right. However, the manner of implementation of this right is complex and varies from country to country. The right to housing has been worded differently or woven differently into national and regional legal systems.[2] The result is a growing need for a comparative examination of the right to housing in these legal systems to draw lessons about how the right has been made to co-exist with the specific legal and

[1] See Article 25(1) of The Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III) ("UDHR") which provides that:

> "Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

See also the International Covenant on Economic, Social and Cultural Rights ('ICESCR') 993 UNTS 3 (The Covenant was adopted by the General Assembly of the United Nations on 16 December 1966 and came into force on 3 January 1976). Article 11 (1) provides that:

> "The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

Further, the Committee on Economic, Social and Cultural Rights ('CESCR'), which is the organ responsible for guiding the implementation of the ICESCR, has, through its interpretative mandate, issued General Comment No *4 The right to adequate housing*, UN Doc E/1992/23, and General Comment No 7 *The right to adequate housing: Forced evictions*, UN Doc E/1998/22. Both Comments clarify the ambit of Article 11 of the ICESCR.

[2] For example, the pre-eminent American and African regional instruments do not expressly provide for the right to housing. Under the auspices of the Organization of American States ('OAS'), Article 26 of the American Convention on Human Rights, OASTS No 36 (The Convention was adopted on 22 November 1969 and came into force on 18 July 1978) ("Pact of San Jose") simply refers generally to certain rights "implicit" in, *inter alia*, the economic and social standards applicable in the OAS. To remedy this, the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, OASTS No 69 (The Protocol was adopted on 17 November 1988 and came into force on 16 November 1999) ("Protocol of San Salvador") was enacted (The Protocol was adopted on 17 November 1988 and came into force on 16 November 1999). Although the Protocol also does not provide for the right to housing, it has inspired the Inter American Court of Human rights (IACHR) to read the right to housing into articles 4 (right to life) and 5 (right to humane treatment). A similar situation obtains in the African context where the right to housing has had to be extrapolated from certain express provisions of the African Charter on Human and People's Rights, 1520 UNTS 217 (The Charter was adopted on 27 June 1981 and came into force on 21 October 1986) ("Banjul Charter"). See Muller G *The impact of section 26 of the Constitution on the eviction of squatters in South African law* (2011) 214—223.

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political cultures in which it finds application. Even more importantly, the protection of property rights affects the right to housing in various ways.[3] The use of legal controls and limitations on property rights to achieve the right to housing is inevitable, although different jurisdictions resort to different permutations of property rights limitations to achieve their housing goals.[4] For South Africa, there is a need to find an appropriate balance between the right to property in section 25 of the Constitution of the Republic of South Africa, 1996 ('Constitution') and the right of access to adequate housing in section 26 of the Constitution.[5] To answer this question it is necessary to have regard to how foreign jurisdictions have treated similar problems within the context of their specific legal frameworks. This will provide some insights into the values[6] that guide legal actors in achieving the appropriate balance. Martinek explains:

> "Comparative jurisprudence deals with various national legal orders in order to describe and to explain their common features, their differences and their peculiarities, in order to analyse and to comprehend their approximations to each other and their distances from each other, and in order to ascertain and to understand their similarities, their strangeness and their mutual influences."[7]

The South African legal context provides the basis for such a comparative study because section 39(1) (c) of the Constitution states that a court, tribunal or forum may

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[3] Kenna P "Globalization and housing rights" (2008) 15 *Indiana J. Glob. L. Stud.* 397—469 407.

[4] The treatment of "home" in law provides interesting examples of how housing has become a favoured form of property interest in comparison to other interests. Property limitations that emphasize the sanctity of "home" have been used to shield certain forms of property against state interference. See Iglesias T "Our pluralist housing ethics and the struggle for affordability" (2007) 42 *Wake Forest L. Rev.* 511—593 514; Peñalver EM "Property metaphors and *Kelo v New London*: Two views of the castle" (2006) 74 *Ford. L. Rev.* 2971—2976 2975; Barros DB "Home as a legal concept" (2006) 26 *Santa Clara L. Rev.* 255—306 255.

[5] The authors that have dealt with the nature of the tension between the two rights include: Muller M & Liebenberg S "Developing the law of joinder in the context of evictions of people from their homes" (2013) 29 *SAJHR* 554—570 555; Wilson S "Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126 *SALJ* 270—290 278, 279; Van der Walt AJ & Viljoen S "The constitutional mandate for social welfare: Systemic differences and links between property, land rights and housing rights" (2015) 18 *P.E.L.J.* 1035—1090 1044—1047; Maass S & Van der Walt AJ "The case in favour of substantive tenure reform in the landlord-tenant framework: *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*; *City of Johannesburg Metropolitan Municipality v Blue Moonlight*" (2011) 128 *SALJ* 436—451 439. The creative tension between the two rights can be illustrated through cases such as *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) para 23. In addition, some cases have dealt with the tension within section 25 itself, that is, between the right to property and the imperatives of land reform. These include *Transvaal Agricultural Union v Minister of Land Affairs* 1997 2 SA 621 (CC) and *Nhlabathi v Fick* 2003 (7) BCLR 806 (LCC).

[6] Foster J "The use of foreign law in constitutional interpretation: Lessons from South Africa" (2010) 45 *U. S. F. L. Rev.* 79—140 81.

[7] Martinek M "Comparative jurisprudence: What good does it do? History, tasks, methods, achievements and perspectives of an indispensable discipline of legal research and education" (2013) 1 *J. S. Afr. L.* 39—57 40.

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consider foreign law when interpreting the Bill of Rights.[8] It is important to inquire into the processes by which foreign courts resolve the standard of review to which building and rent regulation should be subjected. While section 36 (1)[9] of the Constitution tells us that proportionality analysis should guide the limitation of the rights contained in the Bill of Rights, and supplies some relevant factors for this analysis, building and rent regulation serve to clarify the specific societal goals that ought to determine the acceptability of limitations to property rights.[10]

As discussed above,[11] the main purposes of inclusionary housing are the inclusion of previously excluded individuals into the mainstream of housing tenure security. The inclusion is both economic and social because it is appreciated that the most insidious forms of housing exclusion result in an economically and socially fragmented society. It is a supposition of my positions in this chapter that there are two principal ways in which economic and social integration in housing can be achieved. The first is through building controls, where the right to build upon or develop land is regulated through a variety of permit application procedures. Here, authorities typically impose upon applicants conditions that are designed to ensure the attainment of specific policy goals such as affordable housing. The second is through rent regulation. These are a targeted form of property control designed to address tenure security and housing affordability.

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[8] Section 39 (1) of the Constitution provides:
"When interpreting the Bill of Rights, a court, tribunal or forum-
(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
(b) must consider international law, and;
(c) may consider foreign law."

[9] Section 36 (1) of the Constitution provides:
"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
(a) The nature of the right;
(b) The importance of the purpose of the limitation;
(c) The nature and extent of the limitation;
(d) The relation between the limitation and its purpose, and;
(e) Less restrictive means to achieve the purpose."

[10] It is noteworthy that the factors set detailed in section 36 (1) of the Constitution closely resemble those suggested by the U.S. Supreme Court in *Penn Central Transport Company v New York City* 438 U.S. 104 (1978) for determining whether the regulation of property has gone too far. See section 4.2.1.2 below.

[11] See paras 1.3 and 1.5 above.

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This chapter attempts to achieve two related objectives. The first objective (general objective) is to provide an overview of the legal regimes governing the regulation of property rights in the respective jurisdictions under review. This overview encompasses a comparison of the different legal tests that have been invoked in resolving disputes related to the extent of the state's interference with property rights. The second objective (specific objective) is to determine how the different tests adopted or principles applied have been incorporated into the development of two main types of control that are relevant to inclusionary housing, namely, building controls and rent regulation.[12] This objective is achieved by evaluating the extent to which the courts in each jurisdiction have departed from established property law doctrine, developing bespoke doctrines to cover each type of control. It is shown that certain types of control over property are part of implementing economic policy; inadequate housing and the need for economic transformation in the aftermath of communist rule in Eastern Europe, for example, provides the backdrop for much of the discussion under the European Convention on Human Rights ('ECHR') rent regulation.[13]

The jurisdictions studied in this chapter are the United States of America (U.S.), India and the ECHR. These jurisdictions have been chosen because of the presence of varying tests for the exercise of control over property in their legal doctrines. U.S. law illustrates how a constitutional provision that was initially only meant to cover physical occupation of property by government has now been extended to situations where the government merely controls the use of property. The ECHR jurisprudence provides some insights into the process of regulating property against the backdrop of the doctrine of the margin of appreciation, illustrating judicial sensitivities regarding the

[12] For purposes of this chapter, it is assumed that inclusionary housing is implemented mainly through the control of the right to build and the right to charge rent for housing (or house pricing in the case of non-rental housing). Building controls ensure that the right to build is regulated by linking this right to the provision of suitable, low-cost housing within a market-related development. This can serve the purpose of providing locational benefits to the occupants of the low-cost housing, as well as fostering social inclusion. See Iglesias T "Inclusionary zoning affirmed: *California Building Industry Association v City of San Jose*" (2016) 24 *J. Affordable Hous.* 409—434 411. Rent controls, although conceptually distinct from inclusionary housing programmes, are often the result of the latter. They are aimed at affordability of housing and have often been the invariable result of inclusionary housing schemes. See Kautz BE "In defense of inclusionary housing: Successfully creating affordable housing" (2002) 36 *U. S. F. L. Rev.* 971—1032 1011, 1016. See further *Telluride v. Lot Thirty-Four Venture L.L.C.*, 3 P. 3d 30, 35 (Colo. 2000) and *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel*, 456 A.2d 390 (N.J. 1983).

[13] See para 4.2.2.3.2 below.

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state's right to manage property relations. India is a jurisdiction that illustrates how the absence of a formal constitutional property right does not impede the protection of property rights. All three jurisdictions show varying degrees of success in promoting economic and social inclusion.

4.2 An overview of property theory, building and rent regulation

4.2.1 United States (U.S.)

4.2.1.1 Introduction

While the protection of property rights is a theme that is scattered through various provisions of the U.S. Constitution,[14] the Fifth Amendment to the U.S. Constitution ("Takings Clause") provides the conceptual background for understanding the meaning of property and its regulation in U.S. law.[15] It states that no one shall be deprived of property without just compensation.[16] This provision is thought to have been intended to apply only to government's physical seizure of property for purposes of providing physical infrastructure such as roads.[17] However, the rationale of physical seizure did not cover all instances where government might interfere with property to the detriment of the owner, because as the scope of government's police powers grew it was inevitable that such interference would be achieved in non-physical ways, including control on the use of property.[18] The pure exercise of police power entails the imposition of a regulatory system on private property with the aim of ensuring the health, safety and well-being of the public. However, contemporary U.S. legal theory concedes that the modern state requires a much wider ambit of regulation than what

[14] Alvarez JE "The human right of property" (2018) 72 *U. Miami L. Rev.* 580—705 598; Meltz R Merriam DH & Frank RM *The takings issue: Constitutional limits on land use control and environmental regulation* (1999) 13.
[15] The U.S. Supreme Court has identified four essential elements of the right to property. These are possession, use, exclusion and disposal. See *Ruckelshaus v Monsanto Co.*, 467 U.S. 986 1003 (1984); *United States v General Motors Corporation*, 323 U.S. 373, 377—378 (1945); *Phillips v Washington Legal Foundation*, 524 U.S. 156 (1998); Lubens R "The social obligation of property ownership: A comparison of German and U.S. law" (2007) 24 *Ariz. J. Int'l. & Comp. L.* 389—449 396 ('Lubens "Social obligation of property"')
[16] Amendment V of the U.S. constitution states: "Nor shall private property be taken for public use, without just compensation."
[17] Lubens "Social obligation of property" 394; Hart JF "Land use in the early Republic and the original meaning of the Takings Clause" (2000) 94 *Nw. U. L. Rev.* 1099—1156 1101 ('Hart "Original meaning of Takings Clause"'); Treanor WM "The original understanding of the Takings Clause and the political process" (1995) 95 *Colum. L. Rev.* 782—887 807 ('Treanor "Original understanding of the Takings Clause"').
[18] Van der Walt AJ *Constitutional property clauses* (1999) 422 ("Van der Walt *Property clauses*").

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the standard police powers allow for.[19] Hence the notion of regulatory takings, which means that the mere restriction by government on the use of property may well implicate the Fifth Amendment right to compensation (even without physical occupation). In *Pennsylvania Coal Co. v Mahon*[20] ('*Mahon*') the Supreme Court identified the need for such a concept. Justice Holmes stated:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law…When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act."

The exercise of the state's police power may therefore be subject to a duty to provide compensation based on the impact of such powers on the property owner.[21] The concept of regulatory takings is meant to ensure that the state's regulatory measures do not go too far by imposing upon an individual an unacceptably heavy burden that should in truth be borne by society at large.[22] Rent control is, according to Van der Walt, an example of regulatory measures that typically elicit concerns about the regulatory takings power of the state.[23] Several tests have been used by the courts to resolve the issue of regulatory takings and to decide whether compensation should be paid in each case.[24] Each of these tests asks the question whether the property owner has been afforded a fair return on investment.[25] From a property rights point of view, these tests ensure that a certain level of control is exercised over the state's use of the police power to limit property owners' rights.

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[19] Van der Walt *Property clauses* 423.
[20] 260 U.S. 393 (1922).
[21] Van der Walt *Property clauses* 423. See also Appleton B "Regulatory takings: The international law perspective" (2002) 11 *N. Y. U. Envt'l. L. J.* 35—48 38 ('Appleton "Regulatory takings"').
[22] *Mahon* 393; *Armstrong v United States*, 364 U.S. 255 (1960) ('*Armstrong*').
[23] Van der Walt *Property clauses* 423.
[24] For example, Ziegler and Laitos (note 355 below) identify three tests, namely, the physical invasion test, the economic viability test, and the partial benefit-extraction test.
[25] Ziegler EH & Laitos JG "Property rights, housing and the American Constitution: The social benefits of property rights protection, government interventions, and the European Court of Human rights' *Hutten-Czapska* decision" (2011) 21 *Indiana Int'l. & Comp. L. Rev.* 25—46 33 ('Ziegler & Laitos "Property rights and the American constitution"'). The Supreme Court explained in *Federal Power Commission v Hope Natural Gas Co.*, 320 U.S. 591, 603 (1944) ('*Federal Power Commission*') that the concept of fair return means "a return…commensurate with returns on investment in other enterprises having corresponding risks. That return, moreover, should be sufficient to…extract capitol." See also *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 792 (1968) ('*Permian Basin Area*'); *Richardson v City & County of Honolulu*, 759 F. Supp. 1477 (D. Haw. 1991).

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In the next section, I consider two important tests that have been instrumental in helping the courts to determine whether a property regulation has gone too far and, therefore, amounts to a regulatory taking. Although these two tests are by no means exhaustive of the tests utilized in U.S. law,[26] they are the most important for this chapter because they represent two divergent positions on the assessment of loss to a property owner following the regulation of property.

4.2.1.2 The total takings test

The tenor of this test is the protection of the economic uses to which property may be put. The test means that governmental regulation of property will be beyond reproach unless the owner is deprived of every opportunity to use the property in a manner that should reasonably be expected.[27] Crucially, when considering the possible uses for property, such property must be regarded as a whole. There will not be a taking if a part of the owner's property, regarded in its entirety, can still be exploited economically.[28] This issue (the "relevant parcel" issue) is controversial and has seen the Supreme Court lay down criteria for establishing what the extent of an owner's property is.[29]

[26] Some commentators have used different terminology to refer to these tests. For example, Ziegler and Laitos detail the physical invasion test, the economically viable use test and the partial benefit-extraction test. Realistically, the economically viable use test is the same as the total takings test (or, to use Timothy Harris' terminology, the "total wipe-out" test) as set out in *Lucas* because an owner can only be compensated where she is deprived of every use to which her property is reasonably suited. See Ziegler & Laitos "Property rights and the American constitution" 29—37; Harris TM "No *Murr* tests: *Penn Central* is enough already" (2018) 30 *Geo. Int'l. Env. L. Rev.* 605—632 610 ('Harris "No *Murr* tests").

[27] Harris "No *Murr* tests" 610.

[28] Ziegler & Laitos "Property rights and the American constitution" 31.

[29] For example, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 497 (1987) ('*Keystone Bituminous Coal Association*') the Court stated:

> "Our test for regulatory takings requires us to compare the value that has been taken from the property with the value that remains in the property…one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction."

Another example of this reasoning may be found under the law of Wisconsin where an owner whose property's value has not been physically occupied through governmental action must prove that the value of such property has been completely wiped out. This must be preceded by a determination of just what property is affected in the first place. See *Howell Plaza, Inc. v State Highway Commission*, 226 N.W.2d 185 (1975); *Zealy v City of Waukesha*, 548 N.W.2d 528 (Wis. 1996); Harris "No *Murr* tests" 617.

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In *Lucas v South Carolina Coastal Council*[30] ('*Lucas*') the South Carolina Beachfront Management Act[31] was at issue. The Act created the South Carolina Coastal Council, and further required all owners of coastal zone land to apply to the council for permits if they wished to change the uses that were allowed in respect of the land as at 28 September 1977. The Act's effect was to prevent the building of residential houses seaward beyond a certain line. Lucas purchased two beach lots in 1986. At the time, none of these lots qualified as a "critical area" in terms of the Act.[32] He wished to erect single-family residences on these lots. However, the Act's passage in 1988 spelt doom for his plans because of its prohibition, without exception, of the building of residential houses.[33] Lucas filed suit, arguing that the Act's effect was to completely extinguish his property's value without just compensation.[34] Before the Supreme Court, the issue was whether the Act went too far in this case, thus taking Lucas' property without just compensation. Justice Scalia explained the importance of the *Mahon* principle for regulatory takings doctrine, observing that the principle enabled a court to examine not only the "direct appropriation" of property,[35] but also the functional equivalent of limiting an owner's right of possession.[36] *Mahon* did not address the issue of whether governmental regulation had "gone too far." Consequently, it was important to consider the implications of the multifactor test in *Penn Central Transport Company v New York City*[37] ('*Penn Central*') in a case such as this. The *Penn Central* test is a three-part test that requires the court to examine the regulatory measure through the prism of a "complex of factors" that include:

> "(1) The economic impact of the regulation on the claimant
>
> (2) The extent to which the regulation has interfered with distinct investment-backed expectations
>
> (3) The character of the government action."[38]

[30] 505 U.S. 1003 (1992).
[31] Beachfront Management Act, 1988 S.C. Acts 634 (codified at S.C. CODE ANN. §§ 48-39- 270 to 48-39-360 (Law. Co-op. Supp. 1989)).
[32] *Lucas* 1008.
[33] *Lucas* 1009.
[34] *Lucas* 1009.
[35] The Takings Clause was initially understood to only apply to situations where government had directly appropriated property. See *Lucas* 1014; Hart "original meaning of Takings Clause" 1101; Adams B "From *Lucas* to *Palazzolo*: A case study of title limitations" (2001) 16 *J. Land Use & Envt'l. L.* 225—263 227.
[36] *Lucas* 1014.
[37] 438 U.S. 104 (1978).
[38] *Penn Central* 124; See also *Murr v Wisconsin* 1373 S. Ct. 1933, 1943 (2017) ('*Murr*').

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This three-part test[39] focuses generally on the position of the owner before and after the regulatory measure is applied. However, some commentators have argued that the existence of a taking should not be determined by whether a regulation has economically impacted an owner.[40] Instead, economic impact should be regarded as just one of the factors to be considered in determining whether there has been a taking. Moreover, the notion of economic impact appears to be nebulous and ill-defined.[41] At the very least, the impact that a regulation has on the claimant would usually be intertwined with the question whether the claimant's investment-backed expectations have been affected. Thus, no useful purpose is served by splitting the issue into two distinct factors.[42]

Although the South Carolina Supreme Court had held that the Beachfront Management Act did not bring about a taking, the U.S. Supreme Court reversed this decision. The latter Court employed a different standard to the "current uses" one previously invoked in *Penn Central*, stating that the prohibition would only amount to a compensable taking if it effected a "total taking" of the property in question.[43] The Supreme Court identified several factors that would influence the decision as to whether a total taking had occurred, including the degree of harm caused by the owner's activities to public lands and resources or adjacent private property, the social utility of these activities and their suitability to the location in question.[44] The Court emphasised that the state must go beyond the mere statement that the owner's activities are inconsistent with the public good.[45] The state needed to demonstrate how the principles of nuisance and property law would be contravened by the

[39] Some commentators read *Penn Central* as laying down a four-factor test. However, there appears to be no agreement on what the fourth additional factor is. One group argues that the standard in *Armstrong* 260 (the degree to which a small class of property owners is made to bear a burden that should appropriately be borne by society at large) is the fourth factor. Another group views the "parcel as a whole" idea as the fourth factor. See Eagle SJ "The four-factor *Penn Central* regulatory takings test" (2014) 118 *Penn. St. L. Rev.* 601—646 632 ('Eagle "Four-factor test"').
[40] See Eagle "Economic impact" 408. See further Harris "No *Murr* tests" 606.
[41] Eagle "Economic impact" 408.
[42] In *Lingle v Chevron U.S.A. Inc., 544* U.S. 528 (2005) ('*Lingle*'), the Supreme Court said this of the *Penn Central test*:

> "The *Penn Central* inquiry turns in large part…upon the magnitude of the regulation's economic impact and the degree to which it interferes with legitimate property interests."

[43] *Lucas* 1030.
[44] *Lucas* 1031.
[45] *Lucas* 1031.

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proposed activities.[46] The total takings test also implies that the regulatory measure must so impair the owner's use of the property as to render it virtually impossible to derive any economic benefit from it if it is to lead to compensation under the Fifth Amendment of the Constitution.[47] This test is seen as an exception to the three-factor test in *Penn Central* because, under it, an owner is likely to be compensated if she can prove that the property has been stripped of all economic value.[48]

In similar circumstances in *Palazzolo v Rhode Island*[49] ('*Palazzolo*'), the U.S. Supreme Court acknowledged the possibility of compensating even partial takings under the Fifth Amendment, thus undercutting the *Lucas* standard which had required a total taking before compensation could be paid.[50] The *Palazzolo* decision also makes clear that a compensation claim for regulatory taking would ordinarily not be ripe for adjudication until the state authorities have made a final decision on the application of the regulation to the property at issue.[51] This is the only way for the court to determine if the regulation in question goes too far, because "a court cannot determine whether a regulation goes 'too far' unless it knows how far the regulation goes."[52] Scalia J further recalled that there were two situations in which the Supreme Court had always required the payment of compensation, namely, where a regulation resulted in a physical invasion of an owner's property (no matter how slight the degree of invasion),[53] and where a regulation denied a landowner all economically beneficial or productive use of land.[54] In both situations, the regulation went too far and had to be redressed through compensation. These two instances of categorical taking did not

[46] *Lucas* 1031. See also *Webb's Fabulous Pharmacies, Inc. v Beckwith*, 449 U.S. 155, 164 (1980). However, in *Lucas*, Steven J recorded a dissent in which he reasoned that the "total takings" standard would prove unworkable in practice, mainly because of the "elastic nature of property rights." He stated, by way of illustration, that the smaller the property, the more likely that a regulatory measure would result in a total taking. See *Lucas* 1065.
[47] See Appleton "Regulatory takings" 37.
[48] Harris "No *Murr* tests" 610.
[49] 533 U.S. 606 (2001).
[50] *Palazzolo* 617; Appleton "Regulatory takings" 37.
[51] *Palazzolo* 621. See also *Suitum v Tahoe Regional Planning Agency*, 520 U.S. 725, 738 (1997); *Monterey* v. *Del Monte Dunes at Monterey Ltd.,* 526 U. S. 687, 698 (1999).
[52] *MacDonald, Sommer & Frates v Yolo County,* 477 U. S. 340, 348 (1986).
[53] *Loretto v Teleprompter Manhattan CATV Corporation*, 458 U.S. 419 435—440 (1982) ('*Loretto*'); *United States v Causby*, 328 U.S. 256 265 (1946); *Kaiser Aetna v United States*, 444 U.S. 164 (1979) ('*Kaiser Aetna*').
[54] *Nollan* 834; *Keystone Bituminous Coal Association* 495; *Hodel v Virginia Surface Mining and Reclamation Association Inc.*, 452 U.S. 264 295—296 (1981).

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require a specific fact-based inquiry into the social utility of the regulatory measure before compensation could be paid.[55]

In sum, the relevant parcel issue in *Penn Central* was resolved in favour of considering an owner's property interests in their entirety, rather than breaking them up and addressing the regulatory takings issue in respect of each segment. However, subsequent cases have shown that the *Penn Central* standard is not a straightforward one, as illustrated by *Palazzolo*. Its application continues to cause numerous doctrinal and practical problems for the courts.[56]

4.2.1.3 The partial benefit-extraction taking test

The essence of this test is to bar the government from passing a burden that should be carried by society at large onto a few private owners, thus creating a disproportionate regulatory environment.[57] Where a burden is imposed on a private owner in such a way that a public benefit is extracted from her, and the extraction is not necessitated by the conduct of the owner, then a taking occurs.[58] The crucial criterion here is that the benefit extraction must be related to some problem or social

[55] In *Lucas*, Scalia J reasoned that, in the case of a total denial of the economically beneficial use of land, there was a simple explanation for allowing compensation. This was that such denial went well beyond the normal police power function of government. See *Lucas* 1015, 1018. See also Burcat JR & Glencer JM "*Palazzolo v Rhode Island* and the U.S. Supreme Court's increased support of the protection of private property: A response to Echeverria" (2002) 32 *Envt'l. L. Rptr.* 10245—10253 10247.

[56] Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* (2015) 68—70; Fischel WA "Regulatory takings: Law, economics, and politics (1995) 52. The *ad hoc* considerations spelt out in *Penn Central* were subsequently explained further by the Supreme Court in *Cane Tennessee Inc v United States* 62 Fed. Cl. 703 (2004) 706 ('*Cane Tennessee*') where the Supreme Court expanded the *Penn central* "relevant parcel" standard by adding to the factors to be considered. The additional factors are: "(1) The degree of contiguity between property interests; (2) The dates of acquisition of property interests; (3) The extent to which a parcel has been treated as a single unit, and (4) The extent to which the regulated lands enhance the value of the remaining lands." See also *Palazzolo* 631 for the statement that the identification of the "relevant parcel" continues to be a difficult issue. The temporal dimension of the process of identifying the specific property interest affected was emphasized in *Tahoe Sierra Preservation Council v Tahoe Regional Planning Agency* 535 U.S. 302, 332 (2002) ('*Tahoe Sierra*'). See further *Murr* 1943; Harris "No *Murr* tests" 611.

[57] In *Monongahela Navigation Co. v United States*, 148 U.S. 312 325 (1893), the Court explained that the Takings Clause "Prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." This thinking later influenced the Supreme Court's formulation of this principle in *Armstrong* that the Takings Clause "was designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." See further Ziegler & Laitos "Property rights, housing and the American Constitution" 35.

[58] McFarlane AG & Randall RK "Cities, inclusion and exactions" (2017) 102 *Iowa L. Rev.* 2145—2186 2149 ('McFarlane & Randall "Cities, inclusion and exactions"').

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ill caused by the private owner. This is known as "exactions" in U.S. property law.[59] DaRosa states that governments often resort to exactions as a way of encouraging responsible land use and individual home ownership.[60]

U.S. property law has circumscribed the powers of government to levy exactions. McFarlane and Randall argue that the jurisprudence of the U.S. Supreme Court on this issue has been restrictive and disempowering from the point of view of local government.[61] The rationale for treating exactions with such scepticism was that a development condition which did not substantially advance a legitimate governmental purpose was effectively a taking.[62] In *Lingle*,[63] the Supreme Court explained that exactions jurisprudence is meant to cushion property owners against development conditions which lead to losses that should otherwise be compensated under the Takings Clause. An owner cannot be made to bear the costs of solving a problem that was not caused by her. However, the Court's reasoning in this regard has evolved from a purely punitive rationale (invoking the property owner's wrongdoing) to a recognition that the state's authority to impose restrictions on the use of property is not restricted to the prevention of nuisance.[64] Two important Supreme Court decisions illustrate this point. The first is *Nollan v California Coastal Commission*[65] ('*Nollan*'), and the second is *Dolan v City of Tiggard*[66] ('*Dolan*'). Both cases involved applications for

[59] The South African equivalent of this concept is "development contributions" which (arguably) more accurately describes what is at stake whenever the state resorts to this measure. Development contributions are discussed in Chapter 2.
[60] DaRosa M "When are affordable housing exactions an unconstitutional taking" (2007) 43 *Will. L. Rev.* 453—494 454.
[61] McFarlane & Randall "Cities, inclusion and exactions" 2177.
[62] McFarlane & Randall "Cities, inclusion and exactions" 2178. This standard is concerned with the legitimacy of governmental action aimed at regulating property rights. The substantial advancement test requires "a close fit between a measure's objective and the means chosen to implement it." See Radford RS "Regulatory takings law in the 1990's: The death of rent control?" (1992) 21 *S. W. Univ. L. Rev.* 1019—1077 1027 (Radford "Death of rent control"). In *Agins v City of Tiburon* 447 U.S. 255 260 (1980) ('*Agins*') this test was formulated in the context of a Zoning Ordinance that allegedly affected the property interests of the complainant. The Supreme Court explained that a regulatory taking occurs whenever the law in question fails "to substantially advance legitimate state interests…or denies an owner economically viable use of his land." Therefore, one has to look to the declared purpose of the regulatory measure to determine whether it has achieved its expected result.
[63] *Lingle* 547.
[64] In *Lucas* 1035, Kennedy J stated the following:
> "The State should not be prevented from enacting new regulatory initiatives in response to changing conditions, and courts must consider all reasonable expectations whatever their source **...**nuisance prevention accords with the most common expectations of property owners who face regulation, but I do not believe this can be the sole source of state authority to impose severe restrictions."

[65] 483 US. 825 (1987).
[66] 512 U.S. 374 (1994).

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development permission. The government had placed conditions on the right to develop a home (*Nollan*) and business premises (*Dolan*). Because of these permit conditions, it was argued that a taking had occurred in each case and that just compensation ought to be paid in line with the Takings Clause. The decisions in *Nollan* and *Dolan* held that the government must prove an "essential nexus" and "rough proportionality" between means and ends to avoid the obligation to pay compensation for a development exaction. These two criteria imply that it is not disproportionate for an owner to be saddled with the costs of correcting a social ill to which she has contributed. Conversely, an owner who has not caused a social ill is entitled to compensation where the costs of correcting a social ill should have been borne by society through taxation.[67]

Although *Lingle* departed from the "substantially advances" standard for regulatory takings,[68] this departure does not significantly impact the level of scrutiny that development exactions are subjected to. It still behoves the state to establish the "essential nexus" between means and ends. This is a weaker form of justification than the "substantially advances" standard because all that need be shown is that, in principle, the means and ends match logically. There is no need to prove that the means chosen in fact advance the ends envisaged. With reference to rent control, however, the argument advanced by McDonough is that such measures must still be considered under the "substantially advances" formula because the *Lingle* principle is concerned with a regulation's effectiveness.[69] When a regulation fails to achieve its stated purpose, it places a disproportionate burden on a landowner and is therefore unconstitutional.[70]

[67] Ziegler & Laitos "Property rights and the American constitution" 35. See also *Lucas* 1018, where the Court warned that private property should not be pressed into some form of public service. Furthermore, in *Eastern Enterprises v Apfel*, 524 U.S. 498, 528—529 (1998) the Supreme Court stated that causation and proportionality should guide the assessment of fair burdens under the Takings Clause. This is closely related to the idea that exactions must be related in nature and magnitude to some problem that the property owner caused, as decided in *Nollan* and *Dolan*.
[68] *Lingle* 540 (The Court departed from the *Agins* formula that required the regulation of property to substantially advance legitimate state interests, reasoning instead that the *Agins* formula "prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no place in our takings jurisprudence."
[69] McDonough "Rent control and physical takings" 384.
[70] McDonough "Rent control and physical takings" 385.

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Below, I explore building and rent controls in U.S. law against the backdrop of the tests discussed above. The aim of this exploration is to illustrate that these tests have been moulded to fit the specific objectives of building and rent controls, often to the extent that the tests have been rendered redundant in these two contexts. This is important for inclusionary housing because it signals that the pursuit of social and economic integration in housing, together with affordability, may well render these tests inapplicable.

4.2.1.4 Application of tests to specific property controls

4.2.1.4.1 Building controls

The notion of regulatory takings was articulated in the building control context[71] in Penn *Central* where New York City's zoning regulations were alleged to have effected a regulatory taking of Penn Central's property rights in that the latter was not allowed to erect a high rise office block above the Grand Central terminal which it owned. The prohibition against building resulted from the enactment of the New York Landmarks Preservations Law of 1965 ('Landmarks Law') which empowered the state government to designate certain types of property as "landmarks". Citing the general welfare of the community, the U.S. Supreme Court held this building prohibition to be a reasonable exercise of the police power since the law did not restrict current uses of the property.[72] The terminal's owner would still be able to use it as a terminal containing office space and concessions. In addition, Brennan J invoked the owner's reasonable expectations, which he said was what the current uses of the property effectively secured.[73] Current uses and reasonable expectations constituted two important foundations for the *Penn Central* decision, providing the U.S. Supreme Court with a framework where individual property rights could be balanced with community welfare to produce a sensible compromise based on reasonableness.[74]

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[71] Outside of the building control context, the court had in *Pennsylvania Coal Co. v. Mahon* 260 U.S. 393 (1922) ('*Mahon*') acknowledged that government regulation of property rights could be so severe as to amount to a taking. This would be the case if the regulation "went too far." Therefore, the question was no longer *if* but *when* and *how* a regulatory taking occurs. See Radford "Death of rent control" 1022.
[72] *Penn Central* 136, 146.
[73] *Penn Central* 104. In support of this proposition, the Court cited *United States v Willow River Power Co.* 324 U.S. 499 (1945); *United States v Chandler-Dunbar Waterpower Co.* 229 U.S. 53 (1913) and *Demorest v City Bank Co.* 321 U.S. 36 (1944). See also Sax JL "Takings and police power" (1964) 74 *Yale L.J.* 36—77 61.
[74] Siedel G "Landmarks preservation after *Penn Central*" (1982) 17 *Real Prop. Prob. & Tr. J.* 340—356 356.

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Subsequent cases dealing with the preservation of landmarks helped to further illustrate the meaning and scope of *Penn Central*. In *Society for Ethical Culture v Spatt*[75] ('*Society for Ethical Culture*') the designation of a Meeting House operated by a religious group as a landmark was challenged on the ground that it constituted the taking of property without compensation. The rationale for the designation was questioned by the society, arguing that there was nothing extraordinary about the Meeting House that justified its designation as a landmark.[76] The Society argued that the designation led to its inability to put the building to its most profitable use, rather than that the building was incapable of any use at all.[77] It argued that the designation had interfered with its plans to demolish the Meeting House for purposes of redevelopment; consequently, its revenue was negatively affected.[78] The Appellate Division of the Supreme Court of New York found that the designation was rational and that the Meeting House need not have been of extraordinary distinction or to have enjoyed popular appeal to be protected as a landmark.[79] The Court proposed two separate tests for determining whether a regulation designating a landmark had gone too far in respect of commercial property and a charitable concern respectively.[80] In the case of commercial property, regulation would go too far if it prevented the owner from obtaining an adequate return on investment.[81] The criterion in respect of charitable concerns is whether the regulation "either physically or financially prevents or seriously interferes with carrying out the charitable purpose."[82]

[75] 434 N.Y.S.2d 932 (1980).
[76] *Society for Ethical Culture* para 117.
[77] *Society for Ethical Culture* para 119.
[78] *Society for Ethical Culture* para 119.
[79] *Society for Ethical Culture* para 117.
[80] The Court relied on the decision in *Matter of Sailors' Snug Harbor v. Platt*, 29 A.D.2d 376, 378.
[81] *Society for Ethical Culture* para 118. It should be noted that the returns on investment formula implicitly recognizes that a property owner is not ordinarily entitled to the most profitable use of her property as was held in *Hadacheck v Sebastian* 239 U.S. 394, 405, 410 (1915) and *Andrus v Allard* 444 U.S. 51, 66 (1979). On the other hand, some courts have been prepared to find a taking in circumstances where the regulation of property resulted in significant reduction in property value. See *Loveladies Harbor Inc. v United States* 28 F.3d 1171, 1183 (Fed. Cir. 1994) which involved a 99% reduction in land value; *Florida Rock Industry v United States* 18 F.3d 1560, 1572 (Fed. Cir. 1994) in which the land value was reduced by 62%; and *Yancey v United States* 915 F.2d 1534 (Fed. Cir. 1990) where the value of personal property was reduced by 77%. See, further, Lubens "Social obligation of property" 397.
[82] *Society for Ethical Culture* para 118.

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The lesson to be drawn from these cases is that courts have crafted a slightly different standard in respect of charitable as opposed to commercial property. A venture that is not commercially driven can still be protected from regulatory taking provided that the owner illustrates how the non-commercial purpose it pursues will be hampered. The necessary inference here is that building controls are subject to the *Penn Central* test. When the owner of a building cannot exercise her right to exclude others, the courts will look at the reason for the rights limitation, on the one hand, and the purpose for which the owner wishes to exclude, on the other.

4.2.1.4.2 Rent controls

In *Bowles v Willingham*[83] the U.S. Supreme Court described the purpose of rent control, which it stated was to "protect persons with relatively fixed and limited incomes, consumers [and] wage earners…from undue impairment of their standard of living." This description bears out the rationale for rent control in all the other jurisdictions studied in this chapter. This is particularly so in the case of Europe where rent control was devised during the period of the First World War ('WWI') to ensure that people could be housed given the housing shortages caused by the war.[84] The legislatures and the courts in the U.S. have long recognised the potential for rent control to ease the economic burden of the most vulnerable in society in as far as housing is concerned.[85]

The issue of the applicability of regulatory takings doctrine to rent control is a controversial one under U.S. law.[86] Radford notes that the U.S. Supreme Court has seemed reluctant to bring rent control into line with regulatory takings doctrine,[87] even though some members of the Court have agitated for this course to be taken.[88]

[83] 321 U.S. 503, 513 (1944).
[84] Howenstine EJ "European experience with rent controls" (1977) 100 *Monthly Labor Rev.* 21—28 21. The author notes that rent control has historically been linked to a "sudden disequilibrium in housing supply" such as happens during wars. WWI is notable for having triggered a wave of rent control measures across the western world.
[85] See *Eisenman v Eastman*, 421 F.2d 560 566—567 (2d Cir. 1969); *Birkenfeld v City of Berkeley*, 550 P.2d 1001, 1024 (1976). See also Radford "Why rent control is a regulatory taking" 769.
[86] Radford "Why rent control is a regulatory taking" 763.
[87] Radford "Why rent control is a regulatory taking" 763.
[88] See *Pennell v City of San Jose*, 485 U.S. 1 (1988) ('*Pennell*'), per the partially dissenting opinions of Scalia J and O'Connor J; and *Fresh Pond Shopping Center v Callahan*, 464 U.S. 875 (1983), per the partially dissenting opinion of Renqhuist J. See further Radford "Why rent control is a regulatory taking" 763.

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Radford further argues that rent control, to pass constitutional muster, would have to substantially advance a legitimate government interest under the *Nollan*[89]/ *Dolan*[90] standards which require heightened scrutiny of regulatory measures that affect property rights.[91] Under such scrutiny, rent control measures seemed to struggle for justification because the evidence (substantial advancement being an empirical question)[92] suggested that these measures resulted in a decline in the number of affordable houses rather than the converse.[93]

Often, building and rent controls may be fused into a composite control measure for purposes of providing affordable housing. This happened in *Seawall Associates v New York*[94] ('*Seawall Associates*') where the City's Local Law No.9 placed a five-year moratorium on the alteration, conversion and demolition of Single Room Occupancy ('SRO') housing. It also compelled landlords to restore uninhabitable units and to maintain all units as SRO housing. According to the New York Court of Appeals, this law sanctioned a physical occupation of the owner's property, thus triggering the obligation to compensate in terms of the *Loretto*[95] principle.[96] The Court made an alternative finding based on regulatory takings jurisprudence by concluding that the regulation was, in any event, an impermissible government intrusion under the *Penn Central* principle.[97] The rental part of the provision was deemed confiscatory because it required landlords to lease the SRO units at controlled rents.[98]

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[89] *Nollan* 825.
[90] *Dolan* 374.
[91] He wrote in 2011 when this was still the legal position.
[92] See Rose JW "Forced tenancies as takings of property in *Seawall Associates v City of New York*: Expanding on *Loretto* and *Nollan*" (1990) 40 *DePaul L. Rev.* 245—280 277 ('Rose "Forced tenancies as takings of property"').
[93] Radford "Why rent control is a regulatory taking" 769.
[94] 74 N.Y.2d 92 (1989).
[95] *Loretto* 435—440.
[96] *Seawall Associates* 106.
[97] *Seawall Associates* 106.
[98] *Seawall Associates* 100. This decision seems to clash with the Supreme Court's opinion in *Yee v City of Escondido*, 503 U.S. 519 (1992) ('*Yee*'). In this case the petitioners had relied on the *Loretto* principle to argue that the City of Escondido's Mobilehome Residency Law, Cal. Civ. Code Ann. § 798 (West 1982 and Supp. 1991) which significantly limited a park owner's right to terminate a mobile homeowner's tenancy, amounted to a physical taking of property. The petitioners did not properly plead the regulatory takings issue, confining the Supreme Court to a consideration of the physical takings argument. Relying on its earlier decision in *Federal Communications Commission v Florida Power Corporation*, 480 U.S. 245, 252 (1987), the Court held that for a physical taking to occur, the government must require the owner to submit to the physical occupation of land (at 527). Required acquiescence was an indispensable element and was absent in the present case because the park owner had freely invited the mobile-home owner onto his land. The Court characterized this case as one where the state regulated the landlord-tenant relationship (at 528). This same characterization was adopted in *Pennell*

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The *Seawall Associates* opinion has been commended for disregarding the distinction between temporary and permanent occupation; although the moratorium was only for five years, this did not make it any less objectionable as a taking.[99] By contrast (at least with respect to wartime rent control) the Supreme Court seems to be prepared to take the duration of a property limitation into account in determining its validity. In *Block*, the rent control ordinance was a temporary emergency measure designed to alleviate the housing shortage that resulted from war. Justice Holmes stated the following:

> "[A] public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation ... The regulation is put and justified only as a temporary measure. A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change."[100]

Although the ordinance was upheld, the same ordinance was invalidated in *Chastleton Corporation v Sinclair*[101] because the continued existence of the rent control measure could not be justified since the war had ended.[102] This suggests that, for the Supreme Court, wartime rent control is a time-bound device whose rationale is subject to periodic review owing to its negative effect on property rights. On the other hand, peacetime rent control has almost invariably been sanctioned by the court.[103] This

12 (n6) where the Supreme Court reasoned that states have the power to regulate housing conditions, especially the landlord-tenant relationship, even if this resulted in a diminution in property value. Furthermore, it was expressly recognized that the alleviation of the economic hardship of renters was a *bona fide* purpose for which the state could exercise its police power (at 13).

[99] Rose "Forced tenancies as takings of property" 275. It should be noted that the Supreme Court has not coherently defined what constitutes permanent or temporary occupation. In addition, neither has it always honoured the principle that permanent physical occupation constitutes a taking. In *PruneYard Shopping Center v. Robins,* 447 U.S. 74 (1980) shopping center owners were not entitled to compensation even though the law obliged them to admit members of the public to their property to collect signatures for a petition. Similarly, in *Block v Hirsh*, 256 U.S. 135 (1921) ('*Block*') a rent control ordinance protected tenants against eviction at the end of their lease terms. This violated the express terms of the lease contract. The ordinance was upheld. See also *Marcus Brown Holding Co. v. Feldman* 256 U.S. 170 (1921); Singer JW & Beermann JM "The social origins of property" (1993) 6 *Can. J. L. & Juris.* 217—248 225. Conversely, the temporary nature of government-induced floods was not enough to preclude the finding of a taking in *Arkansas Game & Fish Commission v United States*, 568 U.S. 23, 37—40 (2012).

[100] *Block* 156—157.

[101] 264 U.S. 543 (1924).

[102] The Indian Supreme Court seems to adopt this approach when considering the validity of rent control legislation. See the decision in *Motor General Traders* discussed in para 4.2.3.3.2 below. See also the decision in *Mellache*r for a European perspective on sanctity of contract and rent in para 4.2.2.3.2.2 below.

[103] Radford "Why rent control is a regulatory taking" 763.This observation will be instrumental in drawing parallels between post-war regulation and post-apartheid, transformative regulation. Although the end

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contrasts with the Indian situation because the Indian Supreme Court seems to require periodic review of all rent control legislation irrespective of its wartime or peacetime origins.[104]

4.2.1.4.3 Conclusion

Although building controls and rent controls are often used in conjunction with each other under U.S. law, this section has analysed these two types of control separately. It has been found that building controls have largely been used in the preservation of landmarks, which does not have an obvious connection with the provision of housing *per se*. Nevertheless, the cases discussed demonstrate that building controls can be used to limit the right of exclusion that is enjoyed by property owners. Generally, building controls affecting commercial property are subject to the "return on investment" or "fair return" standard applied in *Federal Power Commission*[105] and *Permian Basin Area*.[106] The question as to whether the building control goes too far is answered by reference to what the owner can make from the property relative to the investment made. This inquiry reflects the application of the multifactor test in *Penn Central* to the extent that it investigates the regulation's economic impact on the owner and the protection of the owner's investment-backed expectations. Furthermore, where the property's current use is possible in future, compensation is generally withheld.[107]

Rent controls constitute a departure from the *Penn Central* inquiry because the courts have generally allowed such measures as part of the state's police power.[108] These rent control measures are allowed irrespective of their economic impact on the owner, or whether the owner's investment-backed expectations can be fulfilled. The character of the government action is therefore generally irrelevant to the validity of a rent control measure. McDonough argues that the character of the government's action revolves around reciprocity: if an individual receives a benefit or faces regulation for a problem

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of a traumatic event such as war can precipitate legal developments aimed at correcting the injustices brought about by the war, the question is whether such measures should be implemented within a certain timeframe.

[104] See *Motor General Traders* discussed in section 4.2.3.3.2 below.

[105] *Federal Power Commission* 603.

[106] *Permian Basin Area* 792.

[107] *Penn Central* 136, 146.

[108] *Loretto* 440; McDonough "Rent control and physical takings" 364.

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that she helped to create, then there is no taking.[109] These two factors clearly do not apply to rent control because the landlord gains nothing. Instead, a windfall is created in favour of the tenant.[110] Rent controls are also immune from the heightened scrutiny proposed in *Nollan* and *Dolan* because this type of scrutiny only applies to exactions rather than to all controls upon property and its use. This, coupled with the fact that the Supreme Court has now disfavoured the "substantially advances" standard for regulatory takings, means that rent control is more secured as a method of advancing the affordability and location of housing.[111]

4.2.1.5 Conclusion

U.S. law regulates the use of property in a variety of ways which reflect the anxiety of the founding fathers to protect private property against governmental intrusion. The view that property is a natural right that also protects the right to liberty is reflected in the fact that the courts have devised various ways to curb the use of the police power when property rights are at stake. A prominent method has been through the gradual recognition of regulatory takings as a key component of the Fifth Amendment of the Constitution. In *Palazzolo,* Scalia J recalled that U.S. law had for some time required compensation in cases where property was physically invaded by the state, and where a property owner was deprived of all beneficially economic use of the property. The total takings test[112] was subsequently supplemented by the partial benefits extraction test in recognition of the fact that even where some economically beneficial use of property was possible post-regulation, justice and fairness might still require compensation. Regulatory takings jurisprudence shows a gradual shift from reluctant acceptance of the notion that the police power can be used to limit property rights to more enthusiastic recognition that this is in fact inevitable.

Simultaneously, courts have attempted to articulate a coherent message about the constitutional limits that should be placed on the police power. The Court in *Armstrong*

[109] McDonough "Rent control and physical takings" 375.
[110] McDonough "Rent control and physical takings" 375.
[111] Although McDonough's argument (McDonough "Rent control and physical takings" 375) suggests that courts should still focus on whether the property regulation accomplishes its stated goal (as part of the "character of government action" inquiry) it appears unlikely that they will do so when evaluating rent control.
[112] *Lucas* 1030.

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approached the Takings Clause from the standpoint that its very design was meant to prevent the government from imposing burdens upon private property owners that should be carried by the public. Therefore, a governmental regulation goes "too far" if it has this effect and amounts to a taking. This idea has permeated the jurisprudence of the U.S. Supreme Court and made it possible for compensation to be paid in respect of governmental regulation that does not strictly amount to a taking within the original understanding of the term. Commentators such as Gerhart state that the regulatory takings jurisprudence can have an unfortunate impact on governmental policy because it overstretches the importance of curbing governmental regulation. The importance of the governmental regulation should be given more weight in this weighing up exercise.[113] Building and rent controls appear to be classic examples of the notion that economic and societal imperatives can override regulatory takings doctrine, even in a jurisdiction where the right to property is highly valued.

4.2.2 The European Convention on Human Rights ('ECHR')

4.2.2.1 Introduction

The ECHR position on the regulation of property reveals the effect of a protracted political ideological contest on the meaning of property. Largely because of the cold war, European nations have been divided that subscribe to a capitalist economic system, on the one hand, and those that embrace socialism, on the other.[114] Because of this rift, it was not initially possible to agree on the meaning of property, and whether such a concept should even be the subject of a distinct right. The text of the ECHR does not contain a reference to property rights. Agreement was subsequently reached on the scope of the right to property in the ECHR, culminating in the signing of the First Additional Protocol to the ECHR[115] ('A1P1'). Article 1 of the A1P1 provides as follows:

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[113] Gerhart PM "The social costs of regulatory takings" (2019) 70 *Mercer L. Rev.* 479—524 524.
[114] Escarcena SL "Interferences with property under European human rights law" (2012) *Flo. J. Int'l. L.* 513—544 515 ('Escarcena "Interferences with property"') (At the heart of this ideological disagreement was the right to nationalise, which was favoured by the socialist nations of Europe); Maxwell D "Disputed property rights: Article 1 protocol No. 1 of the European Convention on Human Rights and the Land Reform (Scotland) Act 2016" (2017) 4 *Euro. C. L.* 347—368 ('Maxwell "Disputed property rights"').
[115] Council of Europe, *Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, ETS 9.

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> "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

This provision embodies three separate rules for the protection of property.[116] The first is a general rule that guarantees the peaceful enjoyment of property. The second is a rule that allows the state to deprive the owner of property and subjects this power to certain conditions. The third rule reinforces the state's power to control the use of property in the general interest.[117] Although these rules are separate, they are interconnected.[118] The second and third rules are considered applications of the first rule,[119] and the European Court of Human Rights ('ECtHR') in any given case would follow a certain established sequence of inquiry. The first task would be to establish whether a deprivation or a control on the use of property has occurred.[120] Only if neither has occurred will the ECtHR establish whether the state has interfered with property in any other way.[121] Although the above provision does not expressly mention the right to property, the ECtHR has explained that the provision's essence or substance is to protect the right to property.[122] The ECtHR has further clarified the

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[116] *Sporrong & Lönnroth v Sweden* (1982) 5 EHRR 85 para 61 ('*Sporrong & Lönnroth*')
[117] *Sporrong & Lönnroth* para 61. See also Escarcena "Interferences with property" 520—521
[118] *Lithgow* para 106 ; *James and Others v United Kingdom* (1986) 8 EHRR 123 para 37 ('*James*') ; *Beyeler v Italy* (2001) 33 EHRR 52 para 111 ('*Beyeler*'). The ECtHR has not been consistent in its application of these rules to the destruction or confiscation of property. The court has treated such matters as falling under the first or the second rule. In *Allard v Sweden* 35179/97 a joint owner had built a house without the consent of the fellow joint owners. The court viewed this matter as falling under the second rule rather than the third. See Allen T *Property and the Human Rights Act 1998* (2005) 120.
[119] Escarcena "Interferences with property" 520; *James* para 37; *Visti̧ņš and Perepjolkins v Latvia* (2014) 58 EHRR 4 para 67 ('*Visti̧ņš and Perepjolkins*'); *Scordino v Italy* (2006) 45 EHRR 207 para 78 ('*Scordino*'); *Pressos Compania Naviera S.A. & Others v Belgium* 21 EHHR 301 para 33 ('*Pressos Compania Naviera S.A*').
[120] Escarcena "Interferences with property" 520. See also Mountfield H "Regulatory expropriations in Europe: The approach of the European Court of Human Rights" (2002) 11 *N. Y. U. Envt'l. L. J.* 136—147 141.
[121] Escarcena "Interferences with property" 521; White RCA & Ovey C *Jacobs, White & Ovey: The European Convention on Human Rights* 5 ed (2010) 347 ('White & Ovey *European Convention on Human Rights*.')
[122] See Escarcena "Interferences with property" 517. It has been stated that the protection of property can also be achieved through the indirect application of other clauses in the ECHR, such as the provision on discrimination. See McBride J "Compensation, restitution and human rights in post-

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nature of the protection offered by A1P1 by affirming that the effective exercise of this right may require states, in certain instances, to take positive rather than merely negative steps to protect the right as opposed to merely restraining the states from interfering with the right.[123]

The ECtHR applies the doctrine of the margin of appreciation, which enables it to defer to state authorities in the choice of the methods to be used in fulfilling their obligations under the ECHR. Ploeger and Groetelaers explain that:

> "[I]n general, the Court leaves the national authorities a wide 'margin of appreciation' to implement economic and social policies. Therefore, it will respect the judgment of the national legislature that the measure is in the general interest unless that is manifestly without reasonable foundation."[124]

Apart from showing that it is pursuing a legitimate governmental interest, a state must also demonstrate a proportional relationship between the legitimate goal and the means selected to achieve it.[125] The ECtHR has clarified the nature and extent of this margin of appreciation in several cases, including those involving the interpretation and application of A1P1.[126] In terms of the doctrine, states have a wide margin of appreciation in assessing whether a social problem exists and whether it warrants state intervention. Additionally, they have wide powers to decide upon the nature of

communist Europe" in Meisel F & Cook PJ (eds) *Property and protection: Legal rights and restrictions* (2000) 91.

[123] See *Sierpinski v Poland* (2002) 35 EHRR 198 para 68 ('*Sierpinski*').

[124] Ploeger HD & Groetelaers DA "The importance of the fundamental right to property for the practice of planning: An introduction to the case law of the European Court of Human Rights on Article 1**,** Protocol 1" (2007) *15 Eur. Planning Stud.*1423—1438 1431 ('Ploeger & Groetelaers "Caselaw of the ECtHR on Article 1 Protocol 1"'). See also Jacobs HM "An alternative perspective on United States-European property rights and land use planning: Differences without any substance" (2009) 61 *Planning & Envt'l. L.* 3—12 7; *James* para 46; *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v United Kingdom (*1998) 25 EHRR 127 para 80.

[125] For example, in the United Kingdom (UK) the issue of noise pollution emanating from night flights into and out of Heathrow Airport has been the subject of governmental regulation. In *Powell and Rayner v United Kingdom* (1989) 9 EHRR 375 para 45, the Court accorded the UK a wide margin of appreciation to decide how to regulate aviation noise in view of the importance that the national authorities attached to night travel and its economic benefits, on the one hand, and the right to the enjoyment of one's home (Article 8 of the ECHR) on the other. It was found that the interference with one's home was justified under Article 8 (2). Similarly, in *Hatton and Others v United Kingdom* (2002) 34 EHRR 1 paras 123 & 129, the court stated that it was up to the member state to select the most appropriate means of satisfying its obligations under Article 8 of the Convention. See also *Sporrong & Lönnroth* para 11; Garwood-Gowers A "Improving protection against indirect interference with the enjoyment of home: Challenging the legacy of *Hunter v Canary Wharf* using the European Convention on Human Rights and Human Rights Act 1998" (2002) 11 *Nott. L. J.* 1—19 10.

[126] See *Schalk & Kopf v Austria* (2011) 53 EHRR 20 para 98 where the court stated: "[T]he scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background."

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the intervention required. In *Sierpinski*[127] the ECtHR further clarified that where the state implements social and economic policies as part of its intervention, and such implementation raises an issue of general interest, then the authorities concerned must comply with the following requirements. Firstly, they must act in good time. Delay in implementing such measures negatively affects the rights protected by A1P1. Secondly, the state must act "in an appropriate manner and with the utmost consistency."[128] Uncertainty resulting from the state's inconsistency in implementing measures can lead to a violation of A1P1. The ECtHR stated that uncertainty may be legislative, administrative or the result of the actual practices applied by state authorities.[129] Below, I consider the ECtHR's case law on the interpretation of A1P1, with special emphasis on the meaning and acceptable limits of regulation under this provision. This includes a discussion of the specific rules that the ECtHR has employed in assessing the limits of acceptable deprivation of property.

4.2.2.2 The scope of A1P1: Linking "possessions" to property

A1P1 has been criticized for the general imprecision in its wording, as well as for its lack of philosophical depth.[130] For example, Maxwell asserts that the language of A1P1 does not assist in properly delineating what is meant by "arbitrary" deprivation.[131] Moreover, the text of A1P1 does not contain any reference to the concept of property. However, the ECtHR explained in *Marckx v Belgium*[132] ('*Marckx*') that this provision in substance protects property rights through its reference to the notion of "possessions."[133] The term has been interpreted broadly by the ECtHR, resulting in the widening of the factual matrix within which the right to property under A1P1 applies.[134] Therefore, a licence to serve alcoholic drinks has been deemed a

[127] *Sierpinski* para 71.
[128] *Sierpinski* para 71.
[129] *Sierpinski* para 72. See also *Broniowski v Poland* (2004) 40 EHRR 21 para 151 ('*Broniowski*').
[130] Escarcena "Interferences with property" 516.
[131] Maxwell "Disputed property rights" 50. However, A1P1 has also been praised for being more elaborate than Article 17 of the Universal Declaration of Human Rights, UN General Assembly Resolution 217 A (III) ('UDHR'). The latter provision provides:

> "1. Everyone has the right to own property alone as well as in association with others
> 2. No one shall be arbitrarily deprived of his property."

See Merrills JG & Robertson AH *Human rights in Europe: A study of the European Convention on Human Rights* 4 ed (2001) 234 ('Merrills & Robertson *Human rights in Europe*).
[132] (1979) 2 EHRR 330.
[133] *Marckx* para 63. See also *Lithgow v United Kingdom* (1986) 8 EHRR 324 para 106 ('*Lithgow*'); *Air Canada v United Kingdom* (1995) 20 EHRR 150 para 29 ('*Air Canada*').
[134] Merrills & Robertson *Human rights in Europe* 235.

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"possession" within the meaning of A1P1, but only to the extent that it was considered an adjunct to the economic interest to which it attached.[135] What was considered a possession was the economic interest connected with running the restaurant in which the alcohol would be sold.[136] This thinking was in line with the court's earlier opinion in *Van Marle* that business goodwill amounted to a possession within the meaning of A1P1.[137] Similarly, other interests such as company shares,[138] goodwill in a business,[139] patents,[140] fishing rights,[141] hunting rights,[142] and planning permissions[143] have been considered possessions for purposes of A1P1.

Despite the ECtHR's predilection for generous interpretation, mere expectations have failed to attract the protection offered by A1P1.[144] Since they are not concrete, expectations are too abstract to amount to possessions.[145] In *Marckx* the ECtHR stated that possessions must be "existing" if they are to be the subject of protection under A1P1.[146] However, the ECtHR has not been consistent in this view, because in *Stran Greek Refineries and Stratis Andreadis v Greece*[147] ('*Stran Greek Refineries*')

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[135] *Tre Traktorer Aktiebolag v Sweden* (1991) 13 EHRR 309 para 53 ('*Tre Traktorer*').
[136] *Tre Traktorer* para 53.
[137] It should be noted that, prior to *Van Marle*, ECtHR case law on interference with business goodwill had initially exhibited a reluctance to protect the income expected to accrue from the practice of a profession as property. For example, in *X v Federal Republic of Germany* (1979) 18 DR 170 the Court declined to interpret A1P1 as protecting a notary's expectation in respect of fees. According to the Court, the mere expectation that notary fees would not be reduced did not amount to a "possession" under A1P1. Similarly, in *Van der Mussele v Belgium* (1983) 6 EHRR 163 para 48 the Court decided that payments due to a lawyer for work done did not amount to a possession. Subsequent decisions showed a willingness to at least protect business goodwill (*Van Marle* being an example) as well as licences to pursue an economic activity, such as fishing. See Sermet L *The European Convention on Human Rights and property rights* (1998) 14 ('Sermet *European Convention and property*').
[138] *Bramelid and Malmstrom v Sweden* (1983) 5 EHRR 249.
[139] *Van Marle and Others v Netherlands* (1986) 8 EHRR 483 para 41.
[140] *Smith Kline and French Laboratories v Netherlands* (1990) 66 DR 70.
[141] *Alatulkkila v Finland* (2006) 43 EHRR 34 para 66.
[142] *Chassagnou and Others v France* (2000) 29 EHRR 615 para 74.
[143] *Pine Valley Developments Ltd and Others v Ireland* (1992) 14 EHRR 319 para 54 ('*Pine Valley Developments*').
[144] Merrills & Robertson *Human rights in Europe* 236.
[145] Escarcena "Interferences with property" 518. See also *Sierpinski* para 65 where the ECtHR stated that "Legitimate expectation[s]…must be of a nature more concrete than mere hope." The court has reasoned that claims are included in the definition of "possessions" to the extent that the claimant can demonstrate that she has a legitimate expectation of effectively enjoying a property right. See, further, *Pressos Compania Naviera S.A.* para 31; *Kopecký v Slovakia* (2005) 41 EHRR 4 para 35 ("*Kopecký*"). The principle of effective enjoyment of a property right was further underscored in *The Holy Monasteries v Greece* (1995) 20 EHRR 1 para 58 and *Papamichalopoulos and Others v Greece* (1993) 16 EHRR 440 para 38.
[146] *Marckx* para 50. However, see the court's subsequent reasoning in *Kopecký* para 35 where it was stated that "'Possessions' can be either 'existing possessions' or assets, including claims."
[147] (1994) 19 EHRR 293.

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it reached the opposite conclusion based on its analysis of the invalidation of an existing arbitration award under Greek law. The applicants in this case had contended that the nullification of an existing arbitral award violated their A1P1 rights because such an award constituted a tangible asset.[148] It was argued that this amounted to a "possession" within the meaning of A1P1.[149] On the other hand, the government of Greece argued that the nullification was a valid limitation to the applicant's rights. The Court accepted that the applicant's claim was properly brought as a vindication of its property rights.[150]

Another issue on which the ECtHR has been inconsistent is *de facto* expropriation of property and the duty to compensate. Although the applicant in *Stran Greek Refineries* had argued that the cancellation of the award amounted to *de facto* expropriation, the ECtHR avoided this characterisation in its reasoning and instead found that no expropriation took place, nor was the interference a measure to control the use of property.[151] This approach is at odds with the court's clear commitment to look behind appearances as held in *Sporrong & Lönnroth.*[152] It held in this case that whenever the facts show that no formal expropriation (transfer of ownership) has taken place, it has a duty to nevertheless establish whether the situation amounts to a *de facto* expropriation.[153]

The scope of the concept of "deprivation" under A1P1 law has been clarified by the ECtHR's decisions.[154] Its policy appears to be to find deprivation only in cases where

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[148] *Stran Greek Refineries* para 75.
[149] *Stran Greek Refineries* para 75.
[150] *Stran Greek Refineries* para 66. Furthermore, in *Kopecký* para 35, the ECtHR provided the following clarification:

> "'Possessions' can be either 'existing possessions' or assets, including claims, in respect of which the applicant can argue that he or she has at least a 'legitimate expectation' of obtaining effective enjoyment of a property right. By way of contrast, the hope of recognition of a property right which it has been impossible to exercise effectively cannot be considered a 'possession' within the meaning of Article I of Protocol No. 1, nor can a conditional claim which lapses as a result of the non-fulfilment of the condition."

This principle was reiterated in *Prince Hand-Adam II of Lichtenstein v Germany* [2001] ECHR 467 para 83; and *Gratzinger and Gratzingerova v Czech Republic* (2002) 35 EHRR 202 para 69.
[151] *Stran Greek Refineries* para 68.
[152] *Sporrong & Lönnroth* para 63.
[153] *Sporrong & Lönnroth* para 63.
[154] Griffiths J & McDonagh L "Fundamental rights and European IP law: The case of Art 17 (2) of the EU Charter" in Geiger C (ed) *Constructing European intellectual property: Achievements and new perspectives* (2013) 85.

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all the rights in the property are extinguished.[155] This was decided in *Sporrong & Lönnroth*[156] where the ECtHR was faced with two main issues, namely, the effect of long-term expropriation permits[157] and prohibitions on construction on the claimants' property. Although legal title was not affected, these measures had serious economic consequences for the property owners. The starting point was to acknowledge that A1P1 allows states to control the use of property. The control by the state must nevertheless observe a balance between the individual's interests and those of the public. The A1P1 accords a wide margin of appreciation to the state in this balancing exercise. The ECtHR found that the limitations imposed on the right to property in this case left the owner with the possibility of using and even selling the property at a future date. The Court stated:

> "However, although the right in question lost some of its substance it did not disappear. The effect of the measures involved is not such that they can be assimilated to a deprivation of possessions. The Court observes in this connection that the applicants could continue to utilize their possession and that, although it became more difficult to sell properties in Stockholm affected by expropriation permits and prohibitions on construction, the possibility of selling subsisted."[158]

In the circumstances, no deprivation had taken place.[159] This approach is synonymous with the total takings test employed in U.S. law for determining whether compensation should be paid in the aftermath of a regulatory taking.[160] This standard was applied in the U.S. Supreme Court decision of *Lucas*, although the Supreme Court subsequently softened its stance in *Palazzolo*.[161] The ECtHR similarly faces some pressure to recognize that deprivation of property may take place even where the owner is left with some economic benefit attached to the property. Nevertheless, the Court does not reason along a binary logic that turns all non-deprivations into controls on the use of property.[162]

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[155] Escarcena "Interferences with property" 539.
[156] *Sporrong & Lönnroth* para 63.
[157] In terms of the Swedish Building Act of 1947, the government granted zonal expropriation permits to the city of Stockholm over several properties, including the applicant's. These permits were meant to enable the city to construct a viaduct towards a relief road. These permits enabled the city of Stockholm to effectively freeze any kind of development on the affected property. In this case the owners of the affected property could not develop it for about 23 years (para 18).
[158] *Sporrong & Lönnroth* para 63.
[159] *Sporrong & Lönnroth* para 63.
[160] See para 4.2.1.2 above.
[161] See para 4.2.1.2 above.
[162] Escarcena "Interferences with property" 539; Harris D, O'Boyle M, Bates E & Buckley C *Law of the European Convention on Human Rights* 2 ed (2009) i.

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4.2.2.3 The A1P1 and specific property controls

4.2.2.3.1 Building Controls

4.2.2.3.1.1 *Depalle*

In *Depalle v France*[163] the applicant, Mr Louis Depalle, had occupied a house in the municipality of Arradon along the French coastline since 1960. The house was adjacent to land that was categorised as maritime public property. In 1986, Law No. 86-2 came into force, and section 25 of this law made wholesale changes to the way the occupancy of residential houses along the coastline would be done. The administrative authorities in charge of maritime properties were obliged to consider the zones established by the law in adjudicating any applications before them. This ruled out the use of such land for residential purposes.

On 14 March 1993, the applicant and his wife applied for the renewal of his occupancy authorization.[164] However, the prefect in charge of the locality in which applicant lived declined such authorization, citing the 1986 law. The prefect stated that section 25 of this law no longer allowed him to authorise occupancy on the previous terms and conditions. Recognising, however, that the applicant had a deeply sentimental attachment to his home, and in view of the length of the occupancy, the prefect offered to allow the applicant to use the home strictly for personal use. This arrangement would prevent the applicant from alienating the property or encumbering it in any way. However, the applicant rejected this offer and instead requested a concession to build a dyke.[165] This request was in turn refused.

A challenge to this decision was commenced before French courts. The dispute was subsequently brought before the ECtHR based on the alleged violation of A1P1.[166] At issue was whether there was a "possession" in favour of the applicant. The applicant emphasized the autonomous nature of the concept of possessions, which meant that the ECtHR was free to consider the question regardless of the position under national law.[167] He further argued that since the state had collected taxes and duties in respect

[163] (2012) 54 EHRR 17.
[164] *Depalle* para 15.
[165] In terms of Article L.28 of the Code of State Property, or by agreement, individuals could be granted permission to occupy public land. By means of a concession to build a dyke, an individual could be authorized to carry out works whose effect would be to remove the affected land from tide action.
[166] *Depalle* para 55.
[167] *Oneryildiz v Turkey* (2005) 41 EHRR 20 para 124 ('*Oneryildiz*').

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of the house, it had therefore identified a proprietary interest in it.[168] On the other hand, the state characterised its decisions authorising occupancy in favour of the applicant and his predecessors as "temporary, precarious and revocable."[169] It therefore argued that such decisions did not acknowledge the existence of any property rights in favour of the applicant. In the same vein, no legitimate expectation could be construed in his favour in these circumstances.

In the assessment of the majority of the ECtHR, the question was whether the circumstances of the case were such that title was conferred upon the applicant on a substantive basis.[170] It noted that the answer to this question did not depend entirely on the notion of "existing possessions," as the legitimate expectation of the enjoyment of some classes of assets could also enjoy protection under A1P1.[171] In this regard legitimate expectations must have a sufficient basis in national law. In effect, even though the ECtHR insists on conducting an independent assessment of the existence of a possession, it will defer to national authorities on the question of whether a legitimate expectation exists in each case. In *Depalle*, the ECtHR concluded that no such expectations applied because the French courts and tribunals had repeatedly found that no right *in rem* could be established over public property.[172] A similar finding was made on a different basis, namely, whether there had been uncertainty regarding the legal status of the possession. Here, again, the ECtHR found that the French national courts had always been clear. There was no uncertainty about whether the property in question was public in nature.[173] Although the order for demolition was a radical interference with the applicant's possession given the time that had elapsed in this case,[174] the countervailing interest in the maintenance of the coastline was

[168] *Depalle* para 56.
[169] *Depalle* para 58.
[170] *Depalle* para 61. *Cf Hamer v Belgium* ECHR 2007-V para 76 ('*Hamer*') where the ECtHR, adverting to the doctrine of legitimate expectations, reasoned that when Belgian authorities tolerated a legal violation in respect of property for twenty seven years, this served to sufficiently establish the applicant's proprietary interest in her holiday home. The resulting substantive interest amounted to a "possession" within the meaning of A1P1.
[171] *Depalle* para 62. See also *Iatridis v Greece* (2000) 30 EHRR 97 para 54('*Iatridis*'); *Oneryildiz* para 124, *Hamer* paras 35 &75.
[172] *Depalle* para 67.
[173] *Depalle* para 86. *Cf Beyeler* para 119.
[174] *Depalle* para 88.

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sufficient to strike the required balance.[175] The measure in this case was proportional despite the lack of compensation.

Depalle and *Hamer* point to a balancing process that regards the issue of delay on the part of national authorities as irrelevant to the creation of a legitimate expectation in view of certain governmental goals. There is no necessary link between the time lapse in each case and the decision as to whether the applicant's property right has been violated. Although *Depalle* involved a time lapse of more than 100 years, this did not result in a finding that a property right had been breached.[176] Similarly, the delay in *Hamer* spanned 27 years and even though a property right was at stake, it had not been violated. The building controls in both cases were therefore treated similarly *vis-à-vis* the property rights of the applicants: the court made a value judgment that privileged environmental conservation over property rights, in effect finding that no legitimate expectation could be invoked in respect of a right to continue to violate the environment. Implicit consent by national authorities cannot override a national goal as important as environmental preservation, especially within an area in which no building was permitted.[177]

4.2.2.3.2 Rent restrictions

4.2.2.3.2.1. *Mellacher*

In *Mellacher v Austria*,[178] the issue was the compulsory reduction of negotiated rent pursuant the Rent Act of 1981, and whether such reduction violated A1P1. The applicants, Leopold and Maria Mellacher, owned several flats in the Austrian city of Graz. They charged 1, 8700 Austrian Schillings ('ATS') in terms of the Rent Act of 1922 as amended in 1967. However, the subsequent enactment of the Rent Act of 1981 allowed tenants to apply for reduction in rent. The applicants' tenants accordingly applied to the Graz Arbitration Board and subsequently had their rent reduced to ATS 330 per month. The applicants were aggrieved by this drastic reduction in rent. They argued that the Rent Act of 1981 deprived them of "a contractual right to receive

[175] *Depalle* para 89.
[176] *Depalle* para 66.
[177] *Hamer* para 87.
[178] (1989) 12 EHRR 391.

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payment of the agreed rent."[179] The applicants disputed the existence of any problem justifying the government intervening in this manner, arguing instead that in the period under review Austria had experienced an economic upturn that had consequently driven up the standard of living.[180] They claimed that in 1981 when the law was enacted there had been no shortage of accommodation.[181] They further maintained that the 1981 law was not in the general interest as it had not garnered the support of a sizeable portion of the population as represented by several Austrian political parties.[182]

The ECtHR explored the reasons given for the introduction of the rent control and concluded that the explanations for the measure were not manifestly without reasonable foundation since an earlier law easing rent controls had resulted in disparities for rent in respect of equivalent apartments.[183] The ECtHR proceeded by determining that the Rent Act 1981 was an example of social legislation. Its purpose was to effect social control over an important social phenomenon (high rentals and the resultant homelessness). The Austrian legislature enjoyed some latitude in dealing with this social phenomenon, even in the face of settled legal principles (the sanctity of contracts in this case). The ECtHR stated as follows:

> "The fact that the original rents were agreed upon and corresponded to the prevailing market conditions does not mean that the legislature could not reasonably decide as a matter of policy that they were unacceptable from the point of view of social justice."[184]

In other words, the ECtHR considered that the protection offered by A1P1 has its limits.[185] The protection covering one's property under A1P1 does not extend to the right to exchange that property against some other advantage exclusively under market conditions.[186] Remedial social legislation can alter one's entitlements under A1P1 even where such entitlements are based on contract. The legislative choices made in pursuit of the objectives of this policy cannot be faulted since the protections

[179] *Mellacher* para 12.
[180] *Mellacher* para 46.
[181] *Mellacher* para 46.
[182] *Mellacher* para 46.
[183] *Mellacher* para 47.
[184] *Mellacher* para 56.
[185] Maxwell "Disputed property rights" 54.
[186] De Schutter O "Waiver of rights and state paternalism under the European Convention on Human Rights" (2000) 51 *Nor. Ir. Legal Q.* 481—508 506 ('De Schutter "Waiver of rights under ECHR"').

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offered by A1P1 must be subjected to the demands of social justice.[187] Freedom of contract was therefore not the dominant value in this legislative scheme chosen by the Austrian authorities.[188]

The ECtHR explained the legal principles governing the application of A1P1 and confirmed that this provision involves three distinct though interrelated rules.[189] For purposes of the present dispute, it was held that the relevant rule was the second paragraph of article 1 and that therefore the 1981 law amounted to control on the use of property.[190] The ECtHR then proceeded to determine whether the interference in this case complied with certain conditions for the exercise of control over the use of property. First, it inquired whether the rent controls were in the general interest, noting that the explanation given by the Austrian authorities was sufficient as it showed that there was an urgent need to address disparities in rental charged for similar apartments.[191] Secondly, the ECtHR inquired into the proportionality of the interference and noted that the 1981 law must strike a proper balance between the needs of the tenant and the property interests of the landlord.[192] There must be a reasonable relationship of proportionality between the means chosen and the ends pursued by the rent control law.[193] In this regard, the ECtHR found that the law struck such a balance. It justified this conclusion by observing that when states enact social legislation they must be allowed to take measures that would otherwise be considered contrary to the sanctity of contract.[194] This reasoning suggests that the ECtHR restricted its opinion to the facts of the case as the sanctity of contract was specifically pleaded by the applicants. The ECtHR's reasoning placed freedom of contract at a distinct advantage in relation to social policy by simply privileging the latter at the expense of the former. While acknowledging that the resulting reduction in income was severe in terms of its effect on the applicants, the ECtHR asserted that the impact

[187] *Mellacher* para 56. See also De Schutter "Waiver of rights under ECHR" 506.
[188] In *Spadea & Scalabrino v Italy* (1996) 21 EHRR 482 para 29 the ECtHR explained its deferential stance in relation to national legislation that is aimed at addressing a social problem. It stated that such legislative choices should be allowed to stand unless they are manifestly unreasonable. See also *Mellacher* para 45 and *James* para 46.
[189] *Mellacher* para 42.
[190] *Mellacher* para 44.
[191] *Mellacher* para 47.
[192] *Mellacher* para 48.
[193] *Mellacher* para 48.
[194] *Mellacher* para 51.

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of a rent control law on an owner was not conclusive in determining whether the measure was proportional.[195] The ECtHR did not weigh up any of the countervailing interests of the applicants, on the one hand, and the tenants on the other. For example, no attempt was made to ascertain whether the 1981 law imposed upon the applicants a disproportionate burden in relation to their property rights. Whilst the applicants emphasised that the law not only deprived them of all profits but also made it impossible for them to cover their expenses,[196] the ECtHR avoided the balancing exercise that this argument called for. Instead, it simply invoked the social justice argument to show that the rent control law was proportional.[197]

Therefore, the decision in *Mellacher* was not strictly about interpreting A1P1. The decision was rather based on the weighing of social justice against the asserted freedom of contract on which the applicants in this case relied. Moreover, the decision reveals the ECtHR's attitude that, irrespective of any freedom of contract argument, social policy is a factor that absolves the court from the duty to engage in proportionality analysis whenever a law is challenged on the basis that it violates the provisions of A1P1.[198] It therefore emphasized the notion that such a law can only be defeated on the basis that it is manifestly without reasonable foundation.[199]

4.2.2.3.2.2. *Hutten-Czapska*

In *Hutten-Czapska v Poland*,[200] a French national of Polish descent inherited a house and some land from her parents. The property was situated in the region of Gdynia in Poland.[201] During the communist regime, the Housing Act of 1974 was enacted to deal with the pressing need for housing. This law introduced a "special lease scheme" that governed the letting of houses by tenants. The decision to allocate a rental dwelling to a tenant was administrative rather than contractual, and landlords generally had no say on who they leased their houses to.[202] This scheme applied to both residential and

[195] *Mellacher* para 56.
[196] *Mellacher* para 54.
[197] *Mellacher* para 55.
[198] De Schutter "Waiver of rights under ECHR" 505.
[199] Ploeger & Groetelaers "Case law of the ECtHR on Article 1 Protocol 1" 431; *Immobiliare Saffi v Italy* (1999) 30 EHRR 756 para 49; *Chassagnou v France* (2000) 29 EHRR 615 para 75; *Mellacher* para 48.
[200] (2007) 45 EHRR 4.
[201] *Hutten-Czapska* para 14.
[202] *Hutten-Czapska* para 69.

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commercial housing.[203] The Lease of Dwellings and Housing Allowances Act[204] was subsequently enacted to abolish the special lease scheme. Amongst other reforms, it allowed the leasing of commercial premises to be governed by the prevailing market, although residential premises would continue to be subject to controlled rent.[205] It also maintained controls on the termination of leases, which meant that tenants were protected from eviction following the termination of their leases except in accordance with the provisions of this law.[206] Lastly, section 9 of this law required the landlord to maintain the dwelling in a specific condition.[207]

The applicant's complaint was based on the following facts: In 1992, she sought the eviction of the tenants residing in her house. This request was turned down, as were subsequent attempts to get rid of the tenants through various legal provisions and arguments. She subsequently requested that the Gdynia City Council be ordered to relocate the tenants to city council housing. This was unsuccessful, and a national court held that the Gdynia City Council was under no obligation to relocate the applicant's tenants or, at her request, to find them alternative accommodation.[208] The court observed that, in terms of section 56 (4) and (7) of the 1994 Act, a tenant was obliged to vacate premises only where the owner had offered an alternative dwelling,

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[203] *Hutten-Czapska* para 70.
[204] Of 2 July 1994.
[205] *Hutten-Czapska* para 71.
[206] Sections 31 and 32 of the Act.
[207] Section 9 provided:

> "(1) The landlord shall ensure that the existing technical facilities in the building are in working order; shall enable the tenant to use lighting and heating in the dwelling; shall ensure that the dwelling is supplied with cold and hot water; and shall ensure the proper functioning of lifts, the collective aerial, and other facilities in the building;
> ...
> (3) The landlord shall, in particular:
> 1. maintain in working order and keep clean any shared premises and facilities in the building; the same should apply to the vicinity of the building;
> 2. carry out repairs in the building and its dwellings and facilities, and restore any building which has been damaged, regardless of the cause of such damage; however, the tenant shall bear the costs of repairing damage for which he is liable;
> 3. carry out repairs in the dwellings, repair or replace installations and technical facilities and, in particular, carry out repairs for which the tenant is not responsible; in particular, he shall:
> (a) repair and replace the water supply installation in the building and the gas and hot water supply installations, and repair and replace the sewage, central heating (including radiators), electricity, telephone and collective aerial installations – the latter, however, without fittings;
> (b) replace or repair furnaces, window and door frames, floors, floor linings and plasterwork…"

[208] *Hutten-Czapska* para 37.

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or where the municipality had agreed to provide such accommodation administered by it. The matter ultimately came before the ECtHR where the applicant complained that the continued application of the law imposing tenancy agreements on her and setting inadequate levels of rent amounted to a violation of her ECHR rights, specifically the provisions of A1P1.[209] According to her, the right to property under A1P1 should, at a minimum, entail the right to derive profit from the property and the right to regain its possession.[210] The applicant based her case on the provisions of the first paragraph of A1P1, arguing that the resulting deprivation was akin to the expropriation of her property.[211] On the other hand, the government maintained that this case fell to be decided under the second paragraph of A1P1 because the interference in this case amounted to control on the use of applicant's property and nothing more.[212]

In the ECtHR's view, the case fell within the terms of the second paragraph of A1P1 because the government had not effected a change of ownership of the property or interfered with her right to sell it.[213] The regulation merely affected the use of the property. Therefore, no *de facto* expropriation could be proven on the facts. Approaching the matter in this light, it fell on the ECtHR to inquire into the fair balance of the measures adopted. The Grand Chamber prefaced its analysis by stating that the principle of fair balance presupposed the existence of a legitimate aim,[214] adding that national authorities were best placed to make an initial assessment of the existence of a problem and determine how to address it.[215] The Grand Chamber found that the rent control law was implemented for the social protection of tenants, as well to ensure a transition from state-controlled to market based economics.[216] The state had deliberately kept the allowable rent at less than 3% of the reconstruction value, and further required landlords to spend on the maintenance of their rental houses.[217] The ECtHR further found a link between the prohibition of free disposal of property

[209] *Hutten-Czapska* para 152.
[210] *Hutten-Czapska* para 154.
[211] *Hutten-Czapska* para 158.
[212] *Hutten-Czapska* para 159.
[213] *Hutten-Czapska* para 160.
[214] *Hutten-Czapska* para 164.
[215] *Hutten-Czapska* para 166.
[216] *Hutten-Czapska* para 195.
[217] *Hutten-Czapska* para 200.

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and the depreciation of its value.[218] Unlike the situation in *Mellacher*, the rent control law in this case failed to provide a mechanism through which landlords could recover their costs. The transformation objectives of the 1994 were imposed on one social group (landlords) rather than on society at large.[219] This impaired the applicant's property and violated A1P1. The ECtHR found that the violation of A1P1 resulted from defective legislation that applied to landlords. This legislation should have, at the very least, provided for a mechanism enabling landlords to recover the cost of maintenance.[220]

The decision in *Hutten-Czapska* shows that reform in access to land and housing cannot be achieved by burdening one social group. The principle of fair balance and its conceptual outgrowth (proportionality) require a true fine balance between the identified interests of the social groups involved, without singling out individuals for unfavourable treatment. The ECtHR's order in *Hutten-Czapska* confirms that where a problem is systemic in that it affects many people, it should be addressed through structural reforms. The pilot judgment in this case allowed Poland to address the systemic legal shortcomings in its property protection system.

4.2.2.3.3 Conclusion

The proportionality of a building control is assessed in relation to any countervailing interests of the public in maintaining the control. The decisions in *Depalle* and *Hamer* underscore the centrality of time and certainty in the imposition of legal controls over the right to build. The control in *Depalle* did not result in the deprivation of property even though more than 100 years had elapsed since the illegal building works were conducted. Seemingly, this was because there had been no uncertainty that the land in question constituted public property on which no building works were allowed.

4.2.2.4 Conclusion

The ECtHR jurisprudence on the application of A1P1 has evolved over the years. While the ECtHR initially insisted that possessions must be in existence as a pre-

[218] *Hutten-Czapska* para 198.
[219] *Hutten-Czapska* paras 200, 225.
[220] *Hutten-Czapska* para 237.

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requisite for protection under A1P1,[221] it has subsequently accepted the idea that "possessions" do not always have to exist before the protection offered by the A1P1 can be activated. The ECtHR has stated that benefits expected in the future can amount to possessions, as evidenced by the decision in *Pressos Compania Naviera S.A*. This decision concluded that the pecuniary value of a claim involving compensation for the negligence of pilots of sea-going vessels amounted to a possession.[222] The decision in *Kopecký* further underscores this view because the ECtHR held that claims are subsumed under assets and are protected under A1P1 even though they do not amount to existing possessions.[223]

The ECtHR's jurisprudence on the scope and application of A1P1 illustrates that a wide variety of interests are protected as property within the ECHR framework. The initial insistence that only existing possessions could be protected under A1P1 has gradually softened and given way to the recognition of other forms of interest, such as claims in respect of interests expected to accrue in the future. Furthermore, the ECtHR's articulation of its own role *vis-à-vis* property rights suggests a shift from the mere consideration of the lawfulness of an interference to the examination of the fairness of the interference.[224] In *Handyside v United Kingdom*[225] ('*Handyside*') the ECtHR stated that its only role was to supervise "the lawfulness and the purpose of the restriction in question."[226] That reading of A1P1 changed with the decision in *Sporrong & Lönnroth* which injected the "fair balance" requirement into the process of adjudicating disputes under A1P1. Henceforth, the ECtHR would not only examine the lawfulness of an interference but also its fairness in relation to the respective interests of the parties and the fit between the means adopted and the ends pursued.[227]

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[221] *Marckx* para 50.
[222] *Pressos Compania Naviera S.A.* para 34.
[223] *Kopecký* para 35.
[224] Allen T "Liberalism, socialism and the value of property under the European Convention on Human Rights" (2010) 59 *I.C.L.Q.* 1055—1078 1065.
[225] (1976) 1 EHRR 737.
[226] *Handyside* para 62.
[227] *Sporrong & Lönnroth* para 69: ("[T]he court must determine whether a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights…The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1…"). See also *Hutten-Czapska* para 167 and *Scordino* para 93.

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In respect of building and rent controls, the decisions in *Mellacher* and *Hutten-Czapska* show that the ECtHR will treat rent control measures as aspects of a state's right to control the use of property under the auspices of the second paragraph of A1P1. These measures are also subject to the margin of appreciation doctrine generally employed in respect of state measures within the A1P1 framework. In addition, rent control measures involve specific social and economic considerations that serve to further widen the state's margin of appreciation because the state is best placed to make an initial assessment of the existence of a social or economic problem that requires attention.[228] The ECtHR will allow such measures, especially if carried out in the context of social or economic transformation (as rent control invariably is).

4.2.3 India

4.2.3.1 Introduction

The Indian legal system has strong English law roots because of its history as a British colony. The 1949 Constitution spells out protections for certain fundamental rights and freedoms, such as the right to equality and the right to life, in a manner that closely mimics the U.S. Constitution.[229] The Constitution is the longest and most comprehensive of any sovereign nation in the world.[230] The supremacy of the Constitution and the power of judicial review of official actions are embedded in the Indian legal system. Nevertheless, the Constitution operates within the confines of a system that is welfare-inspired.[231] In other words, the state is responsible for providing certain basic social goods such as healthcare, education and public assistance to the poor who are the clear majority in India.[232] In cases where individual rights and the social good appear to be on collision course, the Supreme Court has in some cases emphasized the social good at the expense of individual rights.[233] This outlook has

[228] *Valkov v Bulgaria* (2016) 62 EHRR 24 para 91; *Hatton* para 97; *Vistiņš and Perepjolkins* para 71.
[229] Sripati "Toward fifty years of constitutionalism" 428. Furthermore, in *Shamsher Singh v State of Punjab* A.I.R. 1974 SC 2192 2212 the Supreme Court made this point in idiomatic fashion when it stated that the "Potomac and not the Thames…fertilised the flow of Yamuna."
[230] Singhvi A "India's constitution and individual rights: Diverse perspectives (2009) 41 *Geo. Wash. Int'l. L. Rev.* 327—360 327 ('Singhvi "India's constitution and individual rights"').
[231] Through Part IV of the Constitution entitled "Directive Principles of State Policy" India committed to securing "a social order for the promotion of the welfare of the people" and to a "social order in which justice, social, economic and political, shall inform all the institutions of the national life."
[232] Articles 41 and 45 of the Indian Constitution.
[233] Singhvi "India's constitution and individual rights" 328.

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impacted the Court's policy on resource distribution in line with the constitutional vision that distribution "does not result in the concentration of wealth and means of production to the common detriment." [234] Although this is the legal position, the Indian Supreme Court has often charted a different path for constitutional rights by developing a creative method for interpreting the rights enshrined in the Constitution.[235] In this way, the Court has often pursued a neoliberal agenda through its interpretation of the property clause, to give an example.[236] The growing proximity between commercial interests and government has therefore benefited from this neoliberal interpretation trend, especially insofar as the protection of property is concerned.[237] Hohmann notes that in India the mantra of creating "world class cities," for example, has been a judicial creation.[238] The courts have arrogated to themselves the role of managing India's urbanization struggles with a view to eliminating sprawl and increasing the attractiveness of the urban centres to the outside world. This has enabled commercial interests to dictate the availability of affordable housing.[239]

In this section I consider the pre-1978 and post-1978 positions on the protection of property rights in the Indian legal system to highlight the manner in which the absence of a property clause under the current constitutional dispensation has impacted the development of building and rent controls.

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[234] Article 39 (c) of the Indian Constitution. In *Indra Sawhney and Others v Union of India and Others* 1992 Supp (3) SCC 217 para 340, the Supreme Court described India as a "socialist republic" in terms of the 1949 Constitution. Allen argues that such declarations often belie the rather determined push by the Supreme Court to pursue a liberal agenda in its interpretation of the Constitution. See Allen T "The revival of the right to property in India" (2015) 10 *Asian J. Comp. L.* 23—52 24 ('Allen "Right to property in India"').

[235] Allen "Right to property in India" 24. Hohmann has referred to this trail blazing posture of the Supreme Court of India as the "governance function" because it stretches the role of the judiciary beyond what has been assigned by the Constitution, taking risks that the other branches of government are unwilling to take. See Hohmann JM "Visions of social transformation and the invocation of human rights in Mumbai: The struggle for the right to housing" (2010) 12 *Yale Hum. Rts. & Dev. L.J.* 135—184 180, 181('Hohmann "Social transformation in Mumbai"'); Mehta P "Internally displaced persons and the Sardar Sarovar project: A case for rehabilitative reform in rural India" (2005) 20 *Amer. Univ. Int'l. L. Rev.* 613—647 619, 627; Sripati V "Toward fifty years of constitutionalism and fundamental rights in India: Looking back to see ahead (1950—2000)" (1998) 14 *Amer. Univ. Int'l. L. Rev.* 413—495 ('Sripati "Fifty years of constitutionalism in India"'); Young K *Constituting economic and social rights* (2012) 172—191; Yap *Courts and democracies in Asia* 79; Singhvi "India's constitution and individual rights" 328.

[236] Allen "Right to property in India" 24.

[237] Allen "Right to property in India" 25.

[238] Hohmann "Social transformation in Mumbai" 174.

[239] Hohmann "Social transformation in Mumbai" 182. See also *Narmada Bachao Andolan v Union of India and Others* AIR 2000 SC 3751.

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4.2.3.2 The constitutional development of the property concept

4.2.3.2.1 The pre-1978 position

The pre-1978 Indian Constitution provided for the right to property in Article 19 which guaranteed the right to acquire, hold and dispose of property,[240] and Article 31 which required the authority of a law for deprivation of property to take place.[241] The latter provision also stated that dispossession shall not be done for a public purpose unless the law in question provided for compensation.[242] Van der Walt characterizes this combination of articles 19 and 31 as a kind of double property guarantee, akin to the property clause of the Interim Constitution of South Africa which provided for a positive property guarantee and a negative property guarantee in different parts of the same clause.[243] The Indian double guarantee precipitated a long drawn-out conflict between the judiciary and the legislature because it complicated the reforms that had been undertaken in India to address the failures of free-market economics.[244]

The pre-amendment epoch in Indian property law was characterized by two main trends. The first was the crucial role that the constitutional provision on equality played in shaping the jurisprudence on property regulation. The state of Bihar was the origin of two important cases that would help to define the scope of the pre-amendment property clause. In *Kameshwar Singh v The Province of Bihar*[245] the proprietors of certain estates complained about the constitutionality of the Bihar State Management of Estates and Tenures Act ('Bihar Estates Act'). This Act was supposed to be the precursor to major reforms in the system of land holdings in India, including the abolition of the *zamindari* system.[246] The Act placed the management of these estates

[240] Article 19 (1) (f).
[241] Article 31 of the Constitution provided:
> "(1) No person shall be deprived of his property save by authority of law.
> (2) [n]o property, movable or immovable, or any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation or specifies the principle on which, and the manner in which, the compensation is to be determined and given."

[242] See note 241 above.
[243] Van der Walt AJ *Constitutional property clauses* (1999) 193.
[244] Sripati "Fifty years of constitutionalism in India" 482; Allen "Right to property in India" 27.
[245] AIR (37) 1950 Pat 392 (SB).
[246] See *State of Bihar v Bishnu Chandlal Choudhary and Others* (1985) AIR 285 para 5. As to the meaning of the *Zamindari* system, see note 251 below.

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in the hands of designated civil servants,[247] although the proprietors of these estates were allowed to draw some income from them. Significantly, the Act did not provide for compensation. The High Court in Patna struck the statute down on account of its violation of Article 14 of the Constitution (equality clause) and Article 19 (property). A different statute, the enactment of which was influenced by the same concerns as applied to the Bihar Estates Act was the Bihar Land Reforms Act.[248] This Act was the subject of the challenge in *Kameshwar Singh and Others v The State of Bihar*.[249] The Act[250] provided for the acquisition by the state of land formerly held by *zamindars*.[251] Although provision was made for compensation, the Court held that the Act violated the equality clause of the Constitution (Article 14).

The second feature of the pre-1978 epoch was the tussle between a reformist legislature and a conservative judiciary as far as property was concerned. The Supreme Court insisted on either reading into Article 19 (1) (f) a requirement of reasonableness or requiring that all deprivations be accompanied by compensation.[252]

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[247] Section 4 of the Bihar Estates Act.
[248] Act 30 of 1950.
[249] AIR (38) 1951 Pat 91 (FB).
[250] Section 3A of the Act provided:

> "(1) Without prejudice to the provision in the last preceding Section the State Government may, at any time, by notification, declare that the intermediary interests of all intermediaries in the whole of the State have passed to and become vested in the State.
> (2) It shall be lawful for the State Government, if it so thinks fit, to issue, from time to time, a notification of the nature mentioned in sub-section (1) in respect of the intermediary interests situate in a part of the State specified in the notification and, on the publication of such notification, all intermediary interests situate in such part of the State shall have passed to and become vested in the State.
> (3) The notification referred to in sub-section (1) or sub-section (2) shall be published in the Official Gazette."

[251] Zamindars were rural intermediaries who controlled large tracts of land on behalf of their British feudal lords. This system was intended to be part of the tax collection system of the British colonial government in India. See Allen T "Property as a fundamental right in India, Europe and South Africa" (2007) 15 *Asia Pac. L. Rev.* 193—218 196 ('Allen "Property in India, Europe and South Africa"') ; Allen T "Constitutional law, social justice and the redistribution of land" in Xu T & Allain J (eds) *Property and human rights in a global context* (2015) 63—90 67; Singh J "Unconstituting property: The deconstruction of the 'right to property' in India" (2005) *Working Paper Series: Centre for the Study of Law and Governance, Jawaharlal Nehru University, New Delhi* 5, available online at https://www.jnu.ac.in/sites/default/files/u63/05-Un%20Constituting%20%28Jaivir%20Singh%29.pdf (accessed on 25 November 2019).
[252] Van der Walt *Constitutional property clauses* 198. It is also noteworthy that, by requiring compensation both in cases of mere deprivation and in cases of compulsory acquisition of property, the Indian Supreme Court adopted an approach that was in sync with the Privy Council's interpretation of sections 3 and 8 the Constitution of Mauritius 1968 in *La Compagnie Sucriere de Bel Ombre Ltee v The Government of Mauritius* [1995] 3 LRC 494 ('*La Compagnie Sucriere de Bel Ombre*'). The Privy Council stated that it was not necessary to reduce the property to a mere shell for compensation to become due.

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In this way, the Court effectively conflated the police power and the power of eminent domain, making it difficult for the state to pursue its land reform agenda.[253] A series of constitutional amendments were passed by Parliament to reaffirm the state's police power that was essential to the reform agenda and the realization of a social democratic republic.[254] In response, the Supreme Court articulated what it saw as the essential features of the Indian constitutional state that could not be altered by Parliament. This line of thinking formed the basis of the "Basic Structure Doctrine"[255] which became a feature of Indian constitutional theory after the Supreme Court decision in *Keshavananda Bharati v State of Kerala*[256] ('*Keshavananda*'). This decision explained that although Article 368 of the Constitution contained no express limitation on Parliament's power to amend the constitution, this power was subject to implied limitations. The Court stated:

> "The meaning of the words 'amendment of this Constitution' as used in Article 368 must be such which accords with the true intention of the Constitution makers as ascertainable from the historical background, the preamble, the entire scheme of the Constitution, its structure and framework and the intrinsic evidence in various

[253] Van der Walt *Constitutional property clauses* 198. See further the Supreme Court opinion in *State of West Bengal v Subodh Gopal Bose* 1954 (5) SCR 587, followed in *Saghir Ahmad v The State of Uttar Pradesh and Others* 1955 (1) SCR 707. In the latter case, it was held that the Uttar Pradesh Road Transport Act 2 of 1951 which allowed the state to conduct transport services as a monopoly was unconstitutional as it violated Article 31 (2) of the Constitution. The resulting revocation of private bus operators' permits was a deprivation of property and therefore called for compensation. This decision precipitated the adoption of the Constitution (Fourth Amendment) Act 1955. Section 2A of the Act replaced section 31 (2) of the Constitution with a new provision that read: "Where a law does not provide for the transfer of ownership or right to possession of any property to the state or to a corporation owned or controlled by the state, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property."

[254] These struggles are documented by Van der Walt *Constitutional property clauses*. Some of the ensuing cases in which the Supreme Court attempted to break free from the strictures of the Fourth Amendment include *Vajralevu Mudaliar v The Special Deputy Collector for Land Acquisition, West Madras and Another* AIR (52) 1965 SC 1017 and *Kochuni v The States of Madras and Kerala and Others* AIR (47) 1960 SC 1080. In addition, the Constitution (First Amendment) Act, which provided for the acquisition by the state of certain estates, was meant to be a part of the agrarian reform process and the protection of tenants from exploitation.

[255] The Basic Structure Doctrine is an ideological framework that encapsulates the immutable values that are thought to underlie the Indian constitutional state. This framework encompasses ideals such as republicanism, democracy, free speech, and expression. The doctrine is considered vague because the courts have not invoked it in relation to specific constitutional provisions, preferring instead to cite general values that are sacrosanct and unchangeable. See Samanta N & Basu S "Test of Basic Structure: An analysis" (2008) 3 *N.U.J.S. L. Rev.* 499—516 502 ('Samanta & Basu "Basic structure analysis"'. The evolution of this doctrine was a response to the constant battles for the amendment of the Constitution that pitted the judiciary against Parliament. It is notable that the right to property was the launching pad for the doctrine. See Singhvi "India's constitution and individual rights" 352; Buss A "Dual legal systems and the Basic Structure Doctrine of constitutions: The case of India" (2004) 19 *Can. J.L. & Soc.* 23—49 34.

[256] (1973) 4 SCC 225.

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> articles including Article 368. It is neither possible to give a narrow meaning nor can such a wide meaning be given which can enable the amending body to change substantially or entirely the structure and identity of the Constitution."

In summary, through a combination of the careful invocation of the equality clause, the disjunctive reading of Articles 19 and 31 and the conjunctive reading of Article 31 (1) and (2) of the old Constitution, Indian courts ensured that they exerted their influence to protect property rights against threats by Parliament.[257] The resistance by the Supreme Court seemed to disregard the need for social justice in India. Allen argues that the Court's stance was partially based on the belief that comparative law favoured the protection of property rights even at the expense of land reform.[258]

4.2.3.2.2 The post-1978 position

While the original property clause enshrined the right to property as a fundamental right,[259] as from 1978 the Indian property clause abolished the right to property as a fundamental right through the Forty Fourth Amendment to the Constitution.[260] The Forty Fourth Amendment deleted Articles 19 and 31 from the Constitution, and further relegated property to the status of a statutory right by placing it under Article 300A of the Constitution.[261] The effect is that the right to property is no longer a fundamental right under the Constitution, although it is clear that property still enjoys some form of legal protection.[262] In addition, property disputes may no longer be dealt with as

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[257] Van der Walt *Constitutional property clauses* 198.

[258] Allen "Property in India, Europe and South Africa" 76. The court seemed to rely almost exclusively on U.S. precedent which is heavily in favor of property rights while completely disregarding ECHR precedent that emphasized the social obligation of property ownership.

[259] Article 31 of the Constitution provided:

> "(1) No person shall be deprived of his property save by authority of law.
> (2) [n]o property, movable or immovable, or any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provides for compensation for the property taken possession of or acquired and either fixes the amount of the compensation or specifies the principle on which, and the manner in which, the compensation is to be determined and given."

[260] Section 6 of the Constitution (Forty-fourth Amendment) Act 1978 provides: "Article 31 of the Constitution shall be omitted."

[261] Article 300A of the Constitution provides: "No person shall be deprived of his property save by authority of law."

[262] It has been argued that the 1978 amendment transformed property from a fundamental right to a "statutory right." See Babu RR "Constitutional right to property in changing times: The Indian experience" (2012) 6 *Vienna J. Int'l. Const. L.* 213—247 232. However, Van der Walt uses the term "constitutional right" to denote this phenomenon. See Van der Walt *Constitutional property clauses* 203. Both sets of terminology appear to refer to the same substantive idea, namely, that property ceased to be a fundamental right and could henceforth be regulated by legislation. Consequently, the legislature

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constitutional issues as direct access to the Supreme Court on property matters has been eliminated.[263] Lastly, this provision guarantees that the deprivation of property will take place in terms of legislation, and that such deprivation will not lead to the violation of other constitutional provisions.[264] Van der Walt is of the opinion that this provision has legal consequences that are similar to the position in Canadian law where there is no property guarantee in the Constitution, although deprivations of property are required to comply with due process.[265] Allen argues that this amendment has made no discernible difference in the way that the Supreme Court has approached the issue of property rights in practice. A liberal understanding of property rights continues to hold sway over the Court. Although India has a social democratic Constitution,[266] commercial interests have been allowed to dictate the direction of government policy. Allen argues that the drafting of the Indian Constitution was guided by the need to ensure a planned economy which simultaneously valued the role of capital.[267]

The post-1978 epoch brought a notable shift in the way the Indian Supreme Court approached property rights. In the first place, the meaning and scope of Article 14 widened significantly. The Supreme Court interpreted this provision in such a way as to imply that state action should not be arbitrary. The provision was no longer simply about equality.[268] This interpretation of Article 14 was first made in a non-property context,[269] although the thinking behind it subsequently influenced property-related decisions such as *Minerva Mills v Union of India*[270] (‘*Minerva Mills*’). Secondly, the Supreme Court underscored the importance of the Basic Structure Doctrine in the

may enact laws for the compulsory acquisition of land. Furthermore, neither fair compensation nor public purpose are a requirement for expropriation.

[263] Allen “Right to property in India” 30.

[264] Allen “Property in India, Europe and South Africa” 202. Van der Walt *Constitutional property clauses* 203.

[265] Van der Walt *Constitutional property clauses* 203.

[266] Article 38 (1) of the Constitution of India.

[267] Allen “Right to property in India” 25.

[268] Allen “Property in India, Europe and South Africa” 202.

[269] *Maneka Gandhi v India* 1978 SCR (2) 621 concerned the withholding of a passport by the state. The Supreme Court in this case construed Article 14 of the Constitution as conferring a right not to be subjected to the arbitrary or unreasonable exercise of state power. The Court also dealt with Article 21 of the Constitution. This provision’s guarantee against the deprivation of “life or personal liberty except according to procedure established by law” did not imply that any procedure would do. The procedure had to be “fair, just and reasonable” (para 40). The interrelatedness of these two provisions was therefore emphasized. See also Sathe SP *Judicial activism in India* (2002) 53; Roux T *The politico-legal dynamics of judicial review* (2018) 168.

[270] 1981 SCR (1) 206.

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adjudication of property disputes. This doctrine provides a foundation for the invocation of the essential values that underpin Indian society in view of its social democratic character.[271] The decision in *Minerva Mills* exemplifies this trend because the Court relied on the Basic Structure Doctrine to invalidate a nationalisation law that impacted on property rights.[272]

In summary, Article 300A of the Indian Constitution forms an important part of the Supreme Court's policy of protecting property rights even though property is no longer a fundamental right. The Court has continued with its pre-1978 idea of placing reasonableness at the heart of restrictions on the state's right to regulate private property. It has further supplemented this position by invoking the Basic Structure Doctrine to counter Parliament's power to amend the Constitution.

4.2.3.2.3 Conclusion

The change in status of the right to property from a fundamental right to a constitutional right has not significantly altered the Supreme Court's stance regarding property protection against intrusions by the state. Although the tools at the Court's disposal have changed minimally, their essence has remained intact. The Court has relied on a combination of strategies that expanded the meaning of other fundamental rights to encompass the protection of property. It also requires the fulfilment of due process whenever the state limits the right to property. The importance of weighing the general interest as against the individual interest is not demonstrated by the Court's approach to property rights either before or after 1978 when the right to property was denuded of its fundamental right status. This demonstrates that proportionality analysis is not an indispensable part of resolving the tension between the right to property and the demands of social justice.

[271] Samanta & Basu "Basic structure analysis" 502.

[272] Pursuant to section 18A of the Industries (Development Regulation) Act 1951, the government authorized the takeover of the management of Minerva Mills, a limited company trading in textiles. The company was thereafter nationalized and taken over by the central government pursuant to the Sick Textile Undertakings (Nationalisation) Act 1974. Subsequently, the Constitution (Thirty Ninth Amendment) Act 1975 inserted the Nationalisation Act into the Ninth Schedule to the Constitution; as a result, courts could no longer question the constitutional validity of the Act's provisions. The Supreme Court held that although Parliament had the power to amend the Constitution, it could not do so by altering its basic structure.

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4.2.3.3 The relevance of constitutional property doctrine to building and rent controls

4.2.3.3.1 Introduction

In this section, I reflect upon the way Indian law deals with building and rent controls as part of the process of ensuring inclusivity, affordability, and locational justice. This discussion takes place against the backdrop of the foregoing overview of Indian constitutional property law.

4.2.3.3.2 Building and rent controls

Indian Law combines building and rent control measures that are aimed at promoting affordability of housing. Rent controls have been a feature of Indian law since colonial rule when the British government introduced legislation[273] in several provinces to address the housing shortage that was witnessed in the aftermath of the First World War.[274] The right to build is controlled under Indian law in a variety of ways. First, legislation may provide for differential incentives to encourage the construction of certain types of buildings. Fused with rent controls, these building incentives in effect exempt certain classes of property owners from the controls aimed at regulating the income that may be generated from rentals. In *Motor General Traders and Another v State of Andhra Pradesh and Others*[275] ('*Motor General Traders*') the validity of section 32B of the Andhra Pradesh Building (Lease, Rent and Eviction) Control Act[276] was at issue. This Act imposed a variety of rent controls in respect of certain residential buildings. To encourage the construction of new buildings, section 32B of the Act exempted buildings constructed after 26 August 1957 from the Act's operation. This provision was challenged based on the equality/non-discrimination clause of the Constitution (Article 14). In holding that the law was discriminatory due to the disparate effect it had on property owners, the Supreme Court reasoned as follows:

> "The long period that had elapsed after the passing of the Act itself served as a crucial factor in deciding the question whether the impugned law had become discriminatory or not because the ground on which the classification of buildings

[273] These included the following: Bombay Rents, Hotel and Lodging House Rates (Control) Act of 1947; United Provinces (Temporary) Control of Rent and Eviction Act of 1947; and Ajmer and Mewar Rent Control Act of 1947.
[274] Alok A & Vora B "Rent control in India: Obstacles for urban reform" (2011) 4 *N.U.J.S. L. Rev.* 83—100 85 ('Alok & Vora "Rent control in India"').
[275] 1984 1 SCR 594.
[276] Of 1960.

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> was made was not a historical or geographical one but was an economic one. Exemption was granted by way of an incentive to encourage building activity and in the circumstances such exemption could not be allowed to last forever."

It is interesting to link this reasoning to the reasonableness feature of Article 300A jurisprudence. It appears that the Supreme Court effectively regarded the differentiation between property owners in this case through the prism of reasonableness when it reasoned that the passage of time had rendered the law discriminatory.[277] The Court adopted the *Maneka* approach that proscribed the arbitrary or unreasonable exercise of state power. The time factor that turned the law into an unreasonable exercise of state power implies that a differentiation that grants a benefit to one group of property owners and not another must be subjected to periodic review if it is to be found reasonable.[278]

Secondly, certain restrictions on the right to build emanate from legislation that espouses police power objectives such as the promotion of the safety, health, and well-being of the population. In *Olga Tellis v Bombay Municipal Corporation and Others*[279] ('*Olga Tellis*') the Indian Supreme Court needed to articulate a legal framework for the protection of the rights of pavement dwellers in the event of their eviction. The pavement dwellers in this case had migrated from their rural homes to the city of Bombay in search of a livelihood. Some of them hawked on the pavements along the streets, while others performed menial jobs for a living. They set up makeshift accommodation along the pavements to protect themselves from the elements. In terms of sections 312 (1), 313 (1) (a) and 314 of the Bombay Municipal Corporation Act,[280] the Municipal Commissioner was empowered to remove any obstructions on public pathways with or without notice. When these powers were invoked, causing the removal of pavement dwellers who drew sustenance from hawking along the pavements, the dwellers challenged the exercise of these powers

[277] This approach was also followed in *Rattan Arya and Others v State of Tamil Nadu and Another* 1986 3 SCC 385. Section 30 (ii) of the Tamil Nadu Buildings (Lease and Rent) Control Act 1960 exempted buildings where tenants paid more than 400 Rupees from the operation of the Act. By contrast, no such exemption was extended to tenants of non-residential buildings. The Court held that this provision violated Article 14 of the Constitution.
[278] Compare this approach to the U.S. Supreme Court's approach to time and its effect on rent control in *Block* and *Chastleton Corporation,* referred to in section 4.2.1.4 a
[279] 1986 AIR 180 (SC).
[280] Of 1888.

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in court. Their case was pegged on the provisions of Article 21 of the Indian Constitution in that their right to life had been jeopardised by the impugned measure, which threatened their livelihoods.[281] The Court therefore had to determine whether the right to a livelihood was protected by the terms of Article 21 of the Constitution.[282] Although this issue had previously been litigated before the Supreme Court in a different matter, the Court had on that occasion held that the right to life does not entail the right to a livelihood.[283] However, in *Olga Tellis* the reasoning employed by the Court acknowledged that a nexus existed between livelihood and life. The Court stated that:

> "The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition or execution of death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of the right to life is the right to livelihood because no person can live without the means of livelihood."

As is apparent, the Court reasoned that life flows directly from livelihood. This was in contrast to its earlier opinion in *In re Sant Ram*[284] that the right to a livelihood could conceivably be protected under Article 16[285] (equality of opportunity in matters of public employment) and Article 19[286] (right to freedom) of the Constitution, but in a rather limited way even then. In *Olga Tellis,* the Court used the notion of public property

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[281] In the court *a quo*, it appeared that the applicants had conceded that their case was not based on any express provision of the Constitution creating a fundamental right. In the Supreme Court, the question therefore arose as to whether they could invoke their fundamental rights on appeal. The Court held that nothing could stop them from doing so, because there was no estoppel against the Constitution. The Court reasoned that even though fundamental rights benefited individuals, they were ultimately for the "larger interests of the community" and as such could not be battered away. See *Olga Tellis* paras 1 and 28.

[282] Article 21 of the India Constitution provides: "No person shall be deprived of his life or personal liberty except according to procedure established by law." This provision has been interpreted extensively in Indian law to give meaning to several other rights such as the right to reputation (*Kiran Bedi v Committee of Inquiry* 1989 AIR 714) and the right to human dignity (*Boddhisatwa Gautam v Subhra Chakraborty* 1996 AIR 922.

[283] *In re Sant Ram* 1960 SC 932 para 12 ('*In re Sant Ram*').

[284] *In re Sant Ram* para 12

[285] Article 16 provides:

> "(1) There shall be equality of opportunity for all citizens in matter relating to employment or appointment to any office under the state.
> (2) No citizen shall, on grounds of any religion, race, caste, sex, descent, place of birth, residence, or any of them, be ineligible for, or discriminated against in respect of. Any employment or office under the state."

[286] This provision protects the right of the individual to freedom of speech, assembly, association, movement, and residence.

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as a basis for concluding that section 314 of the Bombay Municipal Corporation Act was reasonable and constitutional. It was held that pavements amount to public property, and that access to them could not be curtailed by the actions of individuals purporting to earn a livelihood by so doing. It was held that:

> "There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up constructions on pavements and that of the pedestrians to make use of the pavements for passing and repassing, are competing claims and that, the former should be preferred to the latter… [I]t is erroneous to contend that the pavement dwellers have the right to encroach upon pavement by constructing dwellings thereon."

This reasoning underscores the fact that Article 21 of the Constitution only applies to the negative aspect of the right to housing and not the positive aspect. The state may not evict an occupant of housing if this would jeopardise their right to life. However, this provision cannot be used to justify a positive right to housing, especially where granting this right would contravene a statutory prohibition. It is also evident that the right to shelter can only be exercised within the remit of planning statutes, so that no proportionality analysis is necessary where the right to shelter is sought to be exercised against the provisions of a planning statute. The law appears to use the notion of public property to achieve planning goals: public property trumps private housing rights. The two values are incommensurable and therefore cannot be the subject of proportionality analysis.

4.2.3.3.3 Conclusion

The exemption of certain property from rent regulation serves the purpose of encouraging investment in real estate. However, the Indian Supreme Court appears to be concerned about the potential for the abuse of such initiatives. Without a clear requirement for periodic review, it is considered that the potential for the arbitrary and unreasonable exercise of state power is significant. Periodic review of rent control restores the protections that were arguably removed through the Forty-Fourth Amendment to the Constitution have been restored by way of the Court's due process jurisprudence.

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4.2.3.4 Conclusion

Indian constitutional property theory is based on the expansive reading of Article 14 (equality) of the Constitution which support the idea of strong property rights to counter state interference. The meaning and scope of the equality provision has expanded over time to encompass the requirement that the exercise of state power must be reasonable and not arbitrary. This development has seen the Supreme Court extend the meaning of Article 300A beyond its literal meaning by introducing the notion of non-arbitrariness into its interpretation, resulting in strong protection for property rights. This understanding has permeated the Court's jurisprudence on building and rent controls since the Court appears to insist that economic policy legislation must be subjected to periodic review to be reasonable. Unlike the U.S. and ECtHR approach where economic and social policy provides a reason for the limitation of property rights, the Indian approach limits the use of economic and social policy that is aimed at curtailing property rights.

4.3 Use restrictions under South African, U.S., ECHR and Indian law compared

4.3.1 Introduction

As discussed in Chapter 1, South African housing development is governed by several statutes dealing with diverse elements of the housing development process. Housing development would typically affect a landowner in terms of their ownership rights in land. Inclusionary housing adds another dimension in that the landowner's expected earnings are also affected, either in the form of a reduced price or reduced rental. While Chapter 1 introduces the general statutory framework for housing development, Chapters 2 and 3 have shown how the non-arbitrariness test and the reasonable review standard interact.

Above, I deal with building control and rent regulation in U.S, ECHR, and Indian law. Below is a summary of the comparison between these jurisdictions and South African law. In this section, I identify several comparators which I use to discuss how the law deals with landownership and expected earnings from a property perspective.

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4.3.2 Periodic review and time limits

Although the regulation of property rights is permitted under the police power, it is generally acknowledged that regulation can have a severe impact on property rights if it is not restricted by time. The discussion in this chapter and previous chapters has shown the importance of periodically reviewing the necessity and impact of a law that imposes restrictions on property rights. South African case law provides examples. In *Mkontwana*, although the law restricted the owner's right to alienate property, the Court held that the severity of this measure was lessened by limiting the timeframe for the interference to two years. The Court concluded that section 118 (1) of the Local Government: Municipal Systems Act[287] did not result in the arbitrary deprivation of property. Instead, the deprivation in this case was a minor infringement of the owner's property rights. The majority's judgment in *Reflect-All* saw no need for the periodic review of the restrictions over use in that case as it had already held that the interference with property rights was minor.[288] In addition, the majority judgment in *Reflect-All* considered that it would not be economically prudent to impose a review obligation under section 10 (3) of the Infrastructure Act.[289] Nevertheless, the majority judgment[290] went on to conclude that review was in any event adequately catered for by allowing individual owners to apply for the amendment of road designs.[291]

Indian law appears to favour the periodic review of rent regulation measures. In *Motor General Traders*, the Supreme Court reasoned that when a law confers a benefit (exemption from rent regulation) to one class of owners and not another, it must be periodically reviewed to assess its efficacy and necessity.[292] The rationale here is the right to equality provided for under Article 14 of the Indian Constitution, while the rationale provided for periodic review in the above-mentioned South African cases is section 25 of the Constitution which prohibits laws that authorize the arbitrary deprivation of property. Under U.S. law, a mixed picture has emerged in that some decisions with regard to the regulation of rent disregard the distinction between temporary and permanent occupation (for example in *Seawall Associates*), holding

[287] Act 32 of 2000.
[288] *Reflect-All* para 70.
[289] Act 8 of 2001.
[290] *Reflect-All* para 70.
[291] Section 8 (8) and (9) of the Infrastructure Act.
[292] See para 4.2.3.3.2 above.

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that a taking is no less objectionable simply because it is temporary in nature.[293] In *Block*, the Supreme Court allowed a wartime rent control measure to stand because it was temporary.[294]

Inclusionary housing is implemented by allowing the state to impose affordability and integration obligations on a developer when she applies for permission to erect buildings. Since periodic review seems to be a non-arbitrariness issue under South African law, it seems that its necessity will depend on the extent of the deprivation in each case. In addition, a Municipal Spatial Development Framework ('MSDF') must stipulate an implementation plan which includes dates and monitoring indicators to guide the Municipal Planning Tribunal.[295]

4.3.3 Rent regulation

South Africa's Rental Housing Act[296] obliges the government to promote the growth of the rental housing market as a response to the housing needs of the poor and the previously disadvantaged segments of the population.[297] The Act spells out the methods for achieving this goal. The measures adopted must, *inter alia*, ensure that urban sprawl is curtailed.[298] The measures must aim for higher residential densities in existing urban areas "as well as in areas of new or consolidated urban growth."[299] Although the idea of rent control has been abolished from South African law,[300] the Rental Housing Act approaches the quantum of rent as a fairness issue. This is because the Act contains provisions that refer to "unfair practice," which is defined as a practice that unreasonably prejudices the interests of a tenant or a landlord.[301] Furthermore, section 13 (4) (c) states that a Rent Tribunal may order the termination of an unfair practice, including exploitative rentals.[302]

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[293] See para 4.2.1.4.2 above.
[294] See para 4.2.3.3.2 above.
[295] Section 21 (p) of SPLUMA.
[296] Act 50 of 1999.
[297] Section 2 (1) (a) of the Rental Housing Act.
[298] Section 2 (2) (b) of the Rental Housing Act.
[299] Section 2 (2) (c) of the Rental Housing Act.
[300] This was done when the Rental Housing Act repealed the Rent Control Act of 1976.
[301] Section 1 of the Rental Housing Act.
[302] In *Young Min Shan v Chagan NO and Others* 2015 (3) SA 227 (GJ) ('*Young Min Shan*') a group of tenants referred a dispute to the Gauteng Rental Housing Tribunal complaining about a "service charge" that their landlord had levied against them. This amount related to an electricity service charge that the landlord required them to pay monthly. In a significant passage, the Court stated that a landlord must include her costs in the rental charged and cannot simply come up with new charges that are not so

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The idea of regulating the quantum of rent is also statutorily provided for in the social housing context where Social Housing Institutions (SHIs) are obliged to comply with the provisions of the Rental Housing Act.[303] The similarity between an SHI and a developer participating in inclusionary housing is that they both opt to participate in the clear knowledge of the condition that the rental they charge must be fair. This condition is imposed by the Rental Housing Act in both instances. In the case of inclusionary housing, the Land Use Scheme or Spatial Development Framework in question should specify how the quantum of rent in respect of the affordable units should be arrived at, thus giving more guidance to developers.

4.3.4 Proportionality analysis

The *FNB* non-arbitrariness test states that the standard of review applicable to a measure that results in the deprivation of property will vary from mere rationality to proportionality. The choice between these two standards will depend on a variety of factors such as the relationship between the means employed and the end sought to be achieved. Proportionality analysis generally plays the role of striking a balance between the protection of private rights and the promotion of public interests.[304] The foregoing analysis shows that there are differences of approach regarding proportionality analysis across the three jurisdictions. Where one land use is privileged over others, there is no need to undertake proportionality analysis because the result is a foregone conclusion. India provides the most vivid example of this kind of reasoning because of the Supreme Court's history of protecting private property rights, even in the face of constitutional amendments designed to weaken such rights. This approach privileges private property over other forms of entitlement, making it

included (at 247—248). Furthermore, the Rent Tribunal retains the discretion to decide on the issue of the unfairness of rent even where the lease provides that a service charge can be levied against the tenant (at 248).

[303] Section 14 (2) (g) of the Social Housing Act 16 of 2008.

[304] Critiquing some of the assumptions of the proportionality principle, Webber particularly questions the assumption that individual rights are always opposed to community interests. See Webber GCN "Proportionality, balancing, and the cult of constitutional rights scholarship" (2010) 23 *Can. J. L. & Jurisp.* 179—202 180. See also Möller K "Proportionality: Challenging the critics" (2012) 10 *Int'l. J. Const. L.* 709—731 710; Greene J "The Supreme Court 2017 term: Foreword- Rights as trump?" (2018) 132 *Harvard L. Rev.* 28—132 66. The idea that rights are capable of being balanced against community interests is opposed to Ronald Dworkin's vision of rights as trumps. See Dworkin R *Taking rights seriously* (1977) xi.

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harder for the law to protect vulnerable people in dire need of housing.[305] In *Olga Tellis* the issue was the articulation of a legal framework for the protection of the rights of pavement dwellers in the event of their eviction. Their case was pegged on the provisions of Article 21[306] of the Indian Constitution in that their right to life had been jeopardised by the impugned measure, which threatened their livelihoods. The Supreme Court considered that the pavement dwellers could not establish a right to be present on the pavements because the latter constituted public property. The same rationale has been adopted in cases concerning building controls under U.S. and ECHR law. In *Lucas*, the U.S. Supreme Court reasoned that the notion of property did not include the right to build along the coastline.[307] Similarly, in *Depalle* the notion that no private property could be established over public land was explained based on the idea of public property.[308] Therefore, in cases involving the protection of the environment or the promotion of a public goal, the strategy is to privilege the public goal at the expense of the private right. No true balancing of interests is involved.

This chapter highlights several iterations of proportionality analysis in its discussion of building and rent controls across the three jurisdictions. This illustrates the fact that proportionality analysis is a complex tool for constitutional litigation and should be contextualised to fit the specific demands of national legal systems. Perhaps the most comprehensive version of proportionality analysis is contained in the following statement by the Canadian Supreme Court in *R v Oakes*[309] ('*Oakes*'):

> "There are…three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in the first sense, should impair 'as little as possible' the right or freedom in question….Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter

[305] Langford M (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (2008) 112—113.
[306] Article 21 of the India Constitution provides: "No person shall be deprived of his life or personal liberty except according to procedure established by law." This provision has been interpreted extensively in Indian law to give meaning to several other rights such as the right to reputation (*Kiran Bedi v Committee of Inquiry* 1989 AIR 714; 1989 SCR (1) 20) and the right to human dignity (*Boddhisatwa Gautam v Subhra Chakraborty* 1996 AIR 922.
[307] *Lucas* 1031.
[308] *Depalle* para 67.
[309] (1986) 19 CRR 308.

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> right or freedom, and the objective which has been identified as of 'sufficient importance.'"[310]

Although the third point is the most emphasized aspect of proportionality analysis in many jurisdictions, the first two act as contextual qualifiers of the third. They relate to the legitimacy of the limitation in question while the third ("proportionality in the strict sense")[311] envisages the balancing exercise that is the goal of proportionality.

This chapter focuses on two main kinds of limitation on property rights. These are, first, limitations on property rights that impose special burdens on a few and, second, limitations that provide assistance or opportunities to others. The proportionality of both categories is canvassed under different tests and rules. In the first place, limitations that impose upon an owner an obligation to maintain property in a certain condition are evident in cases related to rent control. In U.S. and ECHR law, such obligations are imposed on landlords without any regard to whether the particular landlord will be worse off economically. These limitations therefore avoid the contextualised balancing that is supposed to be the mainstay of proportionality analysis. Instead, a preference for a specific goal is maintained through the imposition of a limitation. Secondly, some limitations are meant to act as retribution for some social ill that is attributable to the property owner. For example, building controls in the form of development exactions are imposed upon a property owner who wishes to develop her property. The imposition of the limitation, once justified by the attribution of the problem to the owner, does not proceed to a contextual balancing of the respective rights of the property owner and the public.

In the case of India, the absence of a constitutional right to property is compensated for by the Supreme Court's insistence that the exercise of state power must not be done unreasonably or arbitrarily. The *Maneka* approach to constitutional litigation has meant that building and rent controls, although legitimate, are subject to control. The Basic Structure Doctrine is a further commitment to the idea of proportionality because it invokes the notion that certain core principles of the Constitution, such as fairness and equality, are immutable. The net effect is that property rights are still largely

[310] *Oakes* 337.
[311] Zoller E "Congruence and proportionality for congressional enforcement powers: Cosmetic change or velvet revolution?" (2003) *Indiana L.J.* 567—586 582.

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protected against government interference through constitutional clauses that have no textual connection to the concept of property *per se* (such as Article 21 on the right to life). This calls into question the utility of the concept of rights in the first place and lends credence to Beatty's claim that "when judges rely on the principle of proportionality to structure their thinking the concept of rights disappears." In *Motor General Traders*, the court effectively invoked the methodology of proportionality analysis in its decision to invalidate the rent control measure in that case. The decision in this case requires that a limitation on property rights be subject to periodic review to establish whether it is still necessary.

4.4 Conclusion

This chapter set out to test the hypothesis that, when considering certain types of property regulation, such as building controls and rent controls, courts avoid established property doctrine. Instead, they root for an analytical framework that accepts that property rights can be limited for the public good. This hypothesis has proven true in the case of the U.S. and the ECHR, while Indian law shows how the Supreme Court has managed to shield property owners from state interference by invoking constitutional provisions on reasonableness and equality. It is shown that the Indian Supreme Court considers itself the protector of property rights even though concerted efforts have been made by the legislature to weaken these rights. The absence of a formal property clause in the Constitution has not prevented the court from finding creative ways to protect property owners. These include the Basic Structure Doctrine and the expansive reading of the right to life in Article 21 of the Constitution. The effect of this approach has been to weaken the significance of building and rent controls that are designed to provide affordable, well-located housing.

The ECtHR has interpreted building controls and rent controls along similar lines that accept that the police power plays an important role in implementing social and economic policy. The ECHR has upheld many of these controls. In *Depalle*, the ECHR found that the demolition in question was a radical restriction of the applicant's property rights. It nevertheless concluded that this interference was proportional in

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view of the public goal (preservation of the coastline) that had been pursued.[312] It did this despite the long period that had lapsed since the breach had occurred. Similarly, the rent control measure in *Mellacher* was found to be severe yet proportional. It was stated that the economic impact of rent control on an owner was not conclusive on the question of proportionality.[313] By contrast, *Hutten-Czapska* illustrates that where the government deliberately pegs the chargeable rent at a rate that will make it impossible for owners to recover their costs, then a violation of A1P1 takes place. The difference of approach in *Mellacher* and *Hutten-Czapska* shows that the ECtHR does not enforce rigid categories or rules. Even though economic impact on the owner was not decisive in *Mellacher*, it became the most important consideration in *Hutten-Czapska*. Considering that rent control legislation is enacted to implement social policy, it seems that even within this category of "social policy" there is a variety of acceptable possible outcomes. This can only be explained by stating that the ECtHR did not interpret the text of A1P1 in these two cases; it simply made choices that seemed to strike a fair balance between the opposing interests involved.

From the foregoing discussion, several broad themes that could impact on the implementation of inclusionary housing in South Africa can be identified. First, the role of time and delay in the regulation of property rights is key.[314] When a society emerges from a period of conflict and begins to transition to an era of respect for the rule of law and human rights, it is important to have an idea of the timeframes within which any redistributive policies must be implemented.[315] I base this argument on the treatment of rent controls under U.S. and Indian law. Both generally require some form of

[312] *Depalle* para 89.
[313] *Mellacher* para 56.
[314] Some scholars acknowledge that time is an important ingredient in the construction of a sense of belonging in society. For example, Keenan demonstrates how property can be used to structure a specific temporal and spatial order. She argues that a certain degree of permanence is necessary for one to truly feel a sense of belonging. Therefore, a fleeting presence in a space does not engender belonging. She shows that since property produces specific spatial realities in the past and present, past and present spatial realities can help to determine how a future spatiality should look like. See Keenan S "Property as governance: Time, space and belonging in Australia's Northern Territory intervention" (2013) 76 *Mod. L. Rev.* 464—493 485; Bastian M "Inventing nature: Re-writing time and agency in a more-than-human world" (2009) 47 *Australian Humanities Rev.* 99—116 111.
[315] The ECtHR has reasoned that states have a wide margin of appreciation in enacting legislation during political and economic transformation. Although the payment of less than full market compensation can only be justified in exceptional circumstances (*The Holy Monasteries* para 71) it is equally true that the ECtHR has found such circumstances in political and economic reforms. See *The Former King of Greece and Others v Greece* (2001) 33 EHRR 21 para 87; *Kopecky* para 35; *Broniowski* para 182; *James* para 54; *Lithgow* para 121; and *Scordino* para 95. Also see Zemke R "The right to property and bank nationalizations" (2016) *Chic. J. Int'l. L.* 591—620 606.

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justification for the continuation of rent control, or at least a re-appraisal of the rationale for imposing such controls. However, the distinction between peacetime and wartime rent control appears artificial. It seems more natural to require any form of rent control to be subjected to periodic review. Even though rent regulation must be considered part of the normal regulation of property, the continued need for rent regulation must be re-determined. It is through periodic review that national authorities can establish whether the state is succeeding in making housing more affordable. If this is the case, the need for a property restriction would fall away or at least reduce.

Secondly, a clear distinction has emerged between the concept of property and its value.[316] The building and rent controls discussed in this chapter show that the ECtHR and U.S. courts do not view the diminution in the value of property as an attack on property itself. It is therefore accepted that property may be regulated even to the extent that its value is diminished considerably. In India, the formal provisions of the law do not support the idea of full compensation for regulation. Unlike the ECtHR where the denial of full compensation is an aberration rather than the norm,[317] Indian law does not require full compensation. This idea is reflected in the general attitude towards compensation: the Indian Constitution was never meant to provide for a right to full compensation if property regulation led to losses to the owner.[318] However, the *Maneka* doctrine now has the effect of providing courts with residual powers of judicial review based on unreasonable exercise of state power.[319] In this way, owner's expectations of fair returns on investment can be protected.

Based simply on the discussion above relating to building and rent controls, it is apparent that all three jurisdictions would allow for the state's right to impose inclusionary housing requirements on owners and developers in the form of building controls and rent control. Full compensation for losses and expenses incurred by owners and developers is not guaranteed because the state has powers to oversee economic and social transformation, and that includes requiring that housing be built in certain locations and is kept affordable. This is all part of framing the scope of

[316] Eagle "Four-factor test" 617.
[317] *The Holy Monasteries* para 71.
[318] Jagit N "The Indian Supreme Court on property rights and the economic objectives of the Indian constitution" (1968) 3 *J. L. & Econ. Dev.* 147—180 161, 165 ('Jagit "The Indian Supreme Court on property rights"').
[319] Jagit "The Indian Supreme Court on property rights" 168.

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property relations rather than developing rules outside property doctrine, although building and rent controls generally provide a further justification (the police power) for limiting constitutionally protected property rights.

The approach of the ECtHR to building controls and rent regulation seems to come closest to addressing the concerns that are inherent in the principle of spatial justice. This is because the ECtHR has specifically recognized that a certain category of property regulation measures amount to social and economic legislation. This has allowed the ECtHR to tailor its reasoning to the demands of addressing specific social and economic ills within states. The ECtHR has combined this approach with the doctrine of the margin of appreciation to give states a wide discretion in choosing the measures to adopt when addressing these social ills. This approach allows states emerging from a difficult historical period to pursue socio-economic transformation. Inclusion can therefore be realized through this approach. This approach would not fit into the scheme set for South African non-arbitrariness analysis by *FNB* because proportionality-type analysis is still necessary even in the context of land reform which is a crucial policy for socio-economic transformation in South Africa. Therefore, when the landownership rights of a developer are affected by inclusionary housing, the measure in question will have to satisfy the proportionality standard of scrutiny.

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Conclusion

South Africa's transformative constitution provides hope for a united, prosperous country. However, after nearly three decades of democratic governance, this vision seems as elusive as ever. Gated communities in South Africa's cities are a vivid reminder of the social and economic divisions that still plague the country.[1] These communities are characterized by high security walls, restricting access for the outsider.[2] The residents of these communities join in such living arrangements motivated by the fear of crime and general insecurity.[3] In addition, these residents worry about preserving the value of their property and retaining what they see as advantages accruing from the character of their neighbourhoods. In a land-scarce country such as South Africa, these fears and concerns are significant.[4] While the government doubles its efforts to provide land and housing to more people, property owners will look at the redistributive bent of such efforts and raise questions about their constitutional validity. Nearly three decades after the end of apartheid, South African cities are largely characterized by living spaces that are divided along racial lines. Since most of the poor in South Africa are black, their exclusion from adequate housing opportunities based on their economic status leaves a decidedly racialized imprint on the spatial patterns evident in the cities.[5] This situation can be attributed to apartheid-era spatial planning practices that sought to confine blacks in rural areas and only occasionally allowed them into urban areas to render cheap labour under strict supervision. This planning rationale informed every decision regarding the allocation of space in urban areas.

[1] Lemanski C "Houses without community: Problems of community (in) capacity in Cape Town, South Africa" (2008) 20 *Environment & Urbanisation* 393—410 399.
[2] Landman K "Exploring the impact of gated communities on social and spatial justice and its relation to restorative justice and peace-building in South Africa" (2007) *Acta Juridica* 134—155 140 ('Landman "Gated communities and spatial justice"')
[3] Landman "Gated communities and spatial justice" 140.
[4] Landman "Gated communities and spatial justice" 135.
[5] Kitchin F & Ovens W *Developing integrated towns: Key findings* (2008) 6; Berrisford S "Unravelling apartheid spatial planning legislation in South Africa: A case study" (2011) 22 *Urban Forum* 247—263 255.

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There is a tension between the right to property guaranteed by section 25 of the Constitution and the right of access to adequate housing enshrined in section 26 of the Constitution. Access to housing will largely depend on whether suitable land is available for purposes of housing development.[6] Furthermore, in *Port Elizabeth Municipality v Various Occupiers*[7] ('*PE Municipality*') the Constitutional Court alluded to a different kind of tension within the property clause itself (section 25). This latter tension is between the need to protect private property interests, on the one hand, and the obligation to serve the public interest through property.[8] These two types of tension often play out in different contexts. Typically, the most relevant and pressing one is where squatters on land or property face eviction and the question arises as to whether they have some form of legal right to be present on the property.[9]

Although South African housing law and policy experts caution that exclusionary practices continue to lock millions of South Africans out of meaningful housing opportunities, they also note that some of this exclusion is attributable to how property relations are structured in South African society. The institution of property law played a major role in supporting the apartheid policy of excluding blacks from both urban and rural spaces.[10] The common law of eviction allowed owners to exercise exclusive control over space by simply invoking their right of ownership to keep everyone else (mainly blacks) at bay.[11] The *rei vindicatio* was a strong and tyrannical remedy at the disposal of the owner.[12] In contrast, a new awakening of the collective conscience of South Africa is beginning to take place; the need for inclusivity in urban planning and resource allocation has increasingly been emphasized.

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[6] This tension and its just resolution constitute the staple of planning law because the planning process seeks to interfere in how people use their rights in land. See Needham B *Planning, law and economics* (2006) 11 ('Needham *Planning, law & economics*').
[7] 2005 (1) SA 217 (CC).
[8] *PE Municipality* para 16. Also see Van der Walt AJ *The constitutional property clause* (1997) 15—16.
[9] Sagaert V & Swinnen K "Squatting in the low Countries: On the conflict between ownership and housing" in Muller G, Brits R, Slade BV & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (2018) 219—242 221.
[10] Wilson "Evictions and a new normality" Wilson S "Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126 *SALJ* 270—290 270 ('Wilson "Evictions and a new normality"').
[11] Wilson "Evictions and a new normality" 270.
[12] Muller G *The Impact of Section 26 of the Constitution on the eviction of squatters in South African law* (2011) 6—9.

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This thesis explains that inclusionary housing is a method of housing delivery that mandates or encourages housing developers to dedicate a part of their market-related development to affordable housing.[13] The affordable housing units are generally required to be part of the market-related units in terms of physical proximity, although some jurisdictions allow developers to opt for off-site developments to cater for affordable housing. It then engages with the law of property dimensions of this general goal, identifying expected earnings as the most relevant aspect of ownership that is directly affected by the inclusionary housing requirement. Chapter 2 discusses landownership and expected earnings from the standpoint of the right of ownership.[14] The discussion in Chapter 2 considers whether expected earnings are a cognizable form of constitutionally protected property under section 25 of the constitution. I discuss what Roux refers to as a "transformation-oriented, public law definition of property."[15] The contemporary role of property in a transformative constitutional context must be factored into how property is defined.[16] This contemporary role consists of a fusion of two separate roles, namely, protective and transformative.[17] The former should not be emphasised at the expense of the latter.[18] In *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*[19] ('*FNB*'), the Constitutional Court alluded to the public element of property when it stated that property must serve public values in addition to protecting private interests.[20] Chapter 2 concludes that, in principle, recognizing expected earnings as property is consistent with the Constitutional Court's own statement that the ownership of both corporeal movables and land is "at the heart of our constitutional concept of property."[21] However, I qualify this position for purposes of this thesis by stating that expected earnings will only be

[13] See paras 1.3 and 1.5 above.
[14] See para 2.2.3.1 above.
[15] Roux T "Property" in Woolman S & Bishop M (eds) *Constitutional law of South Africa* 2 ed (2003) 46-10.
[16] Marais EJ "Expanding the contours of the constitutional property concept" (2016) 3 *J. S. Afr. L.* 576—592 576 ('Marais "Constitutional property concept"').
[17] Marais "Constitutional property concept" 576.
[18] Van der Walt AJ *Constitutional property law* 3 ed (2011) 24; *Agri South Africa v Minister of Minerals and Energy* 2013 (4) SA 1 (CC) paras 60—65; Marais "Constitutional property concept" 576; *Law Society of South Africa and Others v Minister of Transport and Another* 2011 (1) SA 400 (CC) para 83 ('*Law Society SA*')
[19] 2002 (4) SA 768 (CC).
[20] *FNB* para 50.
[21] *FNB* para 51.

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protected under section 25 of the Constitution if they have already vested.[22] The Constitution does not guarantee the protection of every single property interest.[23]

Chapter 2 further concludes that the nature and origin of the housing crisis in South Africa provides sufficient reason to limit property rights in fulfilment of inclusionary housing goals. The apartheid government systematically deprived most of the population of any rights in property and pushed them to the margins of urban life. The housing crisis in South Africa is a product of landlessness and dispossession, the hallmarks of apartheid. However, inclusionary housing will only partially resolve the debilitating housing crisis in South Africa since it will only improve the conditions of a select group of individuals who are able to pay some money for housing. This should not, by itself, negatively affect the cogency of the reasons advanced for embarking on inclusionary housing. The reasonableness of the programme is beyond question so long as the programme is based on a clearly identified housing need. Steps should be taken to cushion property owners from any harsh consequences of participating in inclusionary housing. For example, property owners can be paid some form of compensation in return for regulating their property rights.[24] Alternatively, the duration of the property restriction should be curtailed to cushion property owners.[25]

Lastly, I show that municipalities lack the power to pay financial incentives to developers and that this position must be remedied. Financial incentives are an important component of the structure of an inclusionary housing programme simply because these incentives ensure the sustainability of the programme.[26] This is important because inclusive housing is a serious need in South Africa's context, rather than a dispensable luxury. However, it is concluded that the constitutionality of an inclusionary housing programme does not depend on the presence of financial

[22] See para 2.2.2.2 above.
[23] Van der Walt AJ *Constitutional property clauses: A comparative analysis* (1999) 55, 68; Erasmus J *The interaction between property rights and land reform in the new constitutional order in South Africa* (1998) 253. Also see *Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others* 2015 (6) SA 125 (CC) para 50.
[24] Para 2.5.4 above.
[25] Para 2.2.3.3 above.
[26] South African Property Owners Association (SAPOA) *Inclusionary housing: Towards a new vision in the city of Johannesburg and Cape Town metropolitan municipalities* (2018) 25.

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incentives because the absence of incentives does not render the property regulation arbitrary *per se*.

Chapter 3 takes up the law of property theme with an examination of how property regulation can lead to affordable and well-located housing. The main argument in Chapter 3 is that the structure of sections 25 and 26 of the constitution allows for the regulation of property rights to ensure that housing is affordable and well-located. The argument proceeds from the starting point that *General Comment 4*[27] encompasses the most comprehensive statement on the right to adequate housing. This General Comment outlines certain features of adequate housing, which include tenure security, affordability, and location. Proceeding from this premise, Chapter 3 identifies two shortcomings in the current legal framework governing the provision of housing. First, South Africa's legal response to homelessness seems to rely heavily on evictions jurisprudence as a catalyst for providing the protection needed by those whose homes are threatened. Because of this, much of the emphasis seems to be on ensuring that the status *quo* is preserved. The law operates from this baseline and appears unable to devise a more proactive, forward-looking approach to the question of homelessness. The effect of this approach is that it emphasizes the tenure security aspect of *General Comment 4* but overlooks the location and affordability of housing. Secondly, the existing policy and legislative framework, to the extent that it emphasizes the other characteristics at all, seems to consider affordability at the expense of location. I argue that location should precede any consideration of affordability measures in housing, because location determines the affordability of housing.[28]

The thesis emphasizes that spatial justice is linked to the principle of spatial justice by emphasizing location and its role in housing. Chapter 3 shows that court decisions have tended to disregard the significance of location in promoting the right of access to adequate housing. Eviction from private and publicly owned land requires the court to weigh the justice and equity of the eviction. This necessitates an inquiry into several factors, including whether alternative accommodation has been made available for the

[27] CESCR *General Comment 4: The Right to Adequate Housing (Art. 11(1)* UN Doc E/C 1992/23.
[28] Para 3.5 above.

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unlawful occupiers. So far, the courts have been unable to adequately conceptualize the meaning of location in relation to alternative accommodation. This inability to understand location may well affect how the courts resolve challenges to Municipal Spatial Development Frameworks (MSDFs) and Land Use Schemes under SPLUMA. The case law discussed in Chapter 3 shows that the courts regard location as a matter of mere convenience rather than necessity and survival.[29] Improved access to and use of land cannot be realised if alternative accommodation offers the unlawful occupiers little or no locational advantage in comparison to their current accommodation. Most of the judgments discussed in Chapter 3 reveal that the courts appear to justify eviction by stating that it is for the good of the unlawful occupiers. The impact of dislocation from familiar surroundings is often underestimated. Although the Constitution makes provision for a right of access to adequate housing, one must determine to what extent the right to property should be limited to enable access to adequate housing. Given the housing crisis that continues to grip South Africa, government policy provides a breadth of commitments regarding the eradication of this crisis. Government policy currently describes the problems that are encountered in realising the right of access to adequate housing. Among them, apartheid spatiality plays a major role in denying people any meaningful enjoyment of housing. Many continue to be housed in dilapidated structures that are not fit for human habitation, in an environment that is crowded and unhealthy. Others have access to nominally wholesome structures that they can call "home"[30] but these are often located away from any opportunities for jobs, healthcare, and education.

[29] See Residents *of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC) and *Baron and Others v Claytile (Pty) Ltd and Another* 2017 (5) SA 329 (CC), discussed in Chapter 3, paras 3.3.3.3 and 3.4.2.3 respectively.

[30] In *PE Municipality* para 17, the Constitutional Court explained the significance of section 26 (3) of the Constitution from the perspective of the legal protection of home. Sachs J stated that this provision gave special protection to a person's place of abode since it was the one place capable of providing personal intimacy and family security. Also see Fox L *Conceptualising home: Theories, laws and policies* (2007) 155; Fox L "The meaning of home: A chimerical concept or a legal challenge?" (2002) 9 *Journal of Law & Society* 580—610 598; Fox L "The idea of home in law" (2005) 2 *Home Cultures* 25—49; Muller *Impact of section 26 on evictions* 77—79. Apart from this general idea of the significance of a home, some specific characteristics have been suggested. For example, Currie and De Waal suggest that a dwelling can only qualify as a home if an intention to occupy it for residential purposes is proved. The occupation must also be permanent or long-term. See Currie I & De Waal J *The Bill of Rights Handbook* 5 ed (2005) 587—588. Further see *Barrie NO v Ferris* 1987 (2) SA 709 (C) 714, *Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd* 1997 (4) SA 596 (SE); *Makama v Administrator, Transvaal* 1992 (2) SA 278 (T) 285.

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Limiting the right to property through the inclusionary housing requirement, based on the history of apartheid spatiality and the need to redress this spatiality, is sufficient reason for the limitation. The housing crisis in South Africa is a product of landlessness and dispossession, the hallmarks of apartheid. However, inclusionary housing will only partially resolve the debilitating housing crisis in South Africa since it will only ameliorate the condition of a select group of individuals who are able to pay some money for housing. Many more South Africans face the prospect of having no roof at all over their heads, while many others live in informal settlements with no provision for water, electricity, and social amenities. This consideration should weigh in favour of proceeding conservatively with any property limitation.[31] The rationale for the limitation is such that its cogency lessens with the passage of time. Even though a quarter of a century has passed since the end of apartheid, the spatial picture has remained static and inhospitable for housing satisfaction. The arbitrariness test that was laid down in *FNB* would be more easily satisfied if the limitation of the property right were accompanied by some form of concession from the state, notably through the payment of financial incentives.

The principle of spatial justice must respond to, and remedy, the spatial injustices that many South Africans continue to experience because of apartheid's legacy. These injustices can be seen in the post-apartheid urban form that is characterized by a lack of housing as well as no access to clean drinking water, electricity, and basic sanitation. The apartheid state used space as a defensive mechanism to protect white interests by setting up normalized enclaves that were not accessible to blacks. To further reinforce this overtly racial and political strategy, property values were used to preserve the character of these neighbourhoods. This led to the gentrification of these neighbourhoods, pushing the poor to the periphery of the urban form (both figuratively and physically). As a result, these neighbourhoods maintained a largely racialized and exclusive character. Although Van Wyk notes that this picture has changed slightly since the end of apartheid,[32] some new housing developments are still largely situated

[31] Consideration should be given to several options, such as limiting the duration of the inclusionary housing restriction, paying some form of compensation to the property owner, or structuring the requirements for a particular project such that a relatively low percentage of affordable housing is required in a given project.
[32] Van Wyk J "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26—41 28.

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in remote locations with no access to basic services. They are also located too far from job opportunities, leading to high commuting costs.[33] Those that are close to the urban centre are unaffordable to most South Africans due to high prices.

Understood in this way, the injustice that should be fought consists of a combination of unaffordability and poor location in housing. For middle-income families, a housing programme is needed that directly addresses these issues. This thesis shows that there is a connection between the principle of spatial justice and the concept of the non-arbitrary deprivation of property. The connection is that when a municipality formulates a Municipal Spatial Development Framework ('MSDF') under section 21 of SPLUMA, it does most of the groundwork that is necessary for explaining its decision to implement inclusionary housing. The information that must be specified in the MSDF is important because it would clearly show that the need for inclusionary housing is legitimate, and that affordable, well located and integrated housing can be achieved by depriving landowners of either their landownership or their expected earnings (in the event that the latter have already vested).

Chapter 4 conducts a comparative study of building controls and rent controls in three different jurisdictions: The U.S, the ECHR and India. These jurisdictions are chosen because of their engagement with the issues of inclusivity in housing. In keeping with the central argument of this thesis that property regulation holds the key to the success of inclusionary housing, this chapter demonstrates how the definition and regulation of property interests in these jurisdictions have evolved over time. In addition, the chapter illustrates how the regulation of property rights affects building and rent controls. The discussion shows that courts often go against established property protection provisions in the respective jurisdictions to enforce building and rent controls. For example, the ECtHR and the U.S. Supreme Court begin their analyses from the standpoint of the treaty and constitutional texts that acknowledge the right to property in their respective jurisdictions. The ECtHR then proceeds to invoke the doctrine of the margin of appreciation and the concept of control on the use of property to justify the imposition of regulatory measures such as rent control. The U.S.

[33] Presidency *Twenty-year review: South Africa (1994—2014)* 70. See also Robertson *Planning for affordability* 111.

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Supreme Court invokes the police power to the same effect.[34] On the other end of the spectrum, the Indian Supreme Court fights against the absence of a constitutional property clause to heighten the protection that property owners receive. This results in a judicially enforced requirement for periodic review of rent control, supported by the Basic Structure Doctrine and the principle against the abuse of state power.

South Africa's inclusionary housing programme cannot rely on the concept of unfair practice under the Rental Housing Act to keep rentals affordable. This is because Rental Housing Tribunals are designed to resolve disputes between landlords and tenants, not between developers and municipalities. The philosophy behind the Rental Housing Act is to give effect to section 26 (3) of the Constitution which enshrines the right not to be evicted except by virtue of an order of court. Therefore, traditional rent control only results in the negative protection of the right of access to adequate housing. Inclusionary housing requires positive measures under section 26 (2) to protect the right to adequate housing. These measures should incorporate building standards that will ensure that houses conform to certain spatial planning objectives and that rental charged for these houses are kept affordable. While the NBRSA caters for the technical details of the building standards applicable to housing, there is a glaring gap in the statutory mechanisms for the protection of tenants from high rents (especially in the private rental market).[35] Since Chapter 4 argues that inclusionary housing cannot be effective if it is not based on building controls accompanied by some form of rent control, I propose the enactment of a statute that must specifically provide for minimum standards of affordable housing in relation to their distance from market-rate housing, in addition to the technical specifications prescribed by the NBRSA. Although inclusionary housing can be instituted through municipal by-laws in terms of SPLUMA, a dedicated nation-wide statute is preferable because it will eliminate the inclination for private developers to move to municipalities with more favourable laws, causing an imbalance in the property market. The envisaged statute must also regulate the minimum floor space allowed for affordable units and further specify the method by which rent relative to income will be determined.[36]

[34] See para 4.2.1.4.3 above.
[35] The public rental market is regulated by the Social Housing Act 16 of 2008.
[36] For example, section 17 of Newark's Inclusionary Zoning for Affordable Housing ordinance 2017 (Amending Title 41 of the Municipal Code of Newark, New Jersey) provides that the rent charged should not exceed 30% of the eligible monthly income.

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Given that positive rights claims are assessed according to the reasonableness review standard,[37] this chapter contributes to knowledge about the nature of reasonableness review when applied to a specific housing programme (inclusionary housing). I suggest that although the Constitutional Court did cast the standard in terms of concern for the poorest in society,[38] this standard must be applied in a context-sensitive manner that recognizes the varying meanings of poverty, survival and need in South Africa.[39] It has been shown that the courts consider affordability and location as matters of convenience rather than survival.[40] Inclusionary housing calls for the taking of positive measures to promote the housing right by specifically targeting well-located land that can be used to build affordable housing and to bring about social and economic cohesion. This may mean a more severe limitation of the rights of property owners than would usually be expected where the housing right is protected in the negative sense.

This thesis provides some perspectives on how the concept of "fair returns on investment" applies in South African property law. The transformational spirit of the constitution requires us to think of the objectives of property in non-utilitarian terms. Property is not primarily meant to perform the function of wealth maximisation, but rather to enable us to live a life of dignity in service of public values. The Constitutional Court's decision in *Diamond Producers* shows that it may even be desirable, in South African property law, to break up the right of ownership into constituent parts and to regulate some parts while leaving others intact. In this scenario, it is possible to regulate the pricing of a commodity such as diamond by arguing that the *ius disponendi* and the manner of its exercise are two different matters. If a regulation affects the way a right may be exercised, it does not follow that the right itself is the target of the regulation. Of course, this reasoning is superficial, because the way a right is exercised ultimately affects the right itself. Nevertheless, the *Diamond*

[37] *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) para 38 ('*Grootboom*'); *Minister of Health and others v Treatment Action Campaign and Others* 2002 (5) SA 721 (CC) para 39 ('Treatment Action Campaign'). Also see Liebenberg S & Goldblatt B "The interrelationship between equality and socio-economic rights under South Africa's transformative constitution" (2007) 23 *SAJHR* 335—361 353 ('Liebenberg & Goldblatt "Equality and socio-economic rights"').
[38] See *Grootboom* para 36.
[39] Liebenberg & Goldblatt "Equality and socio-economic rights" 355.
[40] Para 3.5 above.

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Producers reasoning may prove attractive in future cases, especially those involving an element of land reform.[41] Inclusionary housing is the sort of government programme where it could be argued that a developer's right to expected earnings should be understood as a right that is subject to market variability. According to this argument, a developer is entitled to whatever earnings the regulated market can offer, and not necessarily to the best earnings that she subjectively expects. Khampepe J's decision in *Diamond Producers* may have created the impression that the market enables a property owner to freely set the price for her product. However, Marais[42] and Needham[43] correctly observe that the market is, in truth, a state creation. Therefore, pricing can only happen within the framework of what the state allows.

The state cannot deliberately set out to make an investment unsustainable by prescribing a price or rent that is too low. Any regulation of the purchase price or rent must be done only in broad terms after considering the sustainability of such a measure. South African law may benefit from foreign law guidance in the form of the ECtHR's decisions in *Mellacher* and *Hutten-Czapska* discussed above. What accounts for the ECtHR's different approaches in the two cases is that the national authorities in *Hutten-Czapska* had deliberately set the rent in that case at a level that would inevitably lead to losses for landlords. It would not even have been possible to recover the costs of building the rental houses. The value of the property should be considered in determining what fair price or rental should be charged for housing in South Africa's legal context to avoid the sort of problem that emerged in *Hutten-Czapska*.

The thesis illustrates that the principle of spatial justice is no more than an undertaking to consider certain factors in the development application process. These factors include the redress of past imbalances in the development process and increased access to land for disadvantaged communities and persons. Although it is also stated in section 7 of SPLUMA that the discretion of the Municipal Planning Tribunal should

[41] Van der Walt AJ "Unity and pluralism in property theory: A review of property theories and debates in recent literature: Part I" (1995) *J. S. Afr. L.* 15—42 30; Van der Walt AJ "The fragmentation of land rights" (1992) 8 *SAJHR* 431—450 436.
[42] Marais EJ "Narrowing the meaning of 'deprivation' under the property clause? A critical analysis of the implications of the Constitutional Court's *Diamond Producers* judgment for constitutional property protection" (2018) 34 *SAJHR* 167—190 182.
[43] Needham *Planning, law & economics* 12.

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not be restricted simply because the value of property will be affected, I have argued that this provision simply authorizes the Municipal Planning Tribunal to consider property value alongside other factors in determining an application. Similarly, the decision maker must consider the current and future costs of the parties, including the developer.[44] Alongside the principles of spatial sustainability and efficiency, the principle of spatial justice therefore serves to protect developers' property interests against attempts by the state to interfere therewith. I also show in Chapter 3 that the principle of spatial justice can be used to understand the state's positive obligations under section 26 (2) of the Constitution. It could help the state to drag its feet in implementing positive measures under section 26 (2). Read together with the other development principles in SPLUMA, spatial justice helps the developer rather than the housing beneficiary in an inclusionary housing programme. This is because it considers the costs of the developer and the financial sustainability of her development but imposes no corresponding obligation on the decision maker to balance that with the affordability and location needs of the housing beneficiary. I therefore conclude that the principle of spatial justice in SPLUMA requires a commitment to the idea of a fair return on investment for the developer, contrary to the general position (under the police power) that the state is entitled to regulate property to the point that it becomes worthless.

[44] Section 7 (b) (v) of SPLUMA.

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List of abbreviations

AIR	All Indian Reporter
Alberta L. Rev.	Alberta Law Review
Alt. L.J.	Alternative Law Journal
Am. J. Comp. L.	American Journal of Comparative Law
Am. Univ. Bus. L. Rev.	American University Business Law Review
Ame. Crim. L. Rev.	American Criminal Law Review
Amer. Univ. Int'l. L. Rev.	American University International Law Review
Ariz. J. Int'l. & Comp. L.	Arizona Journal of International and Comparative Law
Asia Pac. L. Rev.	Asia Pacific Law Review
Asian J. Comp. L.	Asian Journal of Comparative Law
ASSAL	Annual Survey of South African Law
Australian Humanities Rev.	Australian Humanities Review
B.C. Envt'l. Affairs L. Rev.	Boston College Environmental Affairs Law Review
BCLR	Butterworths Constitutional Law Reports
Boston Coll. J. L. & Soc. Just.	Boston College Journal of Law & Social Justice
Brigham-Kanner Prop. Rts.	Brigham-Kanner Property Rights Conference
Brook. J. Int'l. L.	Brooklyn Journal of International Law
Calif. L. Rev.	California Law Review
Camb. L. J.	Cambridge Law Journal
Can. Bar Rev.	Canadian Bar Review
Can. J. L. & Jurisp.	Canadian Journal of Law & Jurisprudence
Can. J.L. & Soc.	Canadian Journal of Law & Society
CC	Constitutional Court

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Chic. J. Int'l. L.	Chicago Journal of International Law
CILSA	Comparative & International Law Journal of Southern Africa
Colum. J. Envt'l. L.	Columbia Journal of Environmental Law
Colum. J. Eur. L.	Columbia Journal of European Law
Colum. L. Rev	Columbia Law Review
Conn. L. Rev.	Connecticut Law Review
Const. Ct. Rev.	Constitutional Court Review
Cornell L. Rev.	Cornell Law Review
Critical Soc. Pol'y	Critical Social Policy
Cyprus Hum. Rts. L. Rev.	Cyprus Human Rights Law Review
DePaul L. Rev.	DePaul Law Review
Duke J. Const. L. & Publ.	Duke Journal of Constitutional Law & Public Policy
Duke L. J.	Duke Law Journal
E. S. R. Rev.	Economic and Social Rights Review
E.J.I.L.	European Journal of International Law
EHRR	European Human Rights Reports
Envt'l. L. Rptr.	Environmental Law Reporter
Eur. J. Soc. Sec.	European Journal of Social Security
Eur. Planning Stud.	European Planning Studies
Euro. C. L.	European Community Law
FB	Full Bench
Fla. J. Int'l. L.	Florida Journal of International Law
Ford. Envt'l. L. Rev.	Fordham University Environmental Law Review
Ford. L. Rev.	Fordham Law Review

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Ford. Urb. L. J.	Fordham Urban Law Journal
Geo. Int'l. Env. L. Rev.	Georgetown international Environmental law Review
Geo. J. Pov. L. & Pol'y	Georgetown Journal of Poverty Law & Policy
Geo. L. J.	Georgetown Law Journal
Geo. Wash. Int'l. L. Rev.	George Washington International Law Review
German L. J.	German Law Journal
Harv. Black. L. J.	Harvard Blackletter Law Journal
Harvard L. Rev.	Harvard Law Review
Hast. W.-NW. J. Envt'l. L. & Pol'y	Hastings West-Northwest Journal of Environmental Law and Policy
Hastings L.J.	Hastings Law Journal
Hong Kong L. J.	Hong Kong Law Journal
I.C.L.Q.	International and Comparative Law Quarterly
Indiana Int'l. & Comp. L. Rev.	Indiana International and Comparative Law Review
Indiana J. Glob. L. Stud.	Indiana Journal of Global Legal Studies
Indiana L.J.	Indiana Law Journal
Int'l J. Discrimination & L.	International Journal of Discrimination & Law
Int'l. J. Civ. Soc.	International Journal of Civil Society
Int'l. J. Const. L.	International Journal of Constitutional Law
Int'l. J. Hous. Pol'y.	International Journal of Housing Policy
Int'l. J. Legal Info.	International Journal of Legal Information
Int'l. J.L. in Context	International Journal of Law in Context
Iowa L. Rev.	Iowa Law Review
Irish L. Q.	Irish Law Quarterly

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J. Affordable Hous. & Cmty.	Journal of Affordable Housing & Community
Devt. L.	Development Law
J. Affordable Hous.	Journal of Affordable Housing
J. Comp. L.	Journal of Comparative Law
J. Hous. & Built Envir.	Journal of Housing & Built Environment
J. Indian L. & Soc.	Journal of Indian Law and Society
J. Indian L. Institute	Journal of the Indian Law Institute
J. L. & Econ. Dev.	Journal of Law & Economic Development
J. Land Use & Envt'l. L.	Journal of Land Use & Environmental Law
J. Publ. Admin. & Research	Journal of Public Administration & Research
J. S. Afr. L.	Journal of South African Law
J. Soc. & Soc. Welfare	Journal of Sociology and Social Welfare
J. Urban & Contemp. L.	Journal of Urban and Contemporary Law
J.Q.R.	Juta Quarterly Review
	Journal
L. & Ethics Hum. Rts.	Law & Ethics of Human Rights
Labour Stud. J.	Labour Studies Journal
Land Use L. & Zon. Dig.	Land Use Law & Zoning Digest
Law & Contemp. Probs.	Law & Contemporary Problems
LCC	Land Claims Court
LDD	Law Democracy & Development
Loy. U. Chic. L. Rev.	Loyola University of Chicago Law Review
Malaya L. Rev.	Malaya Law Review
McGill L.J.	McGill Law journal

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Mich. L. Rev.	Michigan Law Review
Mod. L. Rev.	Modern Law Review
Monthly Labor Rev.	Monthly Labor Review
N. Y. U. Envt'l. L. J.	New York University Environmental Law Journal
N.U.J.S. L. Rev.	National University of Juridical Sciences Law Review
Nat. Res. J.	Natural Resources Journal
Nebr. L. Rev.	Nebraska Law Review
Nor. Ir. Legal Q.	Northern Ireland legal Quarterly
Northwestern J. L. & Soc. Pol'y	Northwestern Journal of Law & Social Policy
Northwestern Univ. L. Rev.	Northwestern University Law Review
Nott. L. J.	Nottingham Law Journal
Nw. U. L. Rev.	Northwestern University Law Review
P.E.L.J.	Potchefstroom Electronic Law Journal
Pace Int'l. L. Rev.	Pace International Law Review
Penn. St. L. Rev.	Pennsylvania State Law Review
Penn. St. L. Rev.	Pennsylvania State Law Review
Pepp. L. Rev.	Pepperdine Law Review
Phil. L.J.	Philippine Law Journal
Publ. L.	Public Law
S. Afr. Merc. L. J.	South African Mercantile Law Journal
S. Cal. L. Rev.	Southern California Law Review
S. W. Univ. L. Rev.	South Western University Law Review
S.M.U. L. Rev.	South Methodist University Law Review
SAJHR	South African Journal on Human Rights

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SALJ	South African Law Journal
Santa Clara L. Rev.	Santa Clara Law Review
SAPL	South African Public Law
Seton Hall L. Rev.	Seton Hall Law Review
Sing. J. Legal Stud.	Singapore Journal of Legal Studies
Sri Lanka J. Int'l. L.	Sri Lanka Journal of International Law
Stan. L. Rev.	Stanford Law Review
Stell. L. Rev.	Stellenbosch Law Review
Stetson L. Rev.	Stetson Law Review
Sustainable Dev. L. & Pol'y	Sustainable Development Law & Policy
Trinity C. L. Rev.	Trinity College Law Review
Tulsa J. Comp. & Int'l. L.	Tulsa Journal of Comparative and International Law
U. C. L. Hum. Rts. Rev.	University College London Human Rights Review
U.C.L. Journal of Law & Jurisprudence	University College London Journal of Law & Jurisprudence
U. Miami L. Rev.	University of Miami Law Review
U. Mich. J. L. Ref.	University of Michigan Journal of Law Reform
U. N. S. W. L. J.	University of New South Wales Law Journal
U. Pa. L. Rev.	University of Pennsylvania Law Review
U. Toronto L.J.	University of Toronto Law Journal
U.C.L.A. L. Rev.	University of Chicago Los Angeles Law Review
Univ. S. Fla. L. Rev.	University of South Florida Law Review
Univ. S. Fla. L. Rev.	University of South Florida Law Review
Urb. Law.	Urban Lawyer

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Va. J. Soc. Pol'y. & L.	Virginia Journal of Social Policy & the Law
Vanderb. J. Transnat'l. L.	Vanderbilt Journal of Transnational Law
Verm. J. Env. L.	Vermont Journal of Environmental Law
Vermont L. Rev	Vermont Law Review
Victoria U. Wellington L. Rev.	Victoria University of Wellington Law Review
Vienna J. Int'l. Const. L.	Vienna Journal of International Constitutional Law
W. Virg. L. Rev.	West Virginia Law Review
Wake Forest L. Rev.	Wake Forest Law Review
Wash. U. Global Stud. L. Rev.	Washington University Global Studies Law Review
Washb. L. J.	Washburn Law Journal
Will. L. Rev.	Williamette Law Review
Yale Hum. Rts. & Dev. L.J.	Yale Human Rights and Development Law Journal
Yale L.J.	Yale Law Journal

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Bibliography

!Owoses-/Goagoses F *Planning law in Namibia* (Cape Town: Juta & Co. Ltd, 2013)

Abani C *Graceland* (New York: Farrar, Straus and Giroux, 2004)

Adams B "From *Lucas* to *Palazzolo*: A case study of title limitations" (2001) 16 *J. Land Use & Envt'l. L.* 225—263

Adams KD "Do we need a right to housing?" (2009) 9 *Nevada L.J.* 275—324

Addis A "Human dignity in comparative constitutional context: In search of an overlapping consensus" (2015) 28 *J. Int'l. & Comp. L.* 1—28

Agrawal PK *Land reforms in India: Constitutional and legal approach* (New Delhi: MD Publications Pvt. Ltd., 1993)

Akintayo AE *Socio-economic rights, political action, judicial conceptions of democracy and transformation: South Africa and Nigeria* (Unpublished LLD thesis, University of Pretoria, 2014)

Alam A *Human rights in India: Issues and challenges* (Delhi: Raj Publications, 2000)

Alder J *Development Control* 2nd edition (London: Sweet & Maxwell, 1989)

Alexander AT "Occupying the constitutional right to housing" (2015) 94 *Neb. L. Rev.* 245—301

Alexander GS "The potential of the right to property in achieving social transformation in South Africa" (2007) 8 *E. S. R. Rev.* 2—9

Alexander GS "The social obligation norm in American property law" (2009) 94 *Cornell L. Rev.* 745—820

Allen T "Liberalism, socialism and the value of property under the European Convention on Human Rights" (2010) 59 *I.C.L.Q.* 1055—1078

Allen T "Property as a fundamental right in India, Europe and South Africa" (2007) 15 *Asia Pac. L. Rev.* 193—218

Allen T "The revival of the right to property in India" (2015) 10 *Asian J. Comp. L.* 23—52

Allen T *Property and the Human Rights Act 1998* (Oxford: Hart Publishing Co., 2005)

© University of Pretoria

Alok A & Vora B "Rent control in India: Obstacles for urban reform" (2011) 4 *N.U.J.S. L. Rev.* 83—100

Alryck AP "What *Commonwealth v Alger* cannot tell us about regulatory takings" (2007) 82 *N.Y.U. L. Rev.* 1746—1779

Alterman R "Evaluating linkage and beyond: Letting the windfall recapture genie out of the exactions bottle" (1988) 34 *J. Urban & Contemp. L.* 3—49

Altman I & Werner CM (eds) *Home environments* (New York: Plenum Press, 1985)

Alvarez JE "The human right of property" (2018) 72 *U. Miami L. Rev.* 580—705

Angel S *Housing policy matters: A global analysis* (2000)

Appiah KA "Stereotypes and the shaping of identity" (2000) 88 *Calif. L. Rev.* 41—54

Appleton B "Regulatory takings: The international law perspective" (2002) 11 *N. Y. U. Envt'l. L. J.* 35—48

Arpey C "The multifaceted manifestations of the poor door: Examining forms of separation in inclusionary housing" (2017) 6 *Am. Univ. Bus. L. Rev.* 627—645

Atkin B "What kind of property is relationship property?" (2016) 47 *Victoria U. Wellington L. Rev.* 345—362

Babie P "Private property suffuses life" (2017) 39 *Syd. L. Rev.* 135—146

Babie P "Sovereignty as governance: An organizing theme for *Australian* property law" (2013) 36 *U. N. S. W. L. J.* 1075—1108

Babu RR "Constitutional right to property in changing times: The Indian experience" (2012) 6 *Vienna J. Int'l. Const. L.* 213—247

Bailey S & Elliott M "Taking local government seriously: Democracy, autonomy and the constitution" (2009) 68 *Camb. L. J.* 436—472

Bancroft KH "Zones of exclusion: Urban spatial policies, social justice, and social services" (2012) 39 *J. Soc. & Soc. Welfare* 63—84

Barak A "Proportionality and principled balancing" (2010) 4 *L. & Ethics Hum. Rts.* 1—18

© University of Pretoria

Barros DB (ed) *Hernando de Soto and property in a market economy* (London & New York: Routledge, 2010)

Barros DB "Home as a legal concept" (2006) 26 *Santa Clara L. Rev.* 255—306

Bastian M "Inventing nature: Re-writing time and agency in a more-than-human world" (2009) 47 *Australian Humanities Rev.* 99—116

Bateman M "South Africa's post-apartheid microcredit-driven calamity" (2014) 18 *L.D.D.* 92—135

Bekink B *The restructuring (systemization) of local government under the Constitution of the Republic of South Africa*, *1996* (2006) Unpublished LLD thesis, University of Pretoria

Bell A & Parchomovsky G "Givings" (2001) 111 *Yale L. J.* 547—618

Bennett T & Mostert H "Access to property in Africa: An introductory survey" in Mostert H & Bennett T (eds) *Pluralism & Development: Studies in access to property in Africa* (Cape Town: Juta, 2011)

Beyer S "Inclusionary housing is rent control" available online at https://www.forbes.com/sites/scottbeyer/2015/05/27/inclusionary-zoning-is-rent-control-2-0/#63c2c94f561c (last accessed on 6 August 2020)

Bezuidenhout K *Compensation for excessive but otherwise lawful regulatory state action* (Unpublished LLD dissertation, Stellenbosch University, 2015) 210—246

Bilchitz D "Is the Constitutional Court wasting away the time of the poor? *Nokotyana v Ekurhuleni Metropolitan Municipality*" (2010) *SALJ* 591—605

Birbalsingh FM "Urban experience in South African fiction" (1984) *Presence Africaine* 111—121

Blasingame EN "Public welfare and public housing: Due process and equal protection standards" (1971) 38 *Tenn. L. Rev.* 345—368

Blomley N "The right to pass freely: Circulation, begging, and the bounded self" (2010) 19 (3) *Soc. & Legal Stud.* 331—350

© University of Pretoria

Blomley N *Unsettling the city: Urban land and the politics of property* (New York: Routledge, 2004)

Boggenpoel ZT "Compliance with section 25 (2) (b) of the constitution: When should compensation for expropriation be determined" (2012) 129 *SALJ* 605—620

Boggenpoel ZT "Does method really matter? Reconsidering the role of common law remedies in the eviction paradigm" (2014) 25 *Stell. L. Rev.* 72—98

Bond P "Water rights, commons and advocacy narratives" (2013) *SAJHR* 125—143

Boudreaux DJ & Meiners R "Externality: Origins and classifications" (2019) 25 *Nat. Res. J.* 1—34

Boudreaux P "Infill: New housing for twenty first century America" (2018) 45 *Fordham Urb. L. J.* 595—659

Bradlow B "Out of the garden of Eden: Moving beyond the rights-based agenda in the urban sector" (2010) *Sustainable Dev. L. & Pol'y* 47—49

Brand D, De Beer S, De Villiers I & Van Marle K "Poverty as injustice" (2013) 17 *L.D.D.* 273—297

Bright S & Whitehouse L *Information, advice & representation in housing possession cases* (2014)

Brits R *Mortgage foreclosure under the constitution: Property, housing and the National Credit Act* (Unpublished LLD thesis, Stellenbosch University, 2012)

Broekhuijse I & Venter R "Constitutional law from an emotional point of view: Considering regional and local interests in national decision-making" (2016) *J. S. Afr. L.* 236

Brown KJ "A dangerous disappearing act: Preserving affordable housing in the face of maturing mortgages" (2015) 35 *Boston Coll. J. L. & Soc.* Just. 59—88

Bundy C "Land, law and power" in Murray C & O'Regan C (eds) *No place to rest: Forced removals and the law in South Africa* (Cape Town: Oxford University Press, 1990) 3—12

© University of Pretoria

Burcat JR & Glencer JM "*Palazzolo v Rhode Island* and the U.S. Supreme Court's increased support of the protection of private property: A response to Echeverria" (2002) 32 *Envt'l. L. Rptr.* 10245—10253

Buss A "Dual legal systems and the Basic Structure Doctrine of constitutions: The case of India" (2004) 19 *Can. J.L. & Soc.* 23—49

Butler C "Critical legal studies and the politics of space" (2009) 18 *Soc. & Legal Stud.* 313—332

Butler C *Henri Lefebvre: Spatial politics, everyday life and the right to the city* (Oxon, New York: Routledge, 2012)

Calabresi G & Melamed AD "Property rules, liability rules and inalienability: One view of the cathedral" (1972) 85 *Harv. L. Rev.* 1089—1128

Calavita N & Mallach A *Affordable housing, social inclusion, and land value recapture* (Cambridge & Massachusetts: Lincoln Institute of Land Policy, 2010)

Calavita N & Mallach A (eds) *Inclusionary housing in international perspective* (Cambridge & Massachusetts: Lincoln Institute of Land Policy, 2010)

Calavita N "Urbanization, public control of land use and private ownership of land: The development of Italian planning law" (1984) 16 *Urb. Law.* 459

Cammett A "Deadbeat dads and welfare queens: How metaphor shapes poverty law" (2014) 34 *Boston Coll. J. L. & Soc.* 233—265

Campbell D & Hepperle W *The U.S. legal system* (Hague: Martinus Nijhoff, 1983)

Canter D & Rees K "A multivariate model of housing satisfaction" (1982) 31 *Applied Psychology* 185—207

Carney T "The future of welfare law in a changing world: Lessons from Australia and Singapore" (2010) *Sing. J. Legal Stud.* 22—36

Chandrachud C *Balanced constitutionalism* (New Delhi: Oxford University Press, 2017)

Charles CZ "The dynamics of racial residential segregation" (2003) 29 *Ann. Rev. Soc.* 167—207

© University of Pretoria

Chaskalson M "Stumbling towards section 28: Negotiations over the protection of property rights in the interim constitution" (1995) 11 *SAJHR* 222—240

Chaskalson M "The property clause: Section 28 of the Constitution" (1994) 10 *SAJHR* 131—139

Chen AHY "The basic law and the protection of property rights" (1993) 23 *Hong Kong L. J.* 31

Chen J "China's *Ding zi hu*, the United States' *Kelo* and Singapore's *en bloc* process: A new model for economic development eminent domain from a givings perspective" (2008) 24 *J. Land Use & Env. L.* 107—158

Chen J "Curbing rent-seeking and inefficiency with broad takings powers and undercompensation: The case of Singapkore from a givings perspective" (2010) *Pac. Rim L. & Pol'y. J.* 1—62.

Chenwi L & Tissington K *Engaging meaningfully with government on socio-economic rights: A focus on the right to housing* (Cape Town: University of the Western Cape, Community Law Centre, 2010)

Chenwi L "A new approach to socio-economic rights adjudication: *Occupiers of 51 Olivier Road and Others v City of Johannesburg and Others*" (2009) 2 *Const. Ct. Rev.* 371—393

Chenwi L "Legislative and judicial responses to informal settlements in South Africa: A silver bullet" (2012) 23 *Stell. L. Rev.* 540—563

Chenwi L "Unpacking 'progressive realization', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance" (2013) *De Jure* 742—769.

Chew B, Hoong V & Vellasamy M "Compulsory acquisition of land in Singapore: A fair regime?" (2010) 22 *SACLJ* 166—188

City of Johannesburg *Inclusionary housing: Incentives, regulations, and mechanisms* (Johannesburg: CoJ, 2019)

Cloete F & Wissink H (eds) *Improving public policy* (Pretoria: Van Schaik, 2000)

© University of Pretoria

Cloete J *Public administration and management: New constitutional dispensation* (Pretoria: Van Schaik Publishers, 1994)

Çoban AR *Protection of property rights within the European Convention on Human Rights* (Aldershot: Ashgate Publishing, 2004)

Coffin JN "The united mall of America: Free speech, state constitutions and the growing fortress of private property" (2000) 33 *U. Mich. J. L. Ref.* 615—650

Coggin T "Redressing spatial apartheid: The law of nuisance and the transformative role of social utility and the right to the city" (2016) 133 *SALJ* 434—451

Collins H "Discrimination, equality and social inclusion" (2003) 66 *Mod. L. Rev.* 16—43

Collins MG "Opening doors to fair housing: Enforcing the affirmatively further provision of the Fair Housing Act through U.S.C. Sec 1983" (2010) 110 *Colum. L. Rev.* 2135—2184.

Conklin WE *The Phenomenology of Modern Legal Discourse- The Juridical Production and the Disclosure of Suffering* (Aldershot: Dartmouth, 1998)

Connolly M "Achieving social mobility: The role of equality law" (2013) 13 *Int'l. J. Discrimination & L.* 261—291

Couzens E "Avoiding *Mazibuko*: Water security and constitutional rights in Southern African law" (2015) 18 *PELJ* 1162—1186

Cowen S "Can dignity guide South Africa's equality jurisprudence" (2001) 17 *SAJHR* 34—58

Crause C & Scheinin M (eds) *International protection of human rights: A textbook* (Turku: Institute for Human Rights, 2009)

Crawford C "Density, affordable housing and social inclusion: Modest proposal for Cape Town" (2017) 81 *J. Comp. Urb. L. & Pol'y* 81—94.

Crown BC "*En bloc* sales and joint tenancy: *Goh Teh Lee v. Lim Li Pheng Maria*" (2011) 2 *Sing. J. Legal Stud.* 564—569

Currie I & De Waal J *The bill of rights handbook* 5 ed (Lansdowne: Juta & Co. Ltd, 2005)

© University of Pretoria

Curtin DJ & Naughton EM "Inclusionary housing ordinance is not facially invalid and does not result in a taking" (2002) 34 *Urb. Law.* 913—918

Dafel M "Curbing the constitutional development of contract law: A critical response to *Maphango v Aengus lifestyle properties (Pty) Ltd*" (2014) 131 *SALJ* 271—287.

Dafel M "The negative obligation of the housing right: An analysis of the duties to respect and protect" (2013) 29 *SAJHR* 591—614

Dagan H "Inside property" (2013) 63 *U. Toronto L.J.* 1—21

Dagan H *Property: Values and institutions* (Oxford: Oxford University Press, 2011)

DaRosa M "When are affordable housing exactions an unconstitutional taking" (2007) 43 *Will. L. Rev.* 453—494

Davenport TRH "Some reflections on the history of land tenure in South Africa, seen in the light of attempts by the state to impose political and economic control" (1985) *Acta Juridica* 53—76

Davidson NM "Judicial takings and state action: Re-reading *Shelley* after *Stop the Beach Renourishment*" (2011) 6 *Duke J. Const. L. & Publ. Pol'y* 75—89

Davidson NM "Property's morale" (2011) 110 *Mich. L. Rev.* 437—488

Davidson NM "The problem of equality in takings" (2008) 102 *Northwestern Univ. L. Rev.* 1—53

Davis D "The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles" (1992) 8 *SAJHR* 475—490 487

Davis DM "Relationship between courts and other arms of government in promoting and protecting socio-economic rights in South Africa: What about separation of powers?" (2012) 15 *PELJ* 1—14

Davis H & Holdcroft D *Jurisprudence: Texts and Commentary* (London: Butterworths, 1991)

Davis JG *The Evangelistic Bureaucrat* (London: Tavistock Publications, 1972)

© University of Pretoria

Davis M "Afterword - A logic like hell's: Being homeless in Los Angeles" (1991) 39 *UCLA LR* 325—332

De Coning C "The nature and role of public policy" in Cloete F & Wissink H (eds) *Improving public policy* (Pretoria: Van Schaik Publishers, 2000) 3—22

De Schutter O "Waiver of rights and state paternalism under the European Convention on Human Rights" (2000) 51 *Nor. Ir. Legal Q.* 481—508

De Villiers I *Law, spatiality and the Tshwane urban space* (Unpublished LLD thesis, University of Pretoria, 2017)

De Visser J & Steytler N "Confronting the state of local government: The 2013 Constitutional Court decisions" (2013) 6 *Const. Ct. Rev.* 1—23

De Visser J "Institutional subsidiarity in the South African constitution" (2010) 21 *Stell. L. Rev.* 90—115

De Vos P "A bridge too far: History as context in the interpretation of the South African Constitution" (2001) 17 *SAJHR* 1—33

De Vos P "*Grootboom*, the right of access to housing and substantive equality as contextual fairness" (2001) 17 *SAJHR* 258—276

Department of Housing (DOH) *White Paper: A new housing policy and strategy for South Africa*, General Notice 1376 of 1994, Government Gazette 16178, 23 December 1994

Devenish GE "*Department of Land Affairs v Goedgelegen Tropical Fruits*: A triumph for teleological interpretation, an unqualified contextual methodology and the jurisprudence of *ubuntu*" (2008) 125 *SALJ* 231

Dhliwayo P "Consensual use rights that limit the landowners' right to exclude on the basis of the sharing model" (2017) 80 *Journal for Contemporary Roman-Dutch Law* 565—585

Dhliwayo P *A constitutional analysis of access rights that limit landowners' right to exclude* (Unpublished LLD thesis, Stellenbosch University, 2015)

Diamond SR "The San Francisco office/housing program: Social policy underwritten by private enterprise" (1983) 7 *Harv. Envt'l. L. Rev.* 449—486

© University of Pretoria

Dickinson GS "Inclusionary eminent domain" (2014) 45 *Loy. U. Chic. L. Rev.* 845 — 913

Dickson B (ed) *Human rights and the European Convention* (London: Sweet & Maxwell, 1997)

Dikeç M "Justice and the spatial imagination" (2001) 33 *Environment and Planning* 1785–1805

Donald N "Gazing from a distance: Spatial reading of a Law Commission report" (2015) 6 *J. Indian L. & Soc.* 91—109

Downing C "Eminent domain in 21st century India: What New Delhi can learn from New London" (2013) 46 *N.Y.U.J. Int'l. L. & Pol'y* 2017—251.

Downs A (ed) *Growth management and affordable housing: Do they conflict?* (2004)

Downs A *New visions for metropolitan America* (1994)

Du Bois M "Intellectual property as a constitutional property right: The South African approach" (2012) 24 *S. A. Merc. L. J.* 177—193

Du Plessis A "The readiness of South African law and policy for the pursuit of sustainable development goal" (2017) 21 *L.D.D.* 239—262

Du Plessis WJ "The usefulness of Michelman's utilitarian approach to compensation for expropriation in South Africa" (2013) 24 *Stell. L. Rev.* 359—376

Dugard J "Beyond *Blue Moonlight*: The implications of judicial avoidance in relation to the provision of alternative housing" (2014) 5 *Const. Ct. Rev.* 265—279

Dugard J "*Modderklip* revisited: Can courts compel the state to expropriate property where the eviction of unlawful occupiers is not just and equitable?" (2018) 21 *P.E.L.J.* 1—20

Dugger CE "Rights waiting for change: Socio-economic rights in the new South Africa" (2007) 19 *Fla. J. Int'l. L.* 195—287

Duke J "Mixed income housing policy and public housing residents' 'right to the city'" (2009) 29 *Critical Soc. Pol'y* 100—120

© University of Pretoria

Duncan GJ "Mobility lessons from Gautreaux and moving to opportunity" (2006) 1 *Northwestern J. L. & Soc. Pol'y* 110—126

Durand-Lasserve A & Royston A (eds) *Holding their ground, secure land tenure for the urban poor in developing countries* (2002)

Dworkin R *Taking rights seriously* (Massachusetts: Harvard University Press, 1977)

Dyal-Chand R "Sharing the cathedral" (2013) 46 *Connecticut L. Rev.* 647—723

Eagle SJ "Economic impact in regulatory takings law" (2013) 19 *Hast. W.-NW. J. Envt'l. L. Pol'y* 407—443

Eagle SJ "Property rights and takings burdens" (2018) 7 *Brigham-Kanner Prop. Rts. Conf. J.* 199—260

Eagle SJ "Reflections on private property, planning and state power" (2009) 61 *Planning & Envt'l. L.* 3—11

Eagle SJ "The four-factor *Penn Central* regulatory takings test" (2014) 118 *Penn. St. L. Rev.* 601—646

Eisenberg A "'Public purpose' and expropriation: Some comparative insights and the South African Bill of Rights" (1995) 11 *SAJHR* 207—221

Elliason N "Towards a new property" (2002) 4 *Eur. J. Soc. Sec.* 55—76

Ellickson RC "The irony of inclusionary zoning" (1981) 54 *S Cal. L. Rev.* 1167—1216

Erasmus J *The interaction between property rights and land reform in the new constitutional order in South Africa* (Unpublished LLD thesis, University of South Africa,1998)

Erlank W "Don't touch my virtual property: Justifications for the recognition of virtual property" (2016) 133 *SALJ* 664—687

Erlank W "The closeness of property" in Muller G, Brits R, Slade BV & Van Wyk J (eds) *Transformative property law: Festschrift in honour of AJ van der Walt* (Cape Town: Juta, 2018) 202—218

Fagan A "Dignity and unfair discrimination: A value misplaced and a right misunderstood" (1998) 14 *SAJHR* 220—247

© University of Pretoria

Fennell LA "Co-location, co-location, co-location: Land use and housing priorities reimagined" (2015) 39 *Vermont L. Rev.* 925—942

Fenster M "Regulating land use in a constitutional shadow: The institutional contexts of exactions" (2006) 58 *Hastings L.J.* 729—776

Ferrell J "Remapping the city: Public identity, cultural space, and social justice" (2001) *Contemporary Justice Review* 161—180

Fertig AR & Reingold DA "Public housing, health, and health behaviors: Is there a connection?" (2007) 26 *Journal of Policy Analysis and Management* 831—859

Fineman MA "Beyond identities: The limits of an antidiscrimination approach to equality" (2012) 92 *Bost. Univ. L. Rev.* 1713—1770

Fischel WA "The economics of land use exactions: A property rights analysis" (1987) 50 *Law & Contemp. Probs.* 101—114

Floryan M "Cracking the foundation: Highlighting and criticizing the shortcomings of mandatory inclusionary zoning practices" (2010) 37 *Pepp. L. Rev.* 1039—1112

Fombad CA (ed) *The implementation of modern African constitutions: Challenges and prospects* (2016: Pretoria University Law Press, Pretoria)

Foster GK "Community participation in development" (2018) 51 *Vand. J. Transnat'l. L.* 39—100

Foster J "The use of foreign law in constitutional interpretation: Lessons from South Africa" (2010) 45 *U. S. F. L. Rev.* 79—140

Fox L "The idea of home in law" (2005) 2 *Home Cultures* 25—49

Fox L "The meaning of home: A chimerical concept or a legal challenge?" (2002) 9 *Journal of Law & Society* 580—610

Fox L *Conceptualising home: Theories, laws and policies* (2007)

Fox-O'Mahony L & Sweeney JA (eds) *The idea of home in law: Displacement and dispossession* (2011)

© University of Pretoria

Freund ZC "Perpetuating segregation or turning discrimination on its head: Affordable housing residency preferences as anti-displacement measures" (2018) 118 *Colum. L. Rev.* 833—

Freyfogle E "Private property: Correcting the half-truths" (2007) 59 *Zoning Digest* 3—11

Freyfogle E *The land we Share: Private property and the common good* (Washington: Island Press, 2003)

Fuo ON & Du Plessis A "In the face of judicial deference: Taking the minimum core of socio-economic rights to the local government sphere" (2015) 19 *Law, Democracy & Dev.* 1—28

Fuo ON "Constitutional basis for the enforcement of executive policies that give effect to socio-economic rights in South Africa" (2013) 16 *PELJ* 1—44

Fuo ON "Public participation in decentralised governments in Africa: Making ambitious constitutional guarantees more responsive" (2015) 15 *Afr. Hum.Rts.L.J.* 167—191

Fuo ON *Local government's role in the pursuit of the transformative constitutional mandate of social justice in South Africa* (2014) Unpublished LLD thesis, Northwest University

Ganguli AK "Right to property: Its evolution and constitutional development in India" (2006) 48 *J. Indian L. Institute* 489—526

Garwood-Gowers A "Improving protection against indirect interference with the enjoyment of home: Challenging the legacy of *Hunter v Canary Wharf* using the European Convention on Human Rights and Human Rights Act 1998" (2002) 11 *Nott. L. J.* 1—19

Gdesz M "Compensation for depreciation of the property value according to Polish land-use law" (2006) 5 *Wash. U. Global Stud. L. Rev.* 559—586

Geiger C (ed) *Constructing European intellectual property: Achievements and new perspectives* (2013)

© University of Pretoria

Gerhart PM "The social costs of regulatory takings" (2019) 70 *Mercer L. Rev.* 479—524

Giannakourou G & Balla E "Planning regulation, property protection, and regulatory takings in the Greek planning law" (2006) 5 *Wash. Univ. Global Stud. L. Rev.* 535—558

Glass MR, Woldoff R & Morrison L "Does the middle class have rights to the city? Contingent rights and the struggle to inhabit Stuyvesant Town, New York" (2014) 14 *Int'l. J. Hous. Pol'y.* 214—235

Goh Y & Tan P "An empirical study on the development of Singapore law" (2011) 23 *S.A.C.L.J.* 176—226

Gowder WA & Wenter BW "Recent developments in exactions and impact fees: Who pays for new schools, fair housing, and clean air" (2010) 42 *Urb. Law.* 615—626

Graddy EA & Bostic RW "The role of private agents in affordable housing policy" (2010) 20 *J. Publ. Admin. & Research* 81—99

Grant E "Disadvantage and discrimination: The emerging jurisprudence of the South African Constitutional Court" (2000) 51 *Irish Legal Q.* 174—197.

Green SD "Imagining a right to housing, lying in the interstices" (2012) 19 *Geo. J. Pov. L. & Pol'y* 393 —443

Greene J "The Supreme Court 2017 term: Foreword- Rights as trump?" (2018) 132 *Harvard L. Rev.* 28—132

Gregory *et al* (eds) *The dictionary of human geography* 5 ed (2009)

Grover V *The Constitution of India* (Delhi: Deep & Deep Publications, 1999)

Grzeszick B "Rationality requirements on parliamentary legislation under a democratic rule of law" in Meßerschmidt K & Olivia-Lalana D (eds) *Rational law making under review: Legisprudence according to the German Federal Constitutional Court* (Cham: Springer International Publishing, 2016) 61—87.

© University of Pretoria

Gunlicks AB "German federalism and recent reform efforts" (2005) 6 *German L. J.* 1283—1295

Gutierrez IM "Housing rights in the Philippines: Recognition, protection, and promotion" (2008) 83 (2) *Phil. L.J.* 447

Haar CM & Kayden JS *Zoning and the American dream: Promises still to keep* (Chicago: Planners Press, 1989)

Haddad B "Property rights, ecosystem management, and John Locke's labour theory of ownership" (2003) *Ecological Economics* 19–31

Haferburg C "Townships of tomorrow? Cosmo city and inclusive visions for post-apartheid urban futures" (2016) 39 *Habitat International* 261—268

Hailbronner M "Transformative constitutionalism: Not only in the global south" (2017) 65 *Am. J. Comp. L.* 527—565

Hanafin SF "Legal shelter: The case for homelessness as a protected status under hate crime law and enhanced equal protection scrutiny" (2011) 40 *Stetson L. Rev.* 435—474

Hanrahan MV "*Dolan v City of Tigard*: Rough proportionality as the Supreme Court's next step in takings jurisprudence" (1996) 12 *Georgia State U. L. Rev.* 553—576

Hardin G "The tragedy of the commons" (1968) 162 *Science* 1243—1248

Harris DJ, Boyle M O, Bates E P& Buckley C M *Law of the European Convention on Human Rights* 3 ed (Oxford: Oxford University Press, 2009)

Harris TM "No *Murr* tests: *Penn Central* is enough already" (2018) 30 *Geo. Int'l. Env. L. Rev.* 605—632 610

Harrison SK "'Suspended city': Personal, urban and national development in Chris Abani's *Graceland*" (2012) 43 *Research in African Literatures* 95—114.

Hart JF "Land use in the early republic and the original meaning of the Takings Clause" (2000) 94 *N. W. U. L. Rev.* 1099—1156

Harvey D *Rebel cities: From the right to the city to urban revolution* (London: Verso, 2012)

© University of Pretoria

Hattingh J *Governmental relations: A South African perspective* (Pretoria: UNISA Press, 1998)

Hawthorne L "The nature of the claim for holding over: South African law" (2010) 16 *Fundamina* 52—63

Hennette-Vauchez S "A human *dignitas*: Remnants of the ancient legal concept in contemporary dignity jurisprudence" (2011) 9 *Int'l. J. Const. L.* 32—57.

Henning JA "Mitigating price effects with a housing linkage fee" (1990) 78 *Calif. L. Rev.* 721-753

Hepple B *Equality: The new legal framework* (Oxford: Hart Publishing, 2011)

Heyns C & Brand D "Introduction to socio-economic rights in the South African Constitution" (1998) 2 *Law, Democracy & Dev.* 153—167

Hickman T "The substance and structure of proportionality" (2008) *Publ. L.* 694—716

Hildebrandt P, Evert K, Peters S, Schaub M, Wildner K & Ziemer G (eds) *Performing citizenship: Bodies, agencies, limitations* (Cham: Palgrave McMillan, 2019)

Hill A "Stability, assurance and the concept of legal guidance" (2015) 34 *Law & Philosophy* 141—171

Hill DC "Private waterfront property rights and the public trust after *Glass*" (2007) 53 *Wayne L. Rev.* 753—770

Hohfeld WN "Some fundamental legal conceptions as applied in judicial reasoning" (1913) 23 *Yale L. J.* 16—59

Hohmann JM "Visions of social transformation and the invocation of human rights in Mumbai: The struggle for the right to housing" (2010) 12 *Yale Hum. Rts. & Dev. L.J.* 135—184

Holder J & Harrison C *Current Legal Problems- Law & Geography* (Oxford: Oxford University Press, 2002)

Howenstine EJ "European experience with rent controls" (1977) 100 *Monthly Labor Rev.* 21—28

© University of Pretoria

Hu Y "Regulation of equity crowdfunding in Singapore" (2015) *Sing. J. Leg. Stud.* 46—76

Hudson A (ed) *New perspectives on property law, Human rights and the home* (London: Cavendish Publishing Ltd, 2004) 183—204

Hughes D, Davis M & Matthew V *Texts and materials on housing law* (Oxford: Oxford University Press, 2005)

Huneeus A "Reforming the state from afar: Structural reform litigation at the human rights courts" (2015) 40 *Yale J. Int'l. L.* 1—40

Huchzermeyer M "Addressing segregation through housing policy and finance" in Harrison P, Huchzermeyer M & Mayekiso M (eds) *Confronting fragmentation: Housing and urban development in a democratising society* (Cape Town: University of Cape Town Press, 2003) 211—227

Iglesias T "Inclusionary zoning affirmed: *California Building Industry Association v City of San Jose*" (2016) 24 *J. Affordable Hous.* 409—434

Iglesias T "Maximizing inclusionary zoning's contributions to both affordable housing and residential integration" (2015) 54 *Washb. L. J.* 585—611

Iglesias T "Our pluralist housing ethics and the struggle for affordability" (2007) 42 *Wake Forest L. Rev.* 511—593

Iles K "Limiting socio-economic rights: Beyond the internal limitations clauses" (2004) 20 *SAJHR* 448—465

Iveson K "Social or spatial justice? Mercuse and Soja on the right to the city" (2011) 15 (2) *City* 251—259

Jackson P & Wilde DC (eds) *Property law: Current issues and debates* (Aldershot: Dartmouth Publishing Co. Ltd., 1999)

Jackson VC "Constitutional law in the age of proportionality" (2015) 124 *Yale L.J.* Jacob KJS "*California Building Industry Association v City of San Jose*: The constitutional price for affordable housing" (2016) 7 *Calif. L. Rev.* 20—29

Jacobs BJ "The post-apartheid city in the new South Africa: A constitutional *Triomf*" (2006) 18 *Pace Int'l. L. Rev.* 407—454

© University of Pretoria

Jacobs HM "An alternative perspective on United States-European property rights and land use planning: Differences without any substance" (2009) 61 *Planning & Envt'l. L.* 3—12

Jaggi S "Revolutionary reform in German constitutional law" (2018) 41 *Hastings Int'l. & Comp. L. Rev.* 173—243

Jagit N "The Indian supreme court on property rights and the economic objectives of the Indian constitution" (1968) 3 *J. L. & Econ. Dev.* 147—180

Janisch HN "Aid for Sisyphus: Incentives and Canadian content regulation in broadcasting" (1993) 31 *Alberta L. Rev.* 575—590

Jenkins P & Smith H "An institutional approach to analysis of state capacity in housing systems in the developing world: Case studies in South Africa and Costa Rica" (2001) 16 *Housing Studies* 485 —507

Johnson LE, Paulsson J & Paasch JM "Comparative studies on land use rights: Methodological and standardization aspects" (2015) 10 *J. Comp. L.* 1—26

Judd RA & Rosen DP "Inclusionary housing in California: Creating affordability without public subsidy" (1992) 2 *J. Affordable Hous. & Cmty. Dev. L.* 4—7

Kadi J & Ronald R "Market-based housing reforms and the 'right to the city': The variegated experiences of New York, Amsterdam and Tokyo" (2014) 14 *Int'l. J. Hous. Pol'y.* 268—292

Kadi J & Ronald R "Market-based housing reforms and the 'right to the city': The variegated experiences of New York, Amsterdam and Tokyo" (2014) 14 *Int'l. J. Hous. Pol'y.* 268—292

Kaufman RE, Davis MF & Wegleitner H "The interdependence of rights: Protecting the human right to housing by promoting the right to counsel" (2014) 45 *Colum. Hum. Rts. L. Rev.* 772—815

Kautz BE "In defense of inclusionary housing: Successfully creating affordable housing" (2002) 36 *U. S. F. L. Rev.* 971—1032

© University of Pretoria

Kayden JS & Pollard R "Linkage ordinances and traditional exactions analysis: The connection between office development and housing" (1987) 50 *Law & Contemp. Probs.* 127—138

Keenan S "Property as governance: Time, space and belonging in Australia's Northern Territory intervention" (2013) 76 *Mod. L. Rev.* 464—493

Keightley R "The impact of the Extension of Security of Tenure Act on an owner's right to vindicate immovable property" (1999) 15 *SAJHR* 277—307

Kellerman M *The constitutional property clause and immaterial property interests* (Unpublished LLD thesis, Stellenbosch University, 2011)

Kenn D "One nation's dream, another nation's reality: Housing justice in Sweden" (1996-1997) 22 (1) *Brook. J. Int'l. L.* 63

Kenna P "Globalization and housing rights" (2008) 15 *Indiana J. Glob. L. Stud.* 397—469

Kenny D "Proportionality and the inevitability of the local: A comparative localist analysis of Canada and Ireland" (2018) 66 *Am. J. Comp. L.* 537—578

Khoza GS *Planning interventions to lessen the disjuncture between physical and social space: A Lefebvrian analysis of K206 housing in Alexandra* (Unpublished BSc research report, University of the Witwatersrand, 2007)

Kihato C "Beyond bricks and mortar: South Africa's low-cost housing programme 18 years after democracy" (2013) 22 *Poverty & Race* 1—6

Kloppers HJ & Pienaar GJ "The historical context of land reform in South Africa and early policies" (2014) 17 *PELJ* 677—706

Klug N, Rubin M & Todes A "Inclusionary housing policy: A tool for reshaping South Africa's spatial legacy?" (2013) 28 *J. Hous. & Built Envir.* 667—678.

Kobayashi AM "International and domestic approaches to constitutional protections of individual rights: Reconciling the *Soering* and *Kindler* decisions" (1996) 34 *Ame. Crim. L. Rev.* 225—259

Koch CA *The Right to a View: Common law, legislation and the constitution* (2012) Unpublished LLD thesis Stellenbosch University

© University of Pretoria

Kofman E & Lebas E (eds) *Writings on Cities: Henri Lefebvre* (Oxford: Blackwell Publishers Ltd, 1996)

Koons JE "Locational justice: Race, class, and the grassroots protest of property takings" (2006) 46 *Santa Clara L. Rev.* 811—840

Kreiczer-Levy S "Property without personhood" (2017) 47 *Seton Hall L. Rev.* 771—808

Kroeze IJ *Between conceptualism and constitutionalism: Private-law and constitutional perspectives on property* (Unpublished LLD thesis, University of South Africa, 1997)

Kroncke J "Law and development as anti-comparative law" (2012) 45 *Vanderb. J. Transnat'l. L.* 477—555

Kumm M "Constitutional rights as principles: On the structure and domain of constitutional justice" (2003) 2 *Int'l. J. Const. L.* 574—596

Laitos JG & Kugler MK "Equal protection and property and planning" (2012) 64 *Planning & Envt'l. L.* 4—6

Landau D "A dynamic theory of judicial role" (2014) 55 *Boston Coll. L. Rev.* 1501—1562

Landman K "Gated communities in South Africa: The challenge for spatial planning and land use management" (2004) 75 *Town Planning Rev.* 151–172

Landman K "Exploring the impact of gated communities on social and spatial justice and its relation to restorative justice and peace-building in South Africa" (2007) *Acta Juridica* 134—155

Langford M (ed) *Social rights jurisprudence: Emerging trends in international and comparative law* (Cambridge: Cambridge University Press, 2008)

Laubscher N *et al SPLUMA: A practical guide* (Durban: Lexis Nexis, 2016)

Leavitt J & Lingalfelter T "Low wage workers and high housing costs" (2005) 30 *Labour Stud. J.* 41—60

Lefebvre H "Perspective or prospective" in Kofman E & Lebas E (eds) *Writings on Cities: Henri Lefebvre* (Oxford: Blackwell Publishers, 1996) 160—174

© University of Pretoria

Legacy C, Davidson G & Liu E "Delivering social housing: Examining the nexus between social housing and democratic planning" (2016) 33 *Housing, Theory & Society* 324—341

Lehavi A *The construction of property: Norms, institutions, challenges* (New York: Cambridge University Press, 2013)

Lehmann K "In defense of the Constitutional Court: Litigating socio-economic rights and the myth of the minimum core" (2006) 22 *Am. Univ. Int'l. L. Rev.* 163—197

Leichenko RM "Does place still matter? Accounting for income variation across Indian American tribal areas" (2003) 79 *Economic Geography* 365—386

Lemanski C "Houses without community: Problems of community (in)capacity in Cape Town, South Africa" (2008) 20 *Environment & Urbanisation* 393—410

Leonardy U & Brand D "The defect of the Constitution: Concurrent powers are not cooperative or competitive powers" (2010) *J. S. Afr. L.* 657—670

Leong APB "Of cut-off dates and domination: Some problematic aspects of the general reception of English law in Singapore" (1986) 28 *Malaya L. Rev.* 242—266

Lerman BR "Mandatory Inclusionary zoning: The answer to affordable housing problem" (2006) 33(2) *B.C. Env. Affairs L. Rev.* 383—416

Liebenberg S & Quinot G (eds) *Law and poverty: Perspectives from South Africa and beyond* (Claremont: Juta & Co., 2012)

Liebenberg S "Engaging the paradoxes of the universal and the particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement'" (2012) 12 *AHRLJ* 1—29

Liebenberg S "South Africa's evolving jurisprudence on socio-economic rights: An effective tool in challenging poverty? (2002) 6 *L.D.D.* 159—192

Liebenberg S "The right to social assistance: The implication of *Grootboom* for policy reform in South Africa" (2001) 17 *SAJHR* 232—257

Liebenberg S *Socio-economic rights: Adjudication under a transformative constitution* (Claremont: Juta, 2010)

© University of Pretoria

Liedholm E *et al* "Comparative studies on land use rights: Methodological and standardization aspects" (2015) 10 *J. Comp. L.* 1—26

Lombard M "Discursive constructions of low-income neighbourhoods" (2015) 9 *Geography Compass* 648—659

Louw AM "Suggestions for the protection of star athletes and other famous persons against unauthorised celebrity merchandising in South African law" (2007) 19 *S. Afr. Merc. L. J.* 272—301

Lubens R "The social obligation of property ownership: A comparison of German and U.S. law" (2007) 24 *Ariz. J. Int'l. & Comp. L.* 389—449

Lucas LS "Identity as proxy" (2015) 115 *Colum. L. Rev.* 1605—1674

Lynch P "Homelessness, human rights and social inclusion" (2005) 30 *Alt. L. J.* 116—119

Maass S & Van der Walt AJ "The case in favour of substantive tenure reform in the landlord-tenant framework: *The Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele*; *City of Johannesburg Metropolitan Municipality v Blue Moonlight*" (2011) 128 *SALJ* 436—451

Maass S "Rent control: A comparative analysis" (2012) 15 *PELJ* 40—100

Maass S "The South African social housing sector: A critical comparative analysis" (2013) 29 *SAJHR* 571—590

Maass S *Tenure security in urban rental housing* (Unpublished LLD thesis, Stellenbosch University, 2010)

Macewen M *Housing, race and law* (1991) 143

MacLeod G "From urban entrepreneurialism to a 'Revanchist City'? On the spatial injustices of Glasgow's renaissance" (2002) 34 *Antipode* 602—624

Magidimisha HH & Mapungu L "Unconventional housing provision: Reflections on health aspects- a case study of Zimbabwe" (2011) 26 *J. Hous. & Built Envir.* 469—485

Mahajan VD *Constitutional law of India* 7 ed (Lucknow: Eastern Book Co., 1991)

© University of Pretoria

Mailula D "Customary (communal) land tenure in South Africa: Did *Tongoane* overlook or avoid the core issue" (2011) 4 *Const. Ct. Rev.* 73—112

Marais EJ & Maree PJH "At the intersection between expropriation law and administrative law: Two critical views on the Constitutional Court's *Arun* judgment" (2016) 19 *PELJ* 1—54

Marais EJ & Muller G "The right of an ESTA occupier to make improvements without an owner's permission after *Daniels*: *Quo vadis* statutory interpretation and development of the common law?" (2018) 135 *SALJ* 766—798

Marais EJ "The constitutionality of section 89 (5) (c) of the National Credit Act under the property clause: *National Credit Regulator v Opperman and Others*" (2014) 131 *SALJ* 215—233

Marais EJ "When does state interference with property (NOW) amount to expropriation? An analysis of the *Agri SA* court's state acquisition requirement" (2015) 18 *P.E.L.J.* 2983—3031

Martinek M "Comparative jurisprudence: What good does it do? History, tasks, methods, achievements and perspectives of an indispensable discipline of legal research and education" (2013) 1 *J. S. Afr. L.* 39—57

Mathews J "Minimally democratic administrative law" (2016) 68 *Admin. L. Rev.* 605—660.

Maxwell D "Disputed property rights: Article 1 protocol No. 1 of the European Convention on Human Rights and the Land Reform (Scotland) Act 2016" (2017) 4 *Euro. C. L.* 347—368

Mbazira C "Appropriate, just and equitable relief in socio-economic rights litigation: The tension between corrective and distributive forms of justice" (2008) 125 *SALJ* 71—94

Mbazira C *You are the weakest link in realising socio-economic rights: Goodbye: Strategies for effective implementation of court orders in South Africa* (Bellville: Community Law Centre, University of the Western Cape, 2008)

McCann F "Representing post-conflict space: Belfast, Cape Town and cruel optimism in 'The good man'" (2015) 14 *Nordic Irish Studies* 71—82

© University of Pretoria

McCrudden C "Human dignity and judicial interpretation of human rights" (2008) 19 *E.J.I.L.* 655—7

McDermont M "Mixed messages: Housing associations and corporate governance" (2007) 16 *Soc & Legal Stud.* 71—94

McDonough C "Rent control and rent stabilization as forms of regulatory and physical takings" (2007) 34 *B.C. Env. Aff. L. Rev.* 361—385

McFarlane AG & Randall RK "Cities, inclusion and exactions" (2017) 102 *Iowa L. Rev.* 2145—2186

McLean K "meaningful engagement: One step forward or two back?" Some thoughts on *Joe Slovo* (2010) 3 *Const. Ct. Rev.* 223—242

McMurry N "Fulfilling the right to privacy: Positive obligations to assist those in inadequate housing" (2012) 15 *Trinity C. L. Rev.* 35—56

Mehta P "Internally displaced persons and the Sardar Sarovar project: A case for rehabilitative reform in rural India" (2005) 20 *Amer. Univ. Int'l L. Rev.* 613—647

Meisel F & Cook PJ (eds) *Property and protection: Legal rights and restrictions* (Oxford & Portland: Hart Publishing, 2000)

Meltz R, Merriam DH & Frank RM *The takings issue: Constitutional limits on land use control and environmental regulation* (Washington & California: Island Press, 1999)

Metlae MC *Analysis of Community Reinvestment Bill and its impact on the low-cost housing in South Africa: The case of Alexandra East Bank and Yeoville, Johannesburg* (2004) Unpublished Msc research report, University of the Witwatersrand

Meyer J *Local government law 1997* (Durban: Butterworths, 1998)

Michelman FI "Good government, core liberties, and constitutional property: An essay for Joe Singer" (2016) 5 *Brigham-Kanner Prop. Rts. Conf. J.* 27—43

Michelman FI & Marais EJ "A constitutional vision for property: *Shoprite Checkers* and beyond" in Muller G, Brits R, Slade BV & Van Wyk J (eds) *Transformative*

© University of Pretoria

property law: Festschrift in honour of AJ van der Walt (Cape Town: Juta, 2018) 121—146

Milton JRL "Ownership" in Zimmermann R & Visser DP (eds) *Southern cross: Civil law and common law in South Africa* (Cape Town: Juta, 1996) 657—699

Milton JRL "Planning and property" (1985) *Acta Juridica* 267—288

Milton JRL "Planning and property" (1985) *Acta Juridica* 267—288

Mmusinyane BO *Comparative implementation strategies for the progressive realization of the right to adequate housing in South Africa, Canada and India* (Unpublished LLD thesis, University of South Africa, 2015)

Mogoeng M "Twenty years of the South African Constitution: Origins, aspirations and delivery" (2015) 27 *SAcLJ* 1–16

Mok L *et al* (eds) *International handbook on pensions law and similar employee benefits* (London: Graham & Trotman Ltd., 1989)

Möller K "Proportionality: Challenging the critics" (2012) 10 *Int'l. J. Const. L.* 709—731

Mostert H "The distinction between expropriations and deprivations and the future of the 'doctrine' of constructive expropriation in South Africa" (2003) 19 *SAJHR* 567—592

Mostert H "Engaged citizenship and the enabling state as factors determining the interference parameter of property: A comparison of German and South African law" (2010) 127 *SALJ* 238—273

Mostert H *Mineral law: Principles & policies in perspective* (Cape Town: Juta, 2012)

Mountfield H "Regulatory expropriations in Europe: The approach of the European Court of Human Rights" (2002) 11 *N. Y. U. Envt'l. L. J.* 136—147

Mubangizi JC "Protecting human rights amidst poverty and inequality: The South African post-apartheid experience on the right of access to housing" (2008) 2 *Afr. J. Legal Stud.* 130—146

Muller G & Liebenberg S "Developing the law of joinder in the context of evictions of people from their homes" (2013) 29 *SAJHR* 554—570

© University of Pretoria

Muller G "Conceptualizing meaningful engagement as a deliberative democratic partnership" (2011) 22 *Stell. L. Rev.* 742—758

Muller G "Evicting unlawful occupiers for health and safety reasons in post-apartheid South Africa" (2015) 132 *SALJ* 616—638

Muller G "The legal-historical context of urban forced evictions in South Africa" (2013) 19 *Fundamina* 367—396

Muller G *The Impact of Section 26 of the Constitution on the eviction of squatters in South African law* (Unpublished LLD dissertation, Stellenbosch University, 2011)

Mulvaney TM "Non-enforcement takings" (2018) 59 *Bost. Coll. L. Rev.* 145—215

Munzer SR *A Theory of Property* (Cambridge: Cambridge University Press, 1990)

Murcott M "A future for the doctrine of substantive legitimate expectation? The implications of *Kwazulu-Natal Joint Liaison Committee v MEC for Education, Kwazulu-Natal*" (2015) 18 *P.E.L.J.* 3133—3159

Mureinik E "A bridge to where? Introducing the interim bill of rights" (1994) 10 *SAJHR* 31—48

Mureinik E "Beyond a charter of luxuries: Economic rights in the constitution" (1992) 8 *SAJHR* 464—474

Murombo T "From crude environmentalism to sustainable development: *Fuel Retailers*" (2008) 125 *SALJ* 488—504

Murthy SL "A new constitutive commitment to water" (2016) *Bost. Coll. J. L. & Soc.* 159—233

Needham B *Planning, law and economics* (London & New York: Routledge, 2006)

Nelson JS "Residential zoning regulations and the perpetuation of apartheid" (1995) 43 *U.C.L.A. L. Rev.* 1689—1730

Newton M & May L *Proportionality in international law* (Oxford: Oxford University Press, 2014)

Nozick R *Anarchy, state, utopia* (New York: Basic Books, 1974)

© University of Pretoria

O'Regan C "No more forced removals? An historical analysis of the Prevention of Illegal Squatting Act" (1989) 5 *SAJHR* 361—394

Ogus AI *Regulation: Legal form and economic theory* (Oxford: Clarendon Press, 1994)

Olatunde CAJ "Equality law pluralism" (2017) 117 *Colum. L. Rev.* 1973—2004

Olmsted N "Indigenous rights in Botswana: Development, democracy and dispossession" (2004) 3 *Wash. U. Global Stud. L. Rev.* 799—866

Omenya A *Integration in housing the urban poor: Lessons from UNHCS- Habitat best practices* (Unpublished MA research report, University of the Witwatersrand, 2003)

Ong A "Building on shifting sand: The contested terrain of urban heritage legislation in India, Hong Kong and Singapore" (2016) 34 *Sing. L. Rev.* 219—246

Padilla LM "Reflections on inclusionary housing and a renewed look at its viability" (1995) 23 *Hofstra L. Rev.* 539—626

Parnell S "South African cities: Perspectives from the ivory tower of urban studies" (1997) 34 *Urban Studies* 891—906

Patterson A & Mkhulisi M "Traversing South Africa's land reform and conservation objectives: Lessons from the *Dwesa-Cwebe* nature reserve" (2014) 131 *SALJ* 365—407

Pavlich DJ "Zoning law and administration in the United States of America and the Republic of South Africa" (1978) 95 *SALJ* 102—116

Pavone P "Smart sprawl: Green aspirations and the low-down on high density suburbia" (2015) 40 *Colum. J. Envt'l. L.* 145—182

Pearl D & Gray K *Social welfare law* (London: Croom & Helm Ltd, 1981)

Peñalver EM "Property metaphors and *Kelo v New London*: Two views of the castle" (2006) 74 *Fordham L. Rev.* 2971—2976

Philippopoulos-Mihalopoulos A "Spatial justice: Law and the geography of withdrawal" (2010) *Int'l. J.L. in Context* 201—216

© University of Pretoria

Pienaar J & Brickhill J "Land" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa* 2ed (Revision Service 5, January 2013) 48-1—48-68

Pienaar JM "Land reform and housing: Reaching for the rafters or struggling with foundations?" (2015) 30 *SAPL* 1—25

Pieterse M "Development, the right to the city and the legal and constitutional responsibilities of local government in South Africa" (2014) 131 *SALJ* 149—177

Pigou AC *The Economics of welfare* 4 ed (London: Macmillan, 1932)

Pilkington ML "Damages as a remedy for infringement of the Canadian Charter of Rights and Freedoms" (1984) 62 *Can. Bar Rev.* 517—576

Pindell N "Finding a right to the city: Exploring property and community in Brazil and in the United States" (2006) 39 *Vanderb. J. Transnat'l. L.* 435—480

Pindell N "The right to the city" (2008) 24 *Harv. Black L. J.* 69—72

Pipes R *Property and freedom* (New York: Alfred A. Knopf, 1999)

Pithouse R "Producing the poor: The World Bank's new discourse of domination" (2003) 7 *African Sociological Review* 118—148

Ploeger HD & Groetelaers DA "The importance of the fundamental right to property for the practice of planning: An introduction to the case law of the European Court of Human Rights on Article 1, Protocol 1" (2007) 15 *Eur. Planning Stud.*1423—1438

Powell JA "Opportunity-based housing" (2003) *J. Affordable Hous. & Cmty Dev. L.* 188—228

Prakash S "Racial dimensions of property value protection under the Fair Housing Act" (2013) 101 *Calif. L. Rev.* 1437—1497

Presidency *Twenty-year review: South Africa (1994—2014)* (Pretoria: The Presidency, 2014)

Price A & Bishop M *A Transformative justice: Essays in honour of Pius Langa* (Cape Town: Juta & Co. Ltd., 2015)

© University of Pretoria

Przetacznik F "The right of living as basic human right" (1994) 6 *Sri Lanka J. Int'l. L.* 203—242

Purcell M "Possible worlds: Henri Lefebvre and the right to the city" (2014) 36 *Journal of Urban Affairs* 141—154

Purdy LM *In their best interest: The case against equal rights for children* (London: Cornell University Press, 1992)

Quataert JH *Advocating dignity: Human rights mobilizations in global politics* (Philadelphia: University of Pennsylvania Press, 2009)

Quinn G "The European Union and the Council of Europe on the issue of human rights: Twins separated at birth?" (2001) 46 *McGill L.J.* 849—874

Radford RS "Regulatory takings law in the 1990's: The death of rent control?" (1992) 21 *S. W. Univ. L. Rev.* 1019—1077

Radford RS "Why rent control is a regulatory taking" (2011) 6 *Ford. Envt'l. L. Rev.* 755—773

Radin MJ "Property and personhood" (1982) 34 *Stan. L. Rev.* 957—1015

Rao N "On the use and abuse of dignity in constitutional law" (2008) 14 *Colum. J. Eur. L.* 201—256

Ray B "Evictions, aspirations and avoidance" (2014) 6 *Const. Ct. Rev.* 173—232

Recent Cases "Takings Clause: Affordable housing- California Supreme Court upholds residential inclusionary zoning ordinance- *California Building Industry Ass'n v City of San Jose*, 351 P.3d 974 (Cal. 2015)" (2016) 129 *Harvard L. Rev.* 1460—1467

Reich CA "The new property" (1964) 73 *Yale L. J.* 733—787

Render MM "Complexity in property" (2013) 81 *Tenn. L. Rev.* 79—144

Rieth M "Segregation under the guise of the Fair Housing Act: Affirmatively furthering segregative (and expensive) housing developments" (2015) 33 *Law & Inequality* 285—318

© University of Pretoria

Rivers J "Proportionality and variable intensity of review" (2006) 65 *Cambridge L. J.* 174—207

Roberts R *Planning for affordable housing through inclusionary housing against the apartheid spatial landscape in the Western Cape Province, South Africa* (Unpublished PhD thesis, University of the Free State, 2017)

Rolnik R "Place, inhabitance and citizenship: The right to housing and the right to the city in the contemporary urban world" (2014) 14 *Int'l. J. Hou. Pol'y* 293—300

Rosa S "Transformative constitutionalism in a democratic developmental state" (2011) 22 *Stell. L. Rev.* 542—565

Rose JW "Forced tenancies as takings of property in *Seawall Associates v City of New York*: Expanding on *Loretto* and *Nollan*" (1990) 40 *DePaul L. Rev.* 245—280

Rosenberg RH "The changing culture of American land use regulation: Paying for growth with impact fees" (2006) 59 *S.M.U. L. Rev.* 177—263

Ross T "The rhetoric of poverty: Their immorality, our helplessness" (1991) 71 *Geo. L. J.* 1499—1548

Rosser E "Destabilizing property" (2015) 48 *Conn. L. Rev.* 397—472

Roux T *The politico-legal dynamics of judicial review: A comparative analysis* (Cambridge: Cambridge University Press, 2018)

Royston L "Security of urban tenure in South Africa: Overview of policy and practice" in Durand-Lasserve A & Royston A (eds) *Holding their ground, secure land tenure for the urban poor in developing countries* (London: Earthscan Publications, 2002) 165—181

Rugege S "Land reform in South Africa: An overview" (2004) 32 *Int'l. J. Legal Info.* 283—312

Ruskola T "People, Inc.: Law, economic enterprise, and the development of inequality in China" (2019) 67 *Ame. J. Comp. L.* 383—434

Sagaert V & Swinnen K "Squatting in the low countries: On the conflict between ownership and housing" in Muller G, Brits R, Slade BV & Van Wyk J (eds)

© University of Pretoria

Transformative property law: Festschrift in honour of AJ van der Walt (Cape Town: Juta, 2018) 219—242

Samanta N & Basu S "Test of Basic Structure: An analysis" (2008) 3 *N.U.J.S. L. Rev.* 499—516

Sathe SP *Judicial activism in India* (Oxford: Oxford University Press, 2002)

Saul Z *Developing a community engagement model as a normative framework for meaningful engagement during evictions* (Unpublished LLD thesis, University of the Western Cape: 2016)

Sax JL "Takings and police power" (1964) 74 *Yale L.J.* 36—77

Scheepers T *A practical guide to law and development: An introduction to the law applicable to development and the development management process in South Africa* (Kenwyn: Juta & Co. Ltd, 2000)

Schelble MA "A comparative analysis of the privatization of public housing in Britain and the United States" (1990) 9 *Wisc. Int'l. L. J.* 463—490

Schneider D "The constitutional right to housing in South Africa: *The Government of the Republic of South Africa v Irene Grootboom*" (2004) 2 *Int'l. J. Civ. Soc.* 45—62

Schukoske JE "Housing linkage: Regulating development impact on housing costs" (1991) 76 *Iowa L. Rev.* 1011—1065

Schyff VG *Limitation of rights: A study of the European Convention and the South African Bill of Rights* (Nijmegen: Wolf Legal Publishers, 2005)

Sebba R & Churchman A "The uniqueness of home" (1986) 3 *Architecture & Behaviour* 7—24

Sedigh H "What level of host state interference amounts to a taking under contemporary international law?" (2001) 2 *J. World Investment* 631—684

Shapiro S "Law, morality, and the guidance of conduct" (2000) 6 *Legal Theory* 127—170

Siedel G "Landmarks preservation after *Penn Central*" (1982) 17 *Real Prop. Prob. & Tr. J.* 340—356

© University of Pretoria

Siegan BH "Land use regulations should preserve only vital and pressing governmental interests" (1990) 10 *Cato Journal* 127—158

Singer JW & Beermann JM "The social origins of property" (1993) 6 *Can. J. L. & Juris.* 217—248

Singer JW "Property as the law of democracy" (2014) 63 *Duke L. J.* 1287—1336

Singer JW *Entitlement: The paradoxes of property* (2000) 142—144

Singh B *The Supreme Court of India as an instrument of social justice* (New Delhi: Sterling Publishers Pvt. Ltd., 1976)

Singhvi A "India's constitution and individual rights: Diverse perspectives (2009) 41 *Geo. Wash. Int'l. L. Rev.* 327—360

Slade BV "Compensation for what? An analysis of the outcome in *Arun Property Development (Pty) Ltd v Cape Town City*" (2016) 19 *PELJ* 1—25

Slarks HK "Where human rights and development politics meet: Housing rights in South Africa" (2010) 3 *U. C. L. Hum. Rts. Rev.* 164—198

Smith EB "South Africa's land reform policy and international human rights" (2000) 19 *Wisc. Int'l. L. J.* 267—288

Soja E *Seeking spatial justice* (2010)

Somerville P "Explanations of social exclusion: Where does housing fit in?" (1998) 13 *Housing Studies* 761—780

Sripati V "Toward fifty years of constitutionalism and fundamental rights in India: Looking back to see ahead (1950—2000)" (1998) 14 *Amer. Univ. Int'l. L. Rev.* 413—495

Stern S "Property's tipping point" (2018) 39 *Cardozo L. Rev.* 1693—1739

Steytler N & Fessha YT "Defining local government powers and functions" (2007) 124 *SALJ* 320—338

Straub HA "Diminishing property rights" (1967) 69 *W. Virg. L. Rev.* 170—185

Strauss M & Liebenberg S "Contested spaces: Housing rights and evictions law in post-apartheid South Africa" (2014) 13 *Planning Theory* 428—448

© University of Pretoria

Strauss M *A right to the city for South Africa's urban poor* (Unpublished LLD thesis, Stellenbosch University, 2017)

Strydom J & Viljoen S "Unlawful occupation of inner-city buildings: A constitutional analysis of the rights and obligations involved" (2014) 17 *P.E.L.J.* 1206—1261

Sullivan EJ & Ropp MD "An economic analysis of the competing viewpoints in Oregon land-use regulation" (2012) *US-China L. Rev.* 228—245

Super DA "A new new property" (2013) 113 *Colum. L. Rev.* 1773—1896

Swidler GM "Making the Community Reinvestment Act work" (1994) 69 *N.Y.U. L. Rev.* 387—420

Terminski B "The right to adequate housing in international human rights law: Polish transformation experiences" (2011) 22 *Revista Latinoamerica de Derechos Humanos* 219—241

Terreblanche S *A History of Inequality in South Africa 1652-2002* (Durban: University of Natal Press, 2002)

Tissington KA *A Resource Guide on Housing Policy and Implementation in South Africa 1994-2010* (2011)

Treanor WM "The original understanding of the Takings Clause and the political process" (1995) 95 *Colum. L. Rev.* 782—887

Tsabora J "Reflections on the constitutional regulation of property and land rights under the 2013 Zimbabwean Constitution" (2016) 60 *J. Afr. L.* 213—229

Turok I "Urban planning in the transition from apartheid: Part 1: The legacy of social control" (1994) 65 *The Town Planning Review* 243—259

Tushnet M & Khosla M (eds) *Unstable constitutionalism* (New York: Cambridge University Press, 2015)

Underkuffler LS "On property: An essay" (1990) 100 *Yale L.J.* 127—148

Upham FK "The paradoxical roles of property rights in growth and development" (2015) 8 *Law & Dev. Rev.* 253—269

© University of Pretoria

Van Bueren G "Alleviating poverty through the Constitutional Court" (1999) 15 *SAJHR* 52—74

Van der Berg S "Meaningful engagement: Proceduralising socio-economic rights further or infusing administrative law with substance?" (2013) 29 *SAJHR* 376—398

Van der Linde M & Basson E "Environment" in Woolman S, Bishop M & Brickhill J (eds) *Constitutional Law of South Africa* 2ed (Revision Service 5, January 2013) 50-1—50-68

Van der Merwe CG "The South African Sectional Titles Act compared with the Singapore Land Titles (Strata) Act" (1999) 3 *Sing. J. Int'l. & Comp. L.* 134—185

Van der Sijde E *Reconsidering the relationship between property and regulation* (Unpublished LLD thesis, Stellenbosch University, 2015)

Van der Walt AJ & Shay RM "Constitutional analysis of intellectual property" (2014) 17 *PELJ* 52—85 53

Van der Walt AJ & Slade BV "Public purpose and changing circumstances: *Harvey v Umhlatuze Municipality & Others* 2011 (1) SA 601 (KZP)" (2012) 129 *SALJ* 219—235

Van der Walt AJ & Viljoen S "The constitutional mandate for social welfare: Systemic differences and links between property, land rights and housing rights" (2015) 18 *P.E.L.J*. 1035—1090

Van der Walt AJ "Constitutional property law" (2009) *ASSAL* 218—258

Van der Walt AJ "Constitutional property law" (2012) 1 *J.Q.R.* 2.1

Van der Walt AJ "Dancing with codes: Protecting, developing, limiting and deconstructing property rights in the constitutional state" (2001)128 *SALJ* 258—311

Van der Walt AJ "Developing the law on unlawful squatting and spoliation" (2008) 125 *SALJ* 24—36

© University of Pretoria

Van der Walt AJ "Exclusivity of ownership, security of tenure, and eviction orders: A model to evaluate South African land-reform legislation" (2002) 2 *J. S. Afr. L.* 254—289

Van der Walt AJ "Modernity, normality, and meaning: The struggle between progress and stability and the politics of interpretation (Part 1)" (2000) 11 *Stell. L. Rev.* 21—49

Van der Walt AJ "Modernity, normality, and meaning: The struggle between progress and stability and the politics of interpretation (Part 2)" (2000) 11 *Stell. L. Rev.* 226—243

Van der Walt AJ "Procedurally arbitrary deprivation of property" (2012) 23 *Stell. L. Rev.* 88—94

Van der Walt AJ "Reconciling the state's duties to promote land reform and to pay 'just and equitable' compensation for expropriation" (2006) 123 *SALJ* 23—40

Van der Walt AJ "Replacing property rules with liability rules: Encroachment by building" (2008) 125 *SALJ* 592—628

Van der Walt AJ "Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng*" (2005) 122 *SALJ* 75—89

Van der Walt AJ "Roman-Dutch land and environmental land-use control" (1992) 7 *SAPL* 1—11

Van der Walt AJ "Sharing servitudes" (2015) 4 *EPLJ* 162—222

Van der Walt AJ "The fragmentation of land rights" (1992) 8 *SAJHR* 431—450

Van der Walt AJ "The modest systemic status of property" (2014) 1 *Journal of Law, Property, and Society* 15—106

Van der Walt AJ "The South African law of ownership: A historical and philosophical perspective" (1992) 25 *De Jure* 446—457

© University of Pretoria

Van der Walt AJ "The state's duty to protect property owners v The state's duty to provide housing: Thoughts on the *Modderklip* case" (2005) 21 *SAJHR* 144—161

Van der Walt AJ "Tradition on trial: A critical analysis of the civil-law tradition in South African property law" (1995) 11 *SAJHR* 169—206

Van der Walt AJ "Un-doing things with words: The colonization of the public sphere by private-property discourse" (1998) *Acta Juridica* 235–281

Van der Walt AJ *Constitutional property law* (Wetton: Juta & Co Ltd, 2005)

Van der Walt AJ *Constitutional property clauses: A comparative analysis* (Cape Town: Juta, 1999)

Van der Walt AJ *Constitutional property law* 3 ed (Claremont: Juta & Co, 2011)

Van der Walt AJ *Property in the margins* (Oxford & Portland: Hart Publishing, 2009)

Van Marle K "Re-visioning space, justice and belonging in the capital city of Pretoria/ Tshwane" (2014) 47 *De Jure*163—174

Van Niekerk B "Housing as urbanism: A policy to discourage urban sprawl and provide well-located and affordable housing in South Africa" (2018) 3 *Town & Regional Planning* 68—82

Van Wagner E *The place of private property in land use law: A relational examination on Ontario's quarry conflicts* (Unpublished PhD dissertation, York University, 2017)

Van Wyk J *Planning law* 2 ed (Cape Town: Juta, 2012)

Van Wyk J "Can legislative intervention achieve spatial justice" (2015) 48 *CILSA* 381—400

Van Wyk J "Can SPLUMA play a role in transforming spatial injustice to spatial justice in housing in South Africa?" (2015) 30 *SAPL* 26—41

Van Wyk J "Planning and Arun's (not so straight and narrow) roads" (2016) 19 *PELJ* 1—29

© University of Pretoria

Van Wyk J "The complexities of providing emergency housing assistance in South Africa" (2007) *J. S. Afr. L.* 35—55

Van Wyk J "The role of local government in evictions" (2011) 14 *PELJ* 50-83 72

Verma SK & Kusum (eds) *Fifty years of the Supreme Court of India: Its grasp and reach* (New Delhi: Oxford University Press, 2000)

Viljoen F & Orago N "An argument for South Africa's accession to the Optional Protocol to the International Covenant on Economic Social and Cultural Rights in the light of its importance and implications" (2014) 17 *PELJ* 2555—2599

Viljoen S "The constitutional protection of tenants' interests: A comparative analysis" (2014) 47 *CILSA* 460—493

Visser J & Steytler N "Confronting the state of local government: The 2013 Constitutional Court decisions" (2013) 6 *Constitutional Court Rev.* 1—23

Walicki A *Legal philosophies of Russian liberalism* (Oxford: Clarendon Press, 1987)

Walker C "Elusive equality: Women, property rights and land reform in South Africa" (2009) 25 *SAJHR* 467—490

Wallis M "The common law's cool ideas for dealing with Ms. Hubbard" (2015) 132 *SALJ* 940—970

Ware BL "Invisible walls: An examination of the legal strategy of the restrictive covenant cases" (1989) 67 *Wash. Univ. L. Rev.* 737—772

Webb K "Thumbs, fingers, and pushing on string: Legal accountability in the use of federal financial incentives" (1993) 31 *Alberta L. Rev.* 501—535

Webber GCN "Proportionality, balancing, and the cult of constitutional rights scholarship" (2010) 23 *Can. J. L. & Jurisp.* 179—202

Weishert JE "Transcending equality versus adequacy" (2014) 66 *Stan. L. Rev.* 477 — 544.

Wertman CA "There's no place like home: Access to housing for all South Africans" (2014) 40 *Brook. J. Int'l. L.* 719—747

© University of Pretoria

White RCA & Ovey C *Jacobs, White & Ovey: The European Convention on Human Rights* 5 ed (2010)

White SM "Using fees and taxes to promote affordable housing" (1991) 43 *Land Use L. & Zon. Dig.* 3—9

Williams LA "The right to housing in South Africa: An evolving jurisprudence" (2014) 45 *Colum. Hum. Rts. L. Rev.* 816—845

Wilson S "Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126 *SALJ* 270—290

Wilson S "Planning for inclusion in South Africa: The state's duty to prevent homelessness and the potential for 'meaningful engagement'" (2011) 22 *Urban Forum* 265—282

Wizner S "Is social justice still relevant?" (2012) 32 (2) *Boston Coll. J. L. & Soc. Just.* 345—355

Wolf R "Participation in the right of access to adequate housing" (2007) 14 *Tulsa J. Comp. & Int'l. L.* 269—294

Woolman S & Bilchitz D (eds) *Is this seat taken? Conversations at the Bar, the Bench and the Academy about the South African constitution* (2012: Pretoria University Law Press, Pretoria)

Woolman S & Davis D "The last laugh: *Du Plessis v De Kler*k, classical liberalism, creole liberalism and the application of rights under the interim and final constitutions" (1996) 12 *SAJHR* 361—404

Woolman S *et al* (eds) *Constitutional law of South Africa* 2 ed (Original Service, December 2003)

Woolman S *The selfless Constitution: Experimentalism and flourishing as foundations of South Africa's basic law* (2013)

Xu T & Allain J (eds) *Property and human rights in a global context* (Oxford & Portland: Hart Publishing, 2015)

Yap PJ *Courts and democracies in Asia* (Cambridge: Cambridge University Press, 2017)

© University of Pretoria

Young K *Constituting economic and social rights* (Oxford: Oxford University Press, 2012)

Zalkin N "Shifting sands and shifting doctrines: The Supreme Court's changing takings doctrine and South Carolina's coastal zone statute" (1991) 79 *Calif. L. Rev.* 207—266

Zeleza PT & McConnaughay PJ (eds) *Human rights, the rule of law, and development in Africa* (Philadelphia: University of Pennsylvania Press, 2004)

Zemke R "The right to property and bank nationalizations" (2016) *Chic. J. Int'l. L.* 591—620

Zhang T "Moral economies in early modern land markets: History and theory" (2017) 80 *Law & Contemp. Probs*. 107—133

Ziegler EH & Laitos JG "Property rights, housing and the American Constitution: The social benefits of property rights protection, government interventions, and the European Court of Human rights' *Hutten-Czapska* decision)" (2011) 21 *Indiana Int'l & Comp. L. Rev.* 25—46.

Ziegler EH "Urban sprawl, growth management and sustainable development in the United States: Thoughts on the sentimental quest for a new middle landscape" (2003) 11 *Va. J. Soc. Pol'y. & L.* 26—65

Zimmermann J "Property on the line: Is an expropriation-centred land reform constitutionally permissible?" (2005) 122 *SALJ* 378—418

Zoller E "Congruence and proportionality for congressional enforcement powers: Cosmetic change or velvet revolution?" (2003) *Indiana L.J.* 567—586

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Table of cases

Republic of South Africa

Abahlali baseMjondolo Movement SA v Premier of the Province of Kwa-Zulu Natal 2010 (2) BCLR 99 (CC)

Absa Bank Ltd v Amod [1999] 2 All SA 423 (W),

Administrator, Transvaal and Others v Traub and Others 1989 (4) SA 731 (A)

Agri South Africa v Minister of Minerals and Energy 2013 (4) SA 1 (CC)

Akani Garden Route (Pty) Ltd v Pinnacle Point Casino (Pty) Ltd 2001 (4) SA 501 (SCA)

Akbar v Patel 1974 (4) SA 104 (T)

Albutt v Centre for the Study of Violence and Reconciliation and Others 2010 (3) SA 293 (CC)

Apex Mines Ltd v Administrator, Transvaal 1988 (3) SA 1 (A)

AngloGold Operations Ltd v Sandhurst Estates (Pty) Ltd 2007 (2) SA 363 (SCA)

Arun Property Development (Pty) Ltd v City of Cape Town 2015 (2) SA 584 (CC)

August v Electoral Commission 1993 (3) SA 1 (CC)

Baron and Others v Claytile (Pty) Ltd and Another LCC 21R (2014) (Unreported)

Baron and Others v Claytile (Pty) Ltd and Another 2017 (5) SA 329 (CC)

Barrie NO v Ferris 1987 (2) SA 709 (C)

Beckenstrater v Sand River Irrigation Board 1964 (4) SA 510 (T)

Bel Porto School Governing Body v Premier of the Province, Western Cape 2002 (3) SA 265 (CC)

Bengwenyama Minerals (Pty) Ltd and Others v Gemorah Resources (Pty) Ltd and Others 2011 (4) SA 113(CC)

Beukes v Krugersdorp Transitional Local Council 1996 (3) SA 467 (W)

Birch v Klein Karoo Agricultural Co-operative Ltd 1993 (3) SA 387 (A)

© University of Pretoria

Blue Moonlight Properties 39 (Pty) Ltd v Occupiers of Saratoga Avenue and Another 2009 (1) SA 470 (W)

Brink v Kitshoff NO 1996 (4) SA 197 (CC)

Brittania Beach Estate (Pty) Ltd v Saldanha Bay Municipality 2013 (11) BCLR 1217 (CC)

Brummer v Minister for Social Development 2009 (6) SA 323 (CC)

Cape Town Municipality v Abdulla 1976 (2) SA 370 (C)

Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd; Chairman, State Tender Board v Sneller Digital (Pty) Ltd 2012 (2) SA 16 (SCA)

Chamber of Mines of South Africa v Minister of Mineral Resources and Another [2018] 2 ALL SA 391(GP)

Chetty v Naidoo 1974 (3) SA 13 (A)

City of Cape Town and Another v Robertson and Another 2005 (2) SA 323 (CC)

City Council of Pretoria v Walker 1998 (2) SA 363 (CC)

City of Cape Town v Unlawful Occupiers, Erf 1800, Capricorn (Vrygrond Development) 2003 (6) SA 140 (C)

City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Others 2012 (2) SA 104 (CC)

City of Johannesburg v Changing Tides 74 (Pty) Ltd and Others (Socio-Economic Rights institute of South Africa as amicus curiae*)* 2012 (6) SA 294 (SCA)

City of Johannesburg v Rand Properties (Pty) Ltd & Others 2007 (1) SA 78 (W)

City of Tshwane v Marius Blom & GC Germishuizen Incorporated and Another 2014 (1) SA341 (SCA)

City of Tshwane Metropolitan Municipality v Afriforum 2016 (9) BCLR 1133 (CC)

City of Tshwane Metropolitan Municipality v Lombardy Development [2018] 3 ALL SA 605 (SCA)

© University of Pretoria

Commissioner for the South African Revenue Service v Short and Another [2018] 2 ALL SA 100 (WCC)

Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC)

Cooper v Boyes NO and Another 1994 (4) SA 521 (C)

Daniels v Scribante and Others 2017 (4) SA 341 (CC)

Department of Land Affairs & Others v Goedgelegen Tropical Fruits 2007 (6) SA 199 (CC)

Democratic Alliance v Acting national Director of Public Prosecutions 2016 (8) BCLR 1077 (GP)

Democratic Alliance v President of the Republic of South Africa 2016 (8) BCLR 1099 (WCC)

Despatch Municipality v Sunridge Estate and Development Corporation (Pty) Ltd 1997 (4) SA 596 (SE)

*Diepsloot Residents' and Landowners Association and Others v Administrator, Transvaal and Others*1993 (1) SA 577 (T)

Doctors for Life International v Speaker of the National Assembly and Others 2006 (6) SA 416 (CC)

Du Plessis and Others v De Klerk and Another 1996 (3) SA 850 (CC)

Economic Freedom Fighters v Speaker of the National Assembly and Others: Democratic Alliance v Speaker of the National Assembly and Others 2016 (3) SA 580 (CC)

Electoral Commission v Mhlope 2016 (8) BCLR 987 (CC)

Electronic Media Network Ltd v E.TV (Pty) Ltd 2017 (9) BCLR 1108 (CC)

Ellis v Viljoen 2001 (5) BCLR 487 (C)

Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa 1996 1996 (4) SA 744 (CC)

© University of Pretoria

Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council and Others 1999 (1) SA 374 (CC)

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)

Fischer v Persons Listed on Annexure X to the Notice of Motion and those Persons whose Identity are Unknown to the Applicant and who are Unlawfully Occupying or Attempting to Occupy Erf 150 (Remaining Extent) Phillipi, Cape Division, Province of the Western Cape; Stock v Persons Unlawfully Occupying Erven 145, 152, 156, 418, 3107, Phillipi & Portion 0 Farm 597, Cape Rd; Copper Moon Trading 203 (Pty) Ltd v Persons whose Identities are to the Applicant Unknown and who are Unlawfully Occupying Remainder Erf 149, Phillipi, Cape Town 2018 2 SA 228 (WCC)

Fose v Minister of Safety and Security 1997 (3) SA 786 (CC)

Fuel Retailers Association of South Africa v Director General, Environmental Management and Others 2007 (6) SA 4 (CC)

Geyser and Another v Msunduzi Municipality and Others 2003 (5) SA 18 (N)

Government of the Republic of Zimbabwe v Fick 2013 (5) SA 325 (CC)

Government of the Republic of South Africa v Grootboom 2001 (1) SA 46 (CC)

Harksen v Lane NO 1998 (1) SA 300 (CC)

Harvey v Umhlatuze Municipality and Others 2011 (1) SA 601 (KZP)

Hattingh and Others v Juta 2013 (3) SA 275 (CC)

Hayes and Another v Minister of Finance and Development Planning, Western Cape and Others 2003 (4) SA 598 (CC)

Head of Mpumalanga Department of Education v Hoerskool Ermelo 2010 (2) SA 415 (CC)

Hoffman v South African Airways 2001 (1) SA 1 (CC)

© University of Pretoria

Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd and Others [2011] 1 ALL SA 364 (SCA)

Howick District Landowners Association v Umngeni Municipality and Others 2007 (1) SA 206 (SCA)

Imperial Group (Pty) Ltd v Airports Company of South Africa SOC Ltd and Others [2018] 3 ALL SA 751 (GJ)

In re: Certification of the Constitution of the Province of KwaZulu-Natal 1996 1996 (4) SA 1098 (CC)

In re: Certification of the Constitution of the Western Cape 1997 1997 4 SA 795 (CC)

International Trade Administration Commission v SCAW South Africa (Pty) Ltd 2012 (4) SA 618 (CC)

Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit 2001 (1) SA 545 (CC)

Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC)

Judd v Nelson Mandela Bay Municipality Case NO. CA149/2010 (Unreported)

Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development 2004 (6) SA 505 (CC)

Kruger and Another v Minister of Correctional Services and Others 1995 (2) SA 803 (T)

Krugersdorp Town Council v Fortuin 1965 (2) SA 335 (T).

Kwazulu-Natal Agricultural Union v Minister of Co-operative Governance and Traditional Affairs and Others 2011 (4) SA 266 (KZP)

Kwazulu-Natal Joint Liaison Committee v Member of the Executive Council Department of Education Kwazulu-Natal and Others (Centre for Child Law as Amicus Curiae*)* 2013 (4) SA 262 (CC)

© University of Pretoria

Larbi-Odam and Others V Member of the Executive Council for Education (North-West Province) and Another 1998 (1) SA 745 (CC)

Laugh it Off Promotions CC v South African Breweries International (Finance) BV t/a Sabmark International (Freedom of Expression Institute as Amicus Curiae) 2006 (1) SA 144 (CC)

Law Society of South Africa v President of the Republic of South Africa [2018] 2 ALL SA 806 (GP)

Law Society of South Africa and Others v Minister of Transport and Another 2011 (1) SA 400 (CC)

Lester v Ndlambe Municipality and Another 2015 (6) SA 283 (SCA)

Liebenberg NO v Bergrivier Municipality 2013 (8) BCLR 863 (CC)

Lingwood and Another v The Unlawful Occupiers of R/E of Erf 9 Highlands 2008 (3) BCLR 325 (W)

Makama v Administrator, Transvaal 1992 (2) SA 278 (T)

Malan v City of Cape Town 2014 (6) SA 315 (CC)

Mamahule Communal property Association and Others v Minister of Rural Development and Land Reform 2017 (7) BCLR 830 (CC)

Maphango v Aengus Lifestyle Properties (Pty) Ltd 2012 BCLR 449 (CC)

Marcus v Stamper and Zoutendijk 1910 AD 58

MEC, Department of Welfare, Eastern Cape v Kate 2006 (4) SA 478 (SCA)

MEC for Education: Kwa-Zulu Natal and Others v Pillay 2008 (1) SA 474 (CC)

MEC for Local Government and Traditional Affairs, Kwa-Zulu Natal v Botha NO and Others 2015 (2) SA 405 (SCA)

Melani and the Further Residents of Slovo Park Informal Settlement v City of Johannesburg 2016 (5) SA 67 (GJ)

Merafong City Local Municipality v Anglogold Ashanti 2017 (2) BCLR 182 (CC)

© University of Pretoria

Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another 2016 (1) SA 621 (CC)

Minister of Health and others v Treatment Action Campaign and Others 2002 (5) SA 721 (CC)

Minister of Local Government, Environmental Affairs and Development Planning of the Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others 2014 (1) SA 521 (CC)

Minister of Local Government, Environmental Affairs and Development Planning, Western Cape v Habitat Council and Others (City of Johannesburg Metropolitan Municipality as amicus curiae*) and a related matter* 2014 (4) SA 437 (CC)

Minister of Minerals and Energy v Agri South Africa 2012 (5) SA 1 (SCA)

Minister of Mineral Resources and Others v Sishen Iron Ore Co. (Pty) Ltd and Another 2014 (2) SA 603 (CC)

Minister of Police v Mboweni and Another 2014 (6) SA 256 (SCA)

Mistry v Interim National Medical and Dental Council of South Africa 1998 (4) SA 1127 (CC)

Mkontwana v Nelson Mandela Municipality and Another; Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KZN Law Society and Msunduzi Municipality as Amici Curiae) 2005 (1) SA 530 (CC)

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

Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid Afrika 2003 6 BCLR 638 (T)

Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae*)* 2007 (4) SA 222 (CC)

Moroka Swallows Football Club Ltd v The Birds Football Club & Others 1987 (2) SA 511 (W)

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Moseneke v The Master 2001 (2) SA 18 (CC)

National Coalition for Gay and Lesbian Equality and Another v Minister of justice and Others 1999 (1) SA 6 (CC)

National Credit Regulator v Opperman and Others 2013 (2) SA 1 (CC)

National Treasury and Others v Opposition to Urban Tolling Alliance and Others (Road Freight Association as applicant for leave to intervene) 2012 (6) SA 223 (CC)

Ncangayi v Von Broembsen 1920 CPD 538

Ndlovu v Ngcobo; Bekker and Another v Jika 2003 (1) SA 113 (SCA)

Nedcor Bank Ltd v Kindo 2002 (3) SA 185 (C)

Nelson Mandela Metropolitan Municipality v Nobumba NO and Others 2010 (1) SA 579 (ECG)

New National Party of South Africa v Government of the Republic of South Africa 1999 (3) SA 191 (CC)

Nhlabathi v Fick 2003 (7) BCLR 806 (LCC).

Nokotyana and Others v Ekurhuleni Metropolitan Municipality and Others 2010 (4) BCLR 312 (CC)

Nyangane v Stadsraad van Potchefstroom 1998 (2) BCLR 148 (T)

Occupiers of Erf 101, 102, 104 and 112 Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd 2010 (4) BCLR 354 (SCA)

Occupiers of Erven 87 and 88 Berea v De Wet 2017 (8) BCLR 1015 (CC)

Occupiers of 51 Olivia Road, Berea and 197 Main Street, Johannesburg v City of Johannesburg 2008 (3) SA 208 (CC)

Occupiers of Portion R25 of the Farm Mooiplaats 355 JR v Golden Thread Ltd and Others 2012 (2) SA 337 (CC)

Occupiers, Shulana Court, 11 Hendon Road, Yeoville, Johannesburg v Steele 2010 (9) BCLR 911 (SCA)

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Offit Enterprises (Pty) Ltd and Another v Coega Development Corporation (Pty) Ltd and Others 2011 (1) SA 293 (CC)

Ontwikkelingsraad Oos-Transvaal v Radebe 1987 (1) SA 878 (T)

Pieterse NO v Lephalale Local Municipality 2017 (2) BCLR 233 (CC)

Pharmaceutical Manufacturers Association of SA: In Re Ex Parte President of the Republic of South Africa 2000 (2) SA 674 (CC)

Pheko v Ekurhuleni Metropolitan Municipality 2012 (2) SA 598 (CC)

Phumelela Gaming and Leisure Ltd v Grundlingh and Others 2006 (6) SA 350 (CC)

Pitout v Mbolane 2000 2 All SA 377 (LCC)

Port Elizabeth Municipality v People's Dialogue on Land and Shelter 2000 (2) SA 1074 (SE)

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

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC)

President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Others as Amici Curiae) 2005 (5) SA 3 (CC)

Pretoria City Council v Walker 1998 (2) SA 363 (CC)

Prinsloo v Van der Linde 1997 (3) SA 1012 (CC)

Rademan v Moqhaka Municipality 2013 (4) SA 225 (CC)

Rahube v Rahube and Others 2018 (1) SA 638 (GP)

Rail Commuters Action Group v Transnet t/a Metrorail 2005 (2) SA 359 (CC)

Reflect-All 1025 CC and Others v MEC for Public Transport, Roads and Works, Gauteng Provincial Government 2009 (6) SA 391 (CC)

Residents of Bon Vista Mansions v Southern Metropolitan Local Council 2002 (6) BCLR 625 (W)

Residents of Joe Slovo Community, Western Cape v Thubelisha Homes 2010 (3) SA 454 (CC)

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Ross, *Betta Eiendomme v Ekple-Epoh* 2000 (4) SA 468 (W)

Rossmaur Mansions (Pty) Ltd v Briley Court (Pty) Ltd 1945 AD 217

R v Sachs 1953 (1) SA 392 (A)

S v Makwanyane 1995 (6) BCLR 665 (CC)

Sailing Queen Investments v The Occupants La Colleen Court 2008 (6) BCLR 666 (W)

Sarrahwitz v Maritz NO and Another 2015 (4) SA 491 (CC)

Shoprite Checkers (Pty) Limited v Member of the Executive Council for Economic Development, Environmental Affairs and Tourism, Eastern Cape and Others 2015 (6) SA 125 (CC)

Soobramoney v Minister of Health, Kwa-Zulu Natal 1998 (1) SA 765 (CC)

Standard Bank of South Africa v Saunderson 2006(2) SA 264 (SCA)

State Information Technology Agency SOC Ltd v Gijima Holdings (Pty) Ltd 2018 (2) SA 23 (CC)

Steenkamp NO v Provincial Tender Board, Eastern Cape 2007 (3) BCLR 300 (CC)

South African Diamond Producers Organization v Minister of Minerals and Energy NO and Others 2017 (6) SA 331 (CC)

South African Football Association v Stanton Woodrush (Pty) Ltd t/a Stan Smidt & Sons & Another 2003 (3) SA 313 (SCA)

South African Property Owners' Association v Council of the City of Johannesburg 2013 (1) SA 420 (SCA)

South Peninsula Municipality v Malherbe 1999 (2) SA 966 (C)

Steinberg v *South Peninsula Municipality* 2001 (4) SA 1243 (SCA)

Tongoane v National Minister for Agriculture and Land Affairs 2010 (6) SA 214 (CC)

Transvaal Agricultural Union v Minister of Land Affairs 1997 2 SA 621 (CC)

Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality 2007 (6) SA 511 (SCA)

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United Democratic Movement v President of the Republic of South Africa 2000 (11) BCLR 1179 (CC)

Union Government (Minister of Railways and Harbours) v Marais and Others 1920 AD 240

Valley Packers Cooperative Ltd v Dietloff 2001 2 All SA 30 (LCC)

Van Schalkwyk v Die Meester 1975 (2) SA 508 (N)

Victoria & Alfred Waterfront (Pty) Ltd and Another v Police Commissioner of the Western Cape and Others (Legal resources Centre as Amicus Curiae*)* 2004 (4) SA 448 (C)

Vulcan Rubber Works v SAR&H 1958 (3) SA 285 (A)

Walele v City of Cape Town and Others 2008 (6) SA 129 (CC)

Western Cape Provincial Government: In re DVB Behuising (Pty) Ltd v North West Provincial Government 2001 (1) SA 500 (CC)

Westminster Produce (Pty) Ltd t/a Elgin Orchards v Simons 2000 3 All SA 279 (LCC)

Xstrata (Pty) Ltd and Others v SFF Association 2012 (5) SA 60 (SCA)

European Court of Human Rights

Air Canada v United Kingdom (1995) 20 EHRR 150

Alatulkkila v Finland (2006) 43 EHRR 34

Anheuser-Busch Inc. v Portugal (2007) 45 EHRR 830

Beyeler v Italy (2001) 33 EHRR 52

Bramelid v Sweden (1983) 5 EHRR 249

Broniowski v Poland (2004) 40 EHRR 21

Buckley v United Kingdom (1997) 23 EHRR 101

Chassagnou v France (2000) 29 EHRR 615

Depalle v France (2012) 54 EHRR 17

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Gratzinger and Gratzingerova v Czech Republic (2002) 35 EHRR 202

Handyside v United Kingdom (1976) 1 EHRR 737

Hatton and Others v United Kingdom (2002) 34 EHRR 1

Hutten-Czapska v Poland

Iatridis v Greece (2000) 30 EHRR 97

Immobiliare Saffi v Italy (1999) 30 EHRR 756

Jahn and Others v Germany (2006) 42 EHRR 49

James and Others v United Kingdom (1986) 8 EHRR 123

Kopecký v Slovakia (2005) 41 EHRR 43

Lithgow v United Kingdom (1986) 8 EHRR 324

Marckx v Belgium (1979) 2 EHRR 330

Mellacher v Austria (1989) 12 EHRR 391

National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v United Kingdom (1998) 25 EHRR 127

Oneryildiz v Turkey (2005) 41 EHRR 20

Papamichalopoulos and Others v Greece (1993) 16 EHRR 440

Pine Valley Developments Ltd and Others v Ireland (1992) 14 EHRR 319

Powell and Rayner v United Kingdom (1989) 9 EHRR 375

Pressos Compania Naviera & Others v Belgium 21 EHHR 301

Prince Hans-Adam II of Lichtenstein v Germany [2001] ECHR 467

Schalk & Kopf v Austria (2011) 53 EHRR 20

Sierpinski v Poland (2002) 35 EHRR 198

Silickiene v Lithuania (2016) 63 EHRR 16

Soering v United Kingdom (1989) 11 EHRR 439

Spadea & Scalabrino v Italy (1996) 21 EHRR 482

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Slivenko v Latvia (2004) 39 EHRR 24

Smith Kline and French Laboratories v Netherlands (1990) 66 DR 70

Sporrong & Lönnroth v Sweden (1982) 5 EHRR 85

Stec v United Kingdom (2005) 41 EHRR 18

Stran Greek Refineries and Stratis Andreadis v Greece (1995) 19 EHRR 293

The Former King of Greece and Others v Greece (2001) 33 EHRR 21

Tre Traktorer Aktiebolag v Sweden (1991) 13 EHRR 309

Valkov v Bulgaria (2016) 62 EHRR 24

Van der Mussele v Belgium (1984) 6 EHRR 163

Van Marle and Others v Netherlands (1986) 8 EHRR 483

Vistiņš and Perepjolkins v Latvia (2014) 58 EHRR 4

X v Federal Republic of Germany (1979) 18 DR 170

India

Ashokar Kumar Thakur v Union of India (2008) 6 S.C.C. 1

Boddhisatwa Gautam v Subhra Chakraborty 1996 AIR 922

Bombay v RS Nanji

Chameli Singh v State of Uttar Pradesh (1996) 2 S.C.C. 549.

Express Newspaper v Union of India AIR (1958) S.C. 578

Golaknath v State of Punjab AIR (1967) S.C. 1643

Hamabal Framjee v Secretary of State for India

Hanif Quareshi v State of Bihar (1959) S.C.R. 629

Indra Sawhney and others v Union of India and others 1992 Supp. (3) SCC 217

In re Kerala Education Bill AIR (1957) S.C. 956

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In re Sant Ram 1960 SC 932

Olga Tellis v Bombay Municipal Corporation and Others 1986 A.I.R. 180 (SC)

Kameshwar Singh v The Province of Bihar AIR (37) 1950 Pat 392 (SB)

Kameshwar Singh and Others v The State of Bihar AIR (38) 1951 Pat 91 (FB)

Keshavananda Bharati v State of Kerala (1973) 4 SCC 225

Kiran Bedi v Committee of Inquiry 1989 A.I.R. 714

Kochuni v The States of Madras and Kerala and Others AIR (47) 1965 SC 1017

KT Plantation Pvt. Ltd. V State of Karnataka [2011] 13 (ADDL) SCR 636

Maharahadhiraja Sir Kameshwar Singh Darganga v State of Bihar (1951) A.I.R. 91

Maneka Gandhi v India 1978 SCR (2) 621

Minerva Mills v Union of India 1981 SCR (1) 206

Motor General Traders and Another v State of Andhra Pradesh and Others 1984 1 SCR 594

Narmada Bachao Andolan v Union of India and Others AIR 2000 SC 3751

Rattan Arya and Others v State of Tamil Naidu and Another 1986 3 SCC 385

Saghir Ahmad v The State of Uttar Pradesh and Others (1954) 1 SCR 707

Shamsher Singh v State of Punjab A.I.R. 1974 S.C. 2192

Shantistar Builders v Nariyan Khimalal Totame 1990 AIR 630 (SC)

State of Bihar v Bishnu Chandlal Choudhary and Others (1985) AIR 285

State of Madras v Srimathi Champakam Dorairajan (1951) S.C.R. 525

State of West Bengal v Subodh Gopal Bose 1954 (5) SCR 587

U.P. Vikas Parishad v Friends Co-operative Housing Society Ltd 1996 AIR 114 (SC)

Vajralevu Mudaliar v The Special Deputy Collector for Land Acquisition, West Madras and Another AIR (52) 1965 SC 1017

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United States

Andrus v Allard 444 U.S. *51* (1979)

Arkansas Game & Fish Commission v United States, 568 U.S. 23 (2012)

Armstrong v United States 364 U.S. 40 (1960)

Berman v Parker 348 U.S. 26 (1954)

Birkenfeld v City of Berkeley, 550 P.2d 1001 (1976)

Block v Hirsh, 256 U.S. 135 (1921)

Buchanan v Warley 245 U.S. 60 (1917)

California Building Industry Association v City of San Jose 351 P.3d 974 (Cal. 2015)

Cane Tennessee Inc v United States 62 Fed. Cl. 703 (2004)

Chastleton Corporation v Sinclair 264 U.S. 543 (1924)

Commercial Builders of N. California v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991)

Demorest v City Bank Co. 321 U.S. 36 (1944)

Dolan v City of Tigard 512 U.S. 374 (1994)

Eastern Enterprises v Apfel, 524 U.S. 498 (1998)

Eisenman v Eastman, 421 F.2d 560 (2d Cir. 1969)

Erie Railroad Co. v Tompkins, 304 U.S. 64 (1938)

Federal Communications Commission v Florida Power Corporation, 480 U.S. 245 (1987)

First English Evangelical Lutheran Church of Glendale v. *County of Los Angeles,* 482 U. S. 304 (1987)

Florida Rock Industry v United States 18 F.3d 1560 (Fed. Cir. 1994)

Fresh Pond Shopping Center v Callahan, 464 U.S. 875 (1983)

Garneau v City of Seattle, 897 F. Supp. (W.D. Wash. 1995)

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Guimont v Clarke, 854 P. 2d 1 (Wash 1993)

Hadacheck v Sebastian 239 U.S. 394, 405 (1915)

Hills, Secretary of Housing and Urban Development v Gautreaux et al 425 U.S. 284 (1976)

Hodel v Virginia Surface Mining and Reclamation Association Inc., 452 U.S. 264 (1981)

Home Builders' Association of Northern California v City of Napa 108 Cal. Rptr. 2d 60 (2001)

Howell Plaza, Inc. v State Highway Commission, 226 N.W.2d 185 (1975)

In re Permian Basin Area Rate Cases, 390 U.S. 747 (1968)

Kaiser Aetna v United States, 444 U.S. 164 (1979)

Keystone Bituminous Coal Association v DeBenedictis, 480 U.S. 470 (1987)

Koontz v. St. Johns River Water Management District 133 S. Ct. 2586 (2013)

Lingle v Chevron U.S.A. Inc., 544 U.S. 528 (2005)

Lochner v New York, 198 U.S. 45 (1905)

Loretto v Teleprompter Manhattan CATV Corporation, 458 U.S. 419 (1982)

Loveladies Harbor Inc. v United States 28 F.3d 1171 (Fed. Cir. 1994)

Lucas v Southern California Coastal Council, 505 U.S. 1003 (1992)

MacDonald, Sommer & Frates v Yolo County, 477 U. S. 340 (1986)

Mansoldo v State, 187 N.J. 50, 898 A.2d (2006)

Marcus Brown Holding Co. v. Feldman 256 U.S. 170 (1921)

Matter of Sailors' Snug Harbor v. Platt

Monongahela Navigation Co. v United States, 148 U.S. 312 (1893)

Monterey v. *Del Monte Dunes at Monterey Ltd.,* 526 U. S. 687 (1999)

Murr v Wisconsin 137 S. Ct. 1933, 1943 (2017)

© University of Pretoria

Nollan v California Coastal Commission, 483 U.S. 825 (1987)

Palazzolo v Rhode Island 533 U.S. 606 (2001)

Penn Central Transport Company v New York City, 438 U.S. 104 (1978)

Pennell v City of San Jose, 485 U.S. 1 (1988)

Pennsylvania Coal Co. v Mahon 260 U.S. 393 (1922)

Phillips v Washington Legal Foundation, 524 U.S. 156 (1998)

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980)

Railroad Co. v Tompkins, 304 U.S. 64 (1938)

Regents of the University of California v Bakke, 438 U.S. 26J 98 S Ct 2733 (1978)

Richardson v City & County of Honolulu, 759 F. Supp. 1477 (D. Haw. 1991)

Ruckelshaus v Monsanto Co., 467 U.S. 986 1003 (1984)

San Marcos Mobile Home Park Owners Association v City of San Marcos 238 Cal. Rptr. 290 (Cal. Ct. App. 1987)

Seawall Associates v City of New York 74 N.Y.2d 92 (1989)

Shelley v Kraemer, 334 U.S. 1 (1948)

Southern Burlington County N.A.A.C.P. v Mount Laurel Township 67 456 A.2d 390 (N.J.)

Stop the Beach Renourishment Inc. v Florida Department of Environmental Protection 130 S. Ct. 2592 (2010)

Suitum v Tahoe Regional Planning Agency, 520 U.S. 725 (1997)

Tahoe Sierra Preservation Council v Tahoe Regional Planning Agency 535 U.S. 302, (2002)

Telluride v. Lot Thirty-Four Venture L.L.C., 3 P. 3d 30, 35 (Colo. 2000)

United States v Causby, 328 U.S. 256 (1946)

United States v Chandler-Dunbar Waterpower Co. 229 U.S. 53 (1913)

© University of Pretoria

United States v General Motors Corporation, 323 U.S. 373 (1945)

United States v Willow River Power Co. 324 U.S. 499 (1945)

Village of Belle Terre v Boraas 416 U.S. 1 (1974)

Village of Euclid v Ambler Realty Co, 272 U.S. 365 (1926)

Webb's Fabulous Pharmacies, Inc. v Beckwith, 449 U.S. 155 (1980)

Westpark Avenue Inc. v Township of Ocean 48 N.J. 122 A.2d 1 (1966)

Yancey v United States 915 F.2d (Fed. Cir. 1990)

Yee v City of Escondido, 503 U.S. 519 (1992)

Zealy v City of Waukesha, 548 N.W.2d 528 (Wis. 1996)

Others

La Compagnie Sucriere de Bel Ombre Ltee v The Government of Mauritius [1995] 3 LRC 494 (Privy Council)

Rheinland-Pfälzischen Denkmalshutz-und-Pflegegesetz (*BVerfGE* 100, 226 [1999]) (German Federal Constitutional Court)

R v Oakes [1986] 1 S.C.R. 103 (Can.) (Supreme Court of Canada)

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Constitutions

Constitution of Japan 1946

Constitution of the Italian Republic 1947

Constitution (Basic Law) of the Federal Republic of Germany 1949

Constitution of India 1949

Constitution of the Republic of South Africa Act 108 of 1996

Constitution of the Federal Republic of Nigeria 1999

Constitution of Kenya 2010

Constitution of Mauritius 1968

Constitution of Zimbabwe Amendment (No. 20) Act 2013

Legislation

India

Ajmer and Mewar Rent Control Act of 1947

Andhra Pradesh Building (Lease, Rent and Eviction) Control Act of 1960.

Bihar Land Reforms Act 30 of 1950

Bihar State Management of Estates and Tenures Act 21 of 1949

Bombay Municipal Corporation Act of 1888

Bombay Rents, Hotel and Lodging House Rates (Control) Act of 1947

Constitution (First Amendment) Act 4 of 1951

Constitution (Fourth Amendment) Act of 1955

Constitution (Forty Fourth Amendment) Act of 1978

Bombay Rents, Hotel and Lodging House Rates (Control) Act of 1947

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Industries (Development Regulation) Act of 1951

Land Acquisition Act of 1894

Telegraphs Act of 1885

Railways Act of 1890

Sick Textile Undertakings (Nationalisation) Act of 1974

Tamil Nadu Buildings (Lease and Rent) Control Act of 1960

United Provinces (Temporary) Control of Rent and Eviction Act of 1947

Electricity Act of 1910

Forests Act of 1927

Damodar Valley Corporation Act of 1948

Slum Areas (Improvement and Clearance) Act 1of 956

United Provinces (Temporary) Control of Rent and Eviction Act of 1947

Uttar Pradesh Road Transport Act 2 of 1951

Coal Bearing Areas (Acquisition and Development) Act of 1957

Scheduled Caste and the Scheduled Tribes (Prevention of Atrocities) Act of 1989

Special Economic Zones Act of 2005

South Africa

Animal Diseases Act 35 of 1984

Black Administration Act 38 of 1927

Black Land Act 27 of 1913

Black Laws Amendment Act 54 of 1952

Black Service Contract Act 24 of 1932

Black Service Levy Act 64 of 1952

Black (Urban Areas) Consolidation Act

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Blacks (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952

Forest Act 122 of 1984

Native Administration Act 38 of 1927

Insolvency Act 24 of 1936

Cape ordinance 15 of 1985

Communal Property Associations Act 28 of 1996

Development Facilitation Act 67 of 1995

Electric Communications Act 36 of 2005

Development Trust and Land Act 18 of 1936

Diamonds Act 56 of 1986

Diamonds Amendment Act 29 of 2005

Diamonds Amendment Act 50 of 2005

Disaster Management Act 57 of 2002

Expropriation Act 63 of 1975

Gauteng Transport Infrastructure Act 8 of 2001

Glen Grey Act 25 of 1894

Group Areas Act 36 of 1966

Health Act 63 of 1977

Housing Act 107 of 1997

Housing Consumers Protection Measures Act 95 of 1998

Housing Consumers Protection Measures Amendment Act 17 of 2007

Infrastructure Development Act 23 of 2014

Insolvency Act 24 of 1936

Interim Protection of Informal Land Rights Act 31 of 1996

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KwaZulu-Natal Elimination and Prevention of Re-Emergence of Slums Act 6 of 2007

Kwazulu-Natal Planning and Development Act 6 of 2008

Land Use Planning Ordinance 15 of 1985

Local Government: Municipal Finance Management Act 56 of 2003

Local Government: Municipal Structures Act 117 of 1998

National Heritage Resources Act 25 of 1999

Local Government: Municipal Systems Act 32 of 2000

Maritime Zones Act 15 of 1994

Matrimonial Property Act 88 of 1984

Medicines and Related Substances Control Act 101 of 1965

Municipal Fiscal Powers and Functions Act 12 of 2007

National Building Regulations and Standards Act 103 of 1977

National Environmental Management: Protected Areas Act 57 of 2003

National Environmental Management: Biodiversity Act 10 of 2004

Native Administration Act 38 of 1927.

Natives Land Act 27 of 1913

Natives (Urban Areas) Act 21 of 1923

Natives (Urban Areas) Consolidation Act 25 of 1945

Native Trust and Land Act 18 of 1936

Northern Cape Planning and Development Act 7 of 1998

Prevention of Illegal Squatting Act 52 of 1951

Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998

Promotion of Administrative Justice Act 3 of 2000

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

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Property Practitioners Act 22 of 2019

Regulations for the Administration and Control of Townships in Black Areas, GN R293 *GG* 373, 16 November 1962

Rental Housing Act 50 of 1999

Restitution of Land Rights Act 22 of 1994

Rural Development and Land Reform General Amendment Act 4 of 2011

Slums Act 76 of 1979

Sea Shore Act 21 of 1935

Social Assistance Act 59 of 1992

Social Housing Act 16 of 2008

Spatial Planning and Land Use Management Act 16 of 2013

Orange Free State ordinance 9 of 1969

Promotion of Administrative Justice Act 3 of 2000

Transvaal Ordinance 15 of 1986

Upgrading of Land Tenure Rights Act 112 of 1991

United Kingdom

Town and Country Planning Act 1990

United States

Beachfront Management Act 1988

Housing Act of 1961

Housing and Urban Development Act of 1968

Others

Dwellings and Housing Allowances Act of 1994 (Poland)

Miscellaneous Offences (Public Order and Nuisance) Act Cap 184, 1997 Revised Edn (Singapore)

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Rent Act of 1981 (Austria)

Town and Country Planning Act 1990 (United Kingdom)

Housing Act of 1974 (Poland)

Table of treaties

1966 International Covenant on Economic, Social and Cultural Rights 993 UNTS 171, concluded 16 December 1966 and entered into force 23 March 1976

2006 Convention on the Rights of Persons with Disabilities 999 UNTS 171 (The Convention was adopted 13 December 2006 and entered into force on 3 May 2008.

1969 American Convention on Human Rights 1144 UNTS 144, concluded 22 November 1969 and entered into force 18 July 1978

1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights, OASTS No 69 (The Protocol was adopted on 17 November 1988 and came into force on 16 November 1999)

1981 African Charter on Human and Peoples' Rights 1520 UNTS 217, concluded 27 June 1981 and entered into force 21 October 1986 Protocol to the African Charter on the establishment of the African Court on Human and Peoples' Rights OAU doc. OAU/LEG/EXP/AFCHPR/PROT (III), concluded 10 June 1998 and entered into force 25 January 2004

General Comments

General Comment No 4: *The right to adequate housing*, UN Doc E/1992/23

General Comment No 7: *The right to adequate housing: Forced evictions*, UN Doc E/1998/22

General Comment No 15: *The right to water (arts 11 & 12 of the Covenant)* (29th session, 2002) [UN Doc E/C 12/2002/11]

Declarations, Resolutions, Recommendations, and Principles

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1986 Declaration on the Right to Development G.A. Res. 41/128, at 186, U.N. Doc. A/RES/41/53/Annex (Dec. 4, 1986)

1987 *The Limburg Principles on the Implementation of The International Covenant on Economic, Social and Cultural Rights*, UN Doc E/CN 4/1987/17, Annex, reprinted in 9 *Human Rights Quarterly* (1987) 122—135

1996 Habitat Agenda (Adopted at the 18th plenary meeting, on 14 June 1996 of the UN Conference on Human Settlements)

1996 Istanbul Declaration on Human Settlements (UNA/CONF 165/14 7 August 1996)

Reports

City of Johannesburg (CoJ) *Spatial Development Framework 2040* (2016)

Department of Human Settlements (DHS) *National Housing Code: Part 3- Upgrading of Informal Settlements Programme* (2009)

Department of Cooperative Governance and Traditional Affairs (COGTA) *Back to basics: Serving our communities better* (2014)

Department of Housing (DOH) *White Paper: A new housing policy and strategy for South Africa*, General Notice 1376 of 1994, Government Gazette 16178, 23 December 1994

EU Parliament *The European Social Charter in the context of the implementation of the EU Charter of Fundamental Rights* (2016).

Expert Committee on Compensation and Betterment *Final Report* (Cmnd 6386) (1942)

Law Commission of India *Tenth Report: Law of Acquisition and Requisition of Land 1* (1958)

UK Social Mobility & Child Poverty Commission Report *State of the nation 2015: Social mobility and child poverty in Great Britain* (2015)

OHCHR *Land and human rights: Standards and applications* (2015)

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South African Cities Network (SACN) *SPLUMA as a tool for spatial transformation* (2015)

SAPOA *Inclusionary housing: Towards a new vision in the city of Johannesburg and Cape Town metropolitan municipalities* (2018)

UN *Report of the UN Summit for Social Development* (1995)

UN Habitat *The state of the world's cities 2004/2005: Globalization and urban culture* (2004)

Department of Housing (DOH) *White Paper: A new housing policy and strategy for South Africa*, General Notice 1376 of 1994, Government Gazette 16178, 23 December 1994

UN Housing Rights Project, Habitat and the Office of the High Commissioner for Human Rights *Housing rights legislation: United Nations Housing Rights Programme Report No. 1* (2002)

NPC *National Development Plan: Vision for 2030* (2012)

National Scientific Council for Government Policy *Spatial Development Policy* (Report no.53, 1998)

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