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THE SOCIAL OBLIGATION NORM AS THE FRAMEWORK FOR LAND RESTITUTION IN  
SOUTH AFRICA

UNIVERSITY *of the*  
WESTERN CAPE

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**NKANYISO SIBANDA (3581022)**

A thesis submitted in fulfilment of the requirements for the degree Doctor

Legum (LL.D) in the Faculty of Law, University of the Western Cape


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**Supervisor: DR M SULAIMAN**

## DECLARATION

I, Nkanyiso Sibanda, hereby declare that this thesis is my original work (except where acknowledgements indicate otherwise) and that neither the whole work, nor any part of it has been, is being, or is to be submitted for another degree in this or any other university. I authorise the University to reproduce either the whole or any portion of the contents of this thesis in any manner whatsoever.

Signature:



Date: 14 August 2017

Nkanyiso Sibanda



## ACKNOWLEDGEMENTS

I thank -

God for enabling me to complete this thesis;

My wife and my son: for your patience, understanding and support as I worked on this thesis;

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## DEDICATION

For my late parents, my late sister, my wife and my son.



## ABSTRACT

This research project proposes that the social-obligation norm of ownership should be adopted as the ethic on which land restitution is carried out in South Africa. While there exists a subtle and indirect appreciation of the social-obligation norm in South African constitutional property law, this is veiled by the respect given to the classical liberal conception of ownership which gives more regard to an owner's *ius abutendi* and subsequently, accepts that owners can do as they please with their property as long as they do not break any law. Of course, South Africa no longer adheres to such a classical liberalist approach to ownership. An adherence to classical liberalist views of ownership has arguably, led to the neglect of arable restituted land. To this effect, the Constitution as well as the *Restitution of Land Rights Act 22 of 1994* (RLA) need to clearly and more positively express the social-obligation norm of ownership in order to promote productive and sustainable utilisation of cultivable restituted land. The thesis argues that the current failures of the land restitution programme are linked to the absence of a social-obligation norm in the RLA as well as the negatively framed Property Clause in the South African Constitution. Even the envisaged changes to the land restitution process as outlined in the *2011 Green Paper on Land Reform* as well as in the *Property Valuation Act*, will not solve the current problems of wasteful neglect of land. The thesis therefore suggests that a positive expression and formulation of the social-obligation norm in the RLA as well as in the Property Clause will promote active, sustainable, productive, and optimal utilization of all cultivable land acquired through the country's land restitution process. This will assist with meeting the developmental aspirations for the rural economy as envisaged in chapter six of the National Development Plan 2030. Furthermore, utilising the land productively through the social-obligation norm is an expression of *Ubuntu*, a key constitutional theme in South Africa.

The experiences of Brazil and Germany deserve special analysis. This is because the social-obligation norm occupies a prominent and positive place in the constitutional property law of both these countries. Further, both countries respect private ownership of property as long as the property is utilised in a manner that permits others to flourish and improve the quality of their life.

The thesis further argues that a social-obligation norm approach to the concept of ownership is not new to South African Constitutional property law. It is already applied in the context of mineral and petroleum law, to ensure optimal exploitation of South Africa's rich mineral and petroleum resources. In the context of mineral law, the social-obligation norm entails that the

holder of a right to exploit minerals or petroleum must actively exercise such a right, or run the risk that such right is allocated to another player who is capable and willing to exploit the resources actively. In mineral law, compelling owners to use their land actively is regarded as justified as it discourages the formation of monopolies and promotes the optimal exploitation of resources upon which a large part of the South African economy depends.

If the social-obligation norm is applied to the broader setting of land, which is also a limited resource, it would mean that all beneficiaries of land under the government's land restitution programme would run the risk of losing their land if they are not using it actively, sustainably and productively. This will in turn curb wasteful neglect of productive land, contribute to job creation, improve food security while contributing to the rural economy in general.

### **KEY WORDS**

1. Economic growth
2. Food security
3. *Ius abutendi*
4. Land restitution
5. Poverty alleviation
6. Social-obligation norm



## ABBREVIATIONS

ANC – African National Congress.

CJ – Chief Justice.

CLARA – Communal Land Rights Act 11 of 2004.

CRLR – Commission on the Restitution of Land Rights.

DLA – Department of Land Affairs.

FNB – First National Bank.

GDP – Gross Domestic Product.

ICESCR – International Covenant on Economic, Social and Cultural Rights.

LCC – Land Claims Court.

LMB – Land Management Board.

LMC – Land Management Commission.

LRAD – Land and Redistribution for Agricultural Development Programme.

LRC – Legal Resources Centre.

LRMB – Land Rights Management Board.

LRMC – Land Rights Management Committees.

LHR – Lawyers for Human Rights.

LVG – Land Valuer General.

MEC - Member of the Executive Council.

MPRDA – Mineral and Petroleum Resources Development Act 28 of 2002.

NAD – Native Affairs Department.

NDP – National Development Plan 2030.



NGO – Non-Governmental Organisation.

PLAAS – Institute for Poverty Land and Agrarian Studies.

RARFSC – Right to Agrarian Reform for Food Sovereignty Campaign.

RLA – Restitution of land Rights Act 22 of 1994.

SARS – South African Revenue Services.

SPP – Surplus People Project.

TRC – Truth and Reconciliation Commission.

UDHR – Universal Declaration of Human Rights.





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# CHAPTER ONE - INTRODUCTION

## 1.1 Introduction

This thesis is a socio-legal enquiry that explores and suggests policy guidelines which seek to promote active, sustainable and optimal use of land restored or awarded in the context of South Africa's land restitution programme through the adoption of the social-obligation norm of ownership. It argues that the current land restitution process, as provided for in the Constitution<sup>1</sup> and effected through the Restitution of Land Rights Act<sup>2</sup> (RLA) does not promote active, optimal, productive and sustainable utilisation of arable and cultivable land. This in turn undermines agricultural productivity, perpetuates unemployment and also compromises the country's rural economy which is mostly based on agriculture.<sup>3</sup> Further, the country's current land restitution programme also frustrates the rural economy's developmental plans as envisaged in chapter six of the National Development Plan 2030 (NDP). Land restitution is an important leg of the land reform programme which can assist in realising the vision of an integrated and inclusive rural economy as envisioned in chapter six of the NDP. The NDP places agriculture at the centre of realising an inclusive, integrated rural economy which creates jobs, and alleviates poverty as spelt out in chapter six of the NDP.

The thesis contends that the current legal framework for land restitution only provides a technical process which simply returns lost land to those who lost it unfairly in pre-democratic South Africa. It neither encourages nor promotes active, productive, sustainable and optimal post-settlement land utilisation by beneficiaries of the process. Because of this, land restitution currently fails to achieve its stated goals of socio-economic transformation.<sup>4</sup>

Although the Government introduced the 2011 *Green Paper on Land Reform*, as well as the *Property Valuation Act 17* of 2014, a way of addressing the socio-economic shortcomings of the land restitution programme, the institutional changes envisaged in these two pieces of legislation will also not solve the problem of wasteful neglect of arable and productive land. In addition, while the *Regulation of Agricultural Land Holdings Bill*<sup>5</sup> positively affirms the

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<sup>1</sup> 1996 Constitution of the Republic of South Africa, herein after referred to as the Constitution.

<sup>2</sup> 22 of 1994.

<sup>3</sup> See chapter six of the National Development Plan 2030 which reiterates the importance of agriculture to the rural economy.

<sup>4</sup> See a detailed discussion of this in chapter two.

<sup>5</sup> No. 40697.

need to have a fully functional agricultural programme where jobs are created and food security is improved, there are no concrete suggestions on how this will be achieved. In view of the insufficiencies of the current land restitution programme therefore, this thesis recommends that the social-obligation norm of ownership should be adopted as the ethic through which land is returned to its previous owners in terms of the land restitution process in South Africa. The norm has been successfully utilised in other countries such as Brazil and Germany to encourage active and responsible utilisation of land.

While the social-obligation norm will be discussed in more detail in chapter four of this thesis, for now it suffices to point out that it entails the active, sustainable, responsible and conscientious use of property, particularly land. The norm discourages behaviour which leads to wasteful neglect of cultivable land, and encourages industrious and productive utilisation of natural resources for the benefit of others. This accords closely with the ideals of *Ubuntu* as will be discussed in chapter 6.2.4. In respect of the land restitution process, the social-obligation norm should be utilised to encourage a restitution process that promotes active, optimal, sustainable and productive use of all land that is given back to those that lost it as a result of unfair colonial and apartheid practices.

## 1.2 Research Background

The land issue is generally a sensitive and volatile subject in all countries that experienced large-scale settler dispossession of indigenous people's land.<sup>6</sup> In Africa, such countries include South Africa, Zimbabwe, Zambia and Kenya. South Africa, like other countries that have been confronted with addressing the land issue in a post-conflict era, has experienced a number of heated confrontations regarding this issue.<sup>7</sup> As an example, on the 15<sup>th</sup> of April 2009, an armed group of people violently invaded Forana farm in Mpumalanga.<sup>8</sup> The people were frustrated by the slow pace of land restitution and had therefore decided to launch "a

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<sup>6</sup> *Mokala Beleggings and Another v Minister of Rural Development and Land Reform and Others* 2012 (4) SA 22 (SCA) para 16; *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22; Hall R and Ntsebeza L (2007) "Transforming Rural South Africa? Taking Stock of Land Reform" in Ntsebeza L and Hall R (eds) *The Land Question in South Africa – The Challenge of Transformation and Redistribution* 3; T W Bennett "African land -A history of dispossession" in Reinhard Zimmermann & Daniel Visser (1997) (eds) *Southern Cross: Civil Law and Common Law in South Africa* 65.

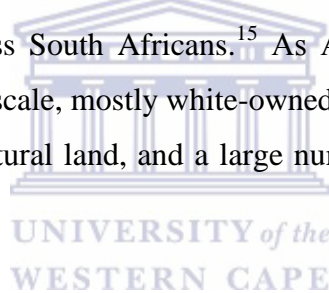
<sup>7</sup> Greenberg S (2006) "The Landless People's Movement and the Failure of Post-Apartheid Land Reform" • In Ballard R. (et al) (Eds) *Voices of Protest: Social Movements in South Africa* 135; Plaatjie (2003) "Taking Matters into their own Hands: The Indigenous African Response to the Land Crisis in South Africa," 1990 - 2001 in Margaret, C. L and Karen Colvard. (Eds) *Unfinished Business – The Land Crisis in Southern Africa* 300; *Baphiring Community and Others v Tshwaranani Projects CC and Others* 2014 (1) SA 330 (SCA); *Mazizini Community v Emfuleni Resorts (Pty) Ltd and Others* [2010] JOL 25378 (LCC).

<sup>8</sup> Jonathan C (2009) "Land grab spreads to South Africa as mob seizes farm."

Zimbabwean-style invasion of one of South Africa's multi-million rand showpiece agricultural projects.”<sup>9</sup> They threatened and drove off local managers and staff at the farm.<sup>10</sup> There have also been reports of the burning of sugar-cane fields in KwaZulu-Natal as well as threatened land invasions in the Wakkerstroom district of Mpumalanga.<sup>11</sup> There are political formations that have made the resolution of the land issue, a key election campaign strategy, leading to a polarised South African community.

The volatility and sensitivity that characterises the land issue in South Africa is traceable to the racially inequitable landownership patterns as well as the violent and brutal means by which the land was taken away from indigenous people during apartheid and colonial times.<sup>12</sup> Black people were forced off their land through beatings, murders and sometimes even through enslavement.<sup>13</sup> This sensitivity is further exacerbated by the poor results of the current land restitution process, which has resulted in many failed land restitution projects.<sup>14</sup>

The present ethnically inequitable and skewed landownership patterns still stir indignation amongst poor, black and landless South Africans.<sup>15</sup> As Aliber (et al) notes, “...there is a relatively small number of large-scale, mostly white-owned commercial farms, occupying the majority of the country's agricultural land, and a large number of small-scale black farmers



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<sup>9</sup> Jonathan C (2009).

<sup>10</sup> Jonathan C (2009).

<sup>11</sup> See numerous reports on this violence at <http://www.farmersweekly.co.za/search.aspx?s=farm%20violence> (accessed 16.03.2013).

<sup>12</sup> Greenberg (2003) “Redistribution and Access in a Market Driven Economy” in *Piecemeal Reforms and Calls for Action – Land Reform in South Africa*. Interfund Development Update, Vol 4, No. 2, 3; Letsoalo, (1987) *Land Reform in South Africa – A Black Perspective* 30; Gibson, (2009) *Overcoming Historical Injustices – Land Reconciliation in South Africa* 11; Hall and Ntsebeza (2007) 3; Walker (2008) *Landmarked – Land Claims and Land Restitution in South Africa* 36; Fay D and James D, (2009) “Restoring what was ours” (eds) *The Rights and Wrongs of Land Restitution* 1; *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22; Bernstein (2005) *Land Reform in South Africa: a 21st century perspective* 49; Cousins, (2009) *Land Reform In Post-apartheid South Africa – A Disappointing Harvest*. Online at <http://www.lalr.org.za/news/land-reform-in-post-apartheid-south-africa-2013-a-disappointing-harvest-by-ben-cousins> (Accessed on 13.08.09); TCOE *Land is Life – The History of Land Dispossession in South Africa* (2004) 6; Mngxitama A (2005) “The National Land Committee, 1994 – 2004: A Critical Insider’s Perspective.” In *Problematising Resistance. Centre for Civil Society Research Reports, 2005*. No. 34(2), 43; Schlemmer and Moller, (1982) *Migrant Labour in South Africa*. Center for Applied Social Sciences. University of Natal, Durban, 1.

<sup>13</sup> Fay D and James D, (2009) 1; Gibson, (2009) *Overcoming Historical Injustices – Land Reconciliation in South Africa*; Bernstein (2005) *Land Reform in South Africa: a 21<sup>st</sup> century perspective* ; Khanya College (2000) *The Land Reform Process in South Africa* 17; Walker, C (2008) *Landmarked – Land Claims and Land Restitution in South Africa* 36; Greenberg S “Redistribution and Access in a Market Driven Economy” in *Piecemeal Reforms and Calls for Action – Land Reform in South Africa*. Interfund Development Update, (2003) Vol 4, No. 2.

<sup>14</sup> See generally Walker C (2008) *Landmarked – Land Claims and Land Restitution in South Africa*. ; Cousins B (2009) *Land Reform in post-apartheid South Africa – A disappointing harvest*.

<sup>15</sup> The intermittent and sometimes violent land grabs every now and then attest to this rage.

largely confined to the ex-bantustans.”<sup>16</sup> The racially skewed landownership patterns arguably have a direct relationship to the current racially inequitable socio-economic demographics of South Africa. Fay and James argue that the dispossession of land was “the central political-economic issue of colonialism and it created modern day capitalism.”<sup>17</sup> Mngxitama goes further to claim that the socio-economic inequality that is seen in contemporary South Africa today is a result of the long colonial conquest and subsequent apartheid land dispossessions, oppression and exploitation of indigenous people.<sup>18</sup> Mngxitama further posits that these land dispossessions privileged white people at the expense of indigenous black South Africans.<sup>19</sup>

The process of taking away land from its original owners happened over a very long time.<sup>20</sup> The erstwhile governments wanted to gain ownership and control of land for various enterprises such as agriculture and mining; and this became the basis for their colonisation of the country.<sup>21</sup> A variety of laws were introduced which forcefully relocated black people from land with high agricultural potential, to less arable parts of the country.<sup>22</sup> These racially discriminatory laws created and entrenched class differences and also eroded the ties that black indigenous communities had to the land.

Beginning with the Natives Land Act,<sup>23</sup> a series of unfair pieces of legislation were enacted to deprive black indigenous people of their land. It is not necessary to give a full chronology of these laws because Gibson does it elsewhere.<sup>24</sup> However, it suffices to say that the laws limited the areas where Africans could live and stripped black Africans of their land,

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<sup>16</sup> Aliber M (et al) (2013) *Land Reform and Livelihoods – Trajectories of change in northern Limpopo Province, South Africa* 14.

<sup>17</sup> Fay D and James D (2009) 1.

<sup>18</sup> Mngxitama A “The National Land Committee, 1994 – 2004, 36 – 82.

<sup>19</sup> Mngxitama A “The National Land Committee, 1994 – 2004, 36 – 82.

<sup>20</sup> Badenhorst PJ, Pienaar M J and Mostert H (2006) *Silberberg and Schoeman’s The Law of Property* 586 -583; Greenberg S (2003) ‘Redistribution and Access in a Market Driven Economy’ in *Piecemeal Reforms and Calls for Action – Land Reform in South Africa*. Interfund Development Update, Vol 4, No. 23; Letsoalo ME (1987) *Land Reform in South Africa – A Black Perspective* 30; Gibson JL (2009) *Overcoming Historical Injustices – Land Reconciliation in South Africa* 11; Hall R and Ntsebeza L (2007)(eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* 3; Walker (2008) *Landmarked – Land Claims and Land Restitution in South Africa* 36.

<sup>21</sup> Greenberg S (2003) “Redistribution and Access in a Market Driven Economy” in *Piecemeal Reforms and Calls for Action – Land Reform in South Africa*. Interfund Development Update, Vol 4, No. 2.

<sup>22</sup> See the history and process of Ebenhaesar dispossession and restitution in the *Commission on Restitution of Land Rights Annual Report, 2007-2008*; Khanya College (2000) *The Land Reform Process in South Africa* 24.

<sup>23</sup> 27 of 1913.

<sup>24</sup> See full chronology in Gibson J L (2009); see also Mostert H (2002) “Land Restitution, Social Justice and Development in South Africa” 119 *SALJ*, 402.

introducing labour tenancy which restricted indigenous people's access to land.<sup>25</sup> As Plaatjie puts it, "[A]waking on Friday June 20, 1913, the South African Native found himself not actually a slave, but a pariah in the land of his birth."<sup>26</sup> The Surplus People Project (SPP) estimated that, between 1960 and 1983, 1.29 million black people were evicted from their land and 614 000 were resettled during the "black spots" and homeland consolidation processes.<sup>27</sup>

The apartheid government relocated millions of black people in both urban and rural areas, attempting to create separate racial zones and ethnically-defined "homelands".<sup>28</sup> Inevitably, this created a racially polarised and economically unequal society.<sup>29</sup> Blacks lost their productive land and in the process, the small-scale farming that helped their rural households to survive was compromised.<sup>30</sup> White farmers, on the other hand, received financial support and subsidies which enabled them to build skills and with time, they became highly productive commercial farmers.<sup>31</sup> With the looming end of apartheid, the Abolition of Racially Based Land Measures Act<sup>32</sup> was enacted to begin the process of redressing historical land dispossessions.<sup>33</sup>

When apartheid came to an end, indigenous black people only had approximately 20% of land while the minority white population had 80%.<sup>34</sup> Naturally, the election of a democratic government in 1994 heightened expectations from landless black people that the land that

<sup>25</sup> Levin R and Weiner D "The Politics of Land Reform in South Africa after Apartheid," *Journal of Peasant Studies*, 23 2/3, pp 93-119; Gibson J L (2009) *Overcoming Historical Injustices – Land Reconciliation in South Africa* 11.

<sup>26</sup> Plaatjie S T (1916) *Native Life in South Africa* 21.

<sup>27</sup> Mngxitama A (2005) 11.

<sup>28</sup> Cousins B (2009) *Land Reform in post-apartheid South Africa – A disappointing harvest*; Fay D and James D, (2009) 6.

<sup>29</sup> Gibson J L (2009) 11.

<sup>30</sup> Hall R (2007) 90; Murray and O'Regan "No Place To Rest" 1989 *SAJHR* 361-394; Gibson J L (2009) 11; Van der Walt AJ "Towards the development of post-apartheid land law: An exploratory survey (1990) 23 *De Jure* 1-45; Hall R "Reconciling the Past, Present, and Future – the parameters and practices of land restitution in South Africa" in *Land, Memory, Reconstruction and Justice – Perspectives on Land Claims in South Africa* (eds) Walker (et al) (2010) 17-20; Frans Cronje (2012) "How much of SA's land is in black hands" 9; The Economist, "Land Reform in South Africa – Hurry up!" online at <http://www.economist.com/node/15022632> (accessed 10.03.2010); Khanya College, (2000) 36; Walker C (2008) 36.

<sup>31</sup> Walker C (2008) 36; Gibson J L (2009) 11. See also Khanya College (2000) 17; Hall R (2007) 90; Murray and O'Regan (1989) *SAJHR* 361-394; Van der Walt AJ "Towards the development of post-apartheid land law: An exploratory survey (1990) 23 *De Jure* 1-45; Hall R (2010) 17-20; Frans Cronje (2012) 9; The Economist (2010) "Land Reform in South Africa – Hurry up!"; Khanya College, (2000) 36; Walker C, (2008) 36.

<sup>32</sup> 108 of 1991.

<sup>33</sup> Khanya College (2000) 24; Van der Walt AJ (2005) *Constitutional Property Law* 289.

<sup>34</sup> T W Bennett "African land -A history of dispossession" in Reinhard Zimmermann & Daniel Visser (eds) *Southern Cross: Civil Law and Common Law in South Africa* (1996) 65; Van der Walt AJ "Towards the development of post-apartheid land law: An exploratory survey (1990) 23 *De Jure* 1-45; Hall R (2007) 90; Murray and O'Regan (1989) *SAJHR* 361-394; Hall R (2010) 17-20; Frans Cronje (2012) 9; The Economist (2010) "Land Reform in South Africa – Hurry up!"; Khanya College, (2000) 36; Walker C (2008) 36.



they had lost unfairly, would be returned to them.<sup>35</sup> The demise of apartheid had transformed a subjugated population into a legitimate citizenry who expected past wrongs of land dispossession to be addressed by the new government. In response to these expectations, the new post-apartheid government initiated an ambitious land reform programme with equally ambitious land reform targets.<sup>36</sup> As Pienaar explains, the advent of the new constitutional dispensation in 1994 introduced a new policy direction whose focus was to “remove the divisions and eradicate the aftermath of separation” caused by land dispossessions.<sup>37</sup> Giving back land to those who had been forced to lose it by apartheid policies of racial discrimination became a key priority of this new government.<sup>38</sup>

The importance of redressing the racially inequitable landownership patterns was reflected in the policy guidelines of the new regime.<sup>39</sup> In fact, such was the urgency of the new government to address the land issue that even before coming to power, the ANC – in its *Ready to Govern* policy guidelines, argued that “the legacy of forced removals and dispossession must be addressed as a fundamental point of departure to any future land policy for our country.”<sup>40</sup>

The Department of Land Affairs (DLA) was mandated with the task of carrying out the land reform programme, a key tenet of which was the land restitution process.<sup>41</sup> What followed was a torrent of land claims from various religious, linguistic and racial groups. Thus, the challenge therefore to the land restitution process was enormous, in that it had “to respond to the huge demands of the landless for land and livelihoods and to introduce a sizeable sector

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<sup>35</sup> Everingham, M and Jannecke, C, “Land Restitution and Democratic Citizenship in South Africa,” *Journal of Southern African Studies*, vol 32(3) 2006, p545; Pienaar JM (2014) *Land Reform* 4.

<sup>36</sup> Hall R (2010) 2; Kepe T “The problem of defining 'community': challenges for the land reform programme in rural South Africa” *Development Southern Africa Vol 16 No 3* Spring 1999 p415.

<sup>37</sup> Pienaar J.M (2014) *Land Reform* 4.

<sup>38</sup> Adams M & Howell J “Redistributive Land Reform in Southern Africa” in *Natural Resource Perspectives* Issue 64. January 2001:1.

<sup>39</sup> African National Congress (1992) – Ready to Govern: ANC Policy Guidelines for a Democratic South Africa. Adopted at the National Conference in Johannesburg in May (28-31) 26 online at <http://www.anc.org.za/ancdocs/history/readyto.html> (accessed 13.03.10); See also Hall R and Cliffe L (2009) “Introduction” in *Another Countryside? Policy Options for Land and Agrarian Reform in South Africa* (eds) Ruth Hall, I. PLAAS, Institute for Poverty, Land and Agrarian Studies, Cape Town South Africa; Everingham, M and Jannecke, C, “Land Restitution and Democratic Citizenship in South Africa,” *Journal of Southern African Studies*, vol 32(3) 2006, p1.

<sup>40</sup> African National Congress (1992) 26.

<sup>41</sup> Van der Walt AJ (2005) *Constitutional Property Law* 289; Mostert H (2002) “Land Restitution, Social Justice and Development in South Africa” 119 *SALJ*, 402; Adams, M & Howell, J “Redistributive Land Reform in Southern Africa” *Natural Resource Perspective*, Vol 64 (2001) 1; The DLA developed the following 3 policy documents – the DLA Framework on Land Policy (May 1995), The Draft Statement of Land Policy and Principles (August/September 1995) and the Green Paper on South African Land Policy (February 1996).

of African smallholders, in order to reduce poverty and promote equity”.<sup>42</sup> Hopes were raised for many dispossessed landless black people that they would get back their land.<sup>43</sup> Land restitution promised the redress of such loss. In this regard, there was need to employ the “law as a tool to dismantle and reassemble the fragmented, complex and intricate web of measures that overshadowed an unequal society” regarding landownership.<sup>44</sup>

It is important to note that the land reform process is a constitutionally based three-legged process whose other two components consists of redistribution and tenure security.<sup>45</sup> While the latter two are not the focus of this thesis, a brief explanation of what they entail will be given for purposes of creating a broader, albeit summarised, picture of what the land reform programme generally entails apart from land restitution.

### **1.2.2 Land Tenure Reform**

The Land Tenure Reform programme aims to achieve tenure security for every previously disadvantaged person whose land tenure is insecure as a result of apartheid discriminatory laws and policies.<sup>46</sup> People living in the former homelands and those living on commercial farmland are the two main groups whose informal rights to land are to be upgraded and secured through the land tenure reform programme.<sup>47</sup> The programme seeks to improve security for all citizens by recognizing individual as well as communal land rights. It is a complex process which involves interests in land and the form that these interests should take.<sup>48</sup> However, tenure security has not been an entire success and more research on how to improve it is on the cards.<sup>49</sup>

### **1.2.3 Land Redistribution**

The land redistribution programme aims to address the racially skewed and inequitable landownership patterns that were inherited from the apartheid era.<sup>50</sup> The programme was meant to address the disparity between the large percentage of land available to white

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<sup>42</sup> Hall R (2009) 98.

<sup>43</sup> Khanya College (2000) 24.

<sup>44</sup> Pienaar J M (2014) 4.

<sup>45</sup> See s 25 of the 1996 Constitution of the Republic of South Africa.

<sup>46</sup> See s 25 (6) and (7). For example, farm workers, labour tenants and rural households living on privately owned land and people living in the former homelands (communal areas) under the authority of traditional chiefs. See also *Extension of Security of Tenure Act 62 of 1997 (ESTA)*; *Land Reform (Labour Tenants) Act 3 of 1996*; Draft tenure security policy and Draft Land Tenure Security Bill (2010).

<sup>47</sup> S 25 (6) and (7). Hall R (2003) “A Comparative Analysis of Land Reform” in Margaret C L and Karen C (Eds) *Unfinished Business – The Land Crisis in Southern Africa* 263.

<sup>48</sup> DLA (Department of Land Affairs) (2001) *Annual report. 1 April 2001–31 March*.

<sup>49</sup> See a discussion of this by Walker C (2008) 199-203.

<sup>50</sup> *White Paper on South African land policy*, section 4.

commercial farmers and the small percentage in the former homelands.<sup>51</sup> Land redistribution intends to relieve overcrowding in communal areas and broaden the ownership structure of commercial farmland along racial lines.<sup>52</sup> It seeks to provide land for productive and residential purposes to black people who were dispossessed during the years of apartheid by using market-based mechanisms.<sup>53</sup> Land redistribution also seeks to assist the urban and rural poor, farm workers, labour tenants as well as emergent farmers.<sup>54</sup> Anyone who wants land in terms of this process can apply to the government for grants.<sup>55</sup> These grants are used to acquire land offered for sale on the market, from willing-sellers. However, priority was given to low income households who could apply to the government for grants of R16 000 that would enable them to purchase land and have a “little start-up capital”.<sup>56</sup> Those that were eligible for the grants were those earning less than R1 500 a month. Because of the small size of the grants, groups of people pooled their grants together to purchase pieces of land that were being sold.

The redistribution programme in turn had three sub-components. These are - giving access to land for agricultural purposes, providing land for settlement purposes and making land available for non-agricultural enterprises. Land redistribution also aims to provide grants to municipalities for the purchase of land for public use to groups of people such as livestock farmers. According to Hall,<sup>57</sup> this aspect of land redistribution has been a significant undertaking: by the end of 2002, a third of all land that had been transferred nationally was through redistribution.<sup>58</sup> Little emphasis has however been put on commonage and this has resulted in it receiving a small budget while emphasis has increasingly been on transferring land directly into the ownership of new farmers through the Land and Redistribution for Agricultural Development Programme (LRAD) initiative.<sup>59</sup>

### 1.3 Research Question

The land restitution programme will be described and explained in more detail in chapter two. However, the process has faced numerous criticisms for its failure to stimulate

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<sup>51</sup> Hall R (2007) 90; Hebinck P and Leynseele VY “Through the prism: Local reworking of land restitution settlements in South Africa in Fay D and James D (eds) *The Rights and Wrongs of Land Restitution* 164.

<sup>52</sup> Hall R (2007) 90.

<sup>53</sup> Hall R (2007) 90.

<sup>54</sup> DLA (Department of Land Affairs). *Medium term strategic and operational plan, 2002–2006*.

<sup>55</sup> Hall R (2007).

<sup>56</sup> Walker C (2008) 1999-203.

<sup>57</sup> Hall R (2007) 90.

<sup>58</sup> According to Hall (2007), this has not been uniform across provinces. Most commonage land has been acquired for extensive grazing in the Northern Cape, 92.

<sup>59</sup> Walker C *Landmarked* 91.

productivity on farms awarded in terms of its restitution programme.<sup>60</sup> The land restitution programme has mainly targeted white-owned commercial farms for reform.<sup>61</sup> It has mostly given back many productive farms to beneficiaries who do not have either the means, expertise and or will to utilise them actively, optimally and productively.<sup>62</sup> This has reduced the number of productive commercial farms in South Africa from approximately 120 000 in 1994 to about 37 000 in 2013.<sup>63</sup> This undermines agricultural production which in turn compromises food security, attenuates employment creation and weakens the economy.<sup>64</sup> Estimates are that about 400 000 jobs have been lost in the agricultural sector since the commencement of the land reform programme of restitution.<sup>65</sup> This is concerning particularly in light of the provisions of chapter six of the NDP which envisions a vibrant rural economy which is based on agriculture; in order to create jobs and build the rural economy.

This is not a socio-economically viable state of affairs for South Africa. Efforts therefore should be made to promote active, optimal, productive and sustainable utilisation of land to guard the country from food insecurity and job losses as well as to enhance agriculture's contribution to the economy. Research and experiences elsewhere have shown that a good land restitution process has numerous positive benefits that make a compelling argument for a land restitution process that promotes active and productive use of land.<sup>66</sup> While a discussion of the socio-economic benefits of a "production-centred" land restitution process will be discussed later in chapter four, five and six, for now, however, it suffices to note that some of the benefits include – increased crop yield,<sup>67</sup> improved nutrition for low income

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<sup>60</sup> Lahiff E (2008) 'Land Reform in South Africa: A Status Report. Programme for Land and Agrarian Studies.' *Research Report No. 38*, 1; Walker C (2008) 198; Greenberg S (2004) *The Landless People's Movement and the Failure of Post-Apartheid Land Reform*; James D (2006) 90; Kleinbooi K (2009) *Umhlaba Wethu 7: A PLAAS bulletin tracking Land Reform in South Africa.*; Hall, R and Ntsebeza, L (2007) 3; see also a comprehensive discussion of this in chapter two and three.

<sup>61</sup> Helen Zille (2013) "Redressing apartheid's original sin" in *Cape Times* 9.

<sup>62</sup> See chapter two.

<sup>63</sup> Helen Zille (2013) 9.

<sup>64</sup> See chapter two for a comprehensive discussion of this.

<sup>65</sup> Helen Zille (2013) 9.

<sup>66</sup> See RL Prosterman and T Hanstad (2006) "Land Reform in the 21<sup>st</sup> century: new challenges and responses" *Seattle Journal of Social Justice* 763-800, 768.

<sup>67</sup> Jacoby HG, Li G and Rozelle S "Hazards of Expropriation: tenure security and investment in rural China" 2002 *American Economic Review* vol 92, 5.

households,<sup>68</sup> reduced socio-economic instability<sup>69</sup> as well as reduced rural-urban migration.<sup>70</sup>

The aim of this thesis consequently is to suggest constitutional and policy improvements, based on property law theory, to the current land restitution framework in order to have a land restitution process that will ensure that arable, cultivable restituted land is not neglected but rather, utilised optimally, sustainably and productively by the beneficiaries. The specific question therefore that this thesis seeks to address is; how can the Constitution, as well as the RLA provide for a large-scale land restitution process which alleviates poverty, promotes food security, consolidates and creates employment as well as contributes to the socio-economic transformation of the beneficiaries as well as the rural economy? The thesis will accordingly investigate and discuss how the law and theory of the social-obligation norm can serve as a basis to address issues of farm neglect which arise in the context of land restitution - to promote food security, economic growth and alleviate poverty as envisaged in the NDP.<sup>71</sup>

#### 1.4 Research motivation

The law of property is based on a number of principles which aid in its understanding and application.<sup>72</sup> These are - absoluteness, which refers to the degree of certainty with which property holders control their property and with which they may be able to protect such control;<sup>73</sup> the principle of abstraction, which assists in understanding how and when property may be transferred;<sup>74</sup> the publicity principle, which supports legal certainty and strengthens the protection that may be afforded to property relations;<sup>75</sup> the principle of specificity, which links a particular piece of property with the rights that may be held in respect of it;<sup>76</sup> the transmissibility principle, which refers to the fact that rights to property are alienable<sup>77</sup> and the *numerus clausus* principle, which confirms that property law relies on closed categories or systems and that ownership can be acquired only in a defined number of ways.<sup>78</sup>

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<sup>68</sup> United Nations Development Programme *Human Development Report 2003: Millenium Development Goals – A compact Among Nations to end human poverty* 82.

<sup>69</sup> Prosterman RL and Riedinger JM (1987) *Land Reform and Democratic Development* 36.

<sup>70</sup> Hanstad T (2006) "Land Reform in the 21<sup>st</sup> century: new challenges and responses" *Seattle Journal of Social Justice* 763-800, 768.

<sup>71</sup> Chapter six of the NDP.

<sup>72</sup> Van der Merwe CG (1987) *The Law of Things* 7.

<sup>73</sup> Van der Merwe CG (1987) 7.

<sup>74</sup> Van der Merwe CG (1987) 9-10.

<sup>75</sup> Van der Merwe CG (1987) 7.

<sup>76</sup> Van der Merwe CG (1987) 8-9.

<sup>77</sup> Van der Merwe CG (1987) 9.

<sup>78</sup> Van der Merwe CG (1987) 7.

While these conventional principles of property law are still intact, their context, challenges and imperatives have changed considerably.<sup>79</sup> A case in point, which is relevant for this thesis relates to the principle of absoluteness, from which derives the *ius abutendi*.<sup>80</sup> The *ius abutendi* is an incident of ownership<sup>81</sup> which entitles an owner to use, abuse, neglect and even destroy her property, as she pleases, within the confines of the law.<sup>82</sup> In Roman law terms, the principle suggests that an owner does not have constraints regarding the use and abuse of the things that he owns.<sup>83</sup> He can do as he contents with his property as long as he does not violate any law.<sup>84</sup>

As will be discussed in more detail in chapter two, the current South African land restitution process gives more respect to and presupposes a strict adherence to the classical and liberal idea of an unfettered *ius abutendi*.<sup>85</sup> Various court decisions such as *Drymiotis v Du Toit*,<sup>86</sup> *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others*<sup>87</sup> as well as *Bozzone and Others v Secretary for Inland Revenue*<sup>88</sup> give the impression that the *ius abutendi* should be adhered to strictly except obviously in instances where an owner infringes on another owner's rights. This explains why the then Minister of Agriculture and Land Affairs Lulu Xingwana was criticised when she suggested her infamous "use it or lose it" approach to dealing with neglect of potentially productive restitution farms.<sup>89</sup> The minister's envisaged "use it or lose it" approach would entail that all beneficiaries of land through the restitution process, who are not actively utilising their land would lose it to those who will use it optimally, productively and sustainably.<sup>90</sup> The minister was quoted as saying,

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<sup>79</sup> Badenhorst PJ, Pienaar M J and Mostert H (2006) *Silberberg and Schoeman's The Law of Property* 92-93.

<sup>80</sup> There is no consensus regarding the exact origins of the *ius abutendi*. Scholars such as Blackstone (see Blackstone W (1765) *Commentaries on the Laws of England*, Book III chapter 14) for example argue that the *ius abutendi* is a result of an absolute conception of ownership. It was there to protect an owner against illicit interference with ownership. Others such as McCaffery (see McCaffery EJ (2001) "Must we have a right to waste?" in Munzer RS (eds) *New Essays in the Legal and Political Theory of Property – Cambridge Studies in Philosophy and Law*, 76-105) argue that the *ius abutendi* does not in fact allow waste, but rather, it was initially introduced in order to prevent waste.

<sup>81</sup> Some of the incidents of ownership include the power to vindicate the property (*ius vindicandi*); to possess the property (*ius possidendi*); to dispose of the property (*ius disponendi*); to use the property (*ius utendi*); to draw its fruits (*ius fruendi*); and the power to neglect or destroy the property (*ius abutendi*).

<sup>82</sup> *Gien v Gien* 1979 (2) SA 1113 (T) at 1120.

<sup>83</sup> Birks P (1985) *The Roman Law Concept of Dominion and the Idea of Absolute Ownership*, 1.

<sup>84</sup> Birks P (1985) 1.

<sup>85</sup> Van der Walt AJ (2010) *The Law of Neighbours* 1; see also *Drymiotis v Du Toit* 1969 (1) SA 631 (T).

<sup>86</sup> 1969 (1) SA 631 (T).

<sup>87</sup> 1996 (4) SA 499 (A) 504.

<sup>88</sup> 1975 (4) SA 579 (A) 585.

<sup>89</sup> Reuters (2009). "use it or lose it" - Government Warns New Farmers." *Cape Times and Independent Online (Pty) Ltd*. Online at <http://www.news24.com/SouthAfrica/News/Use-land-or-lose-it-Nkwinti-2010030> (Accessed 16.03.2010).

<sup>90</sup> Reuters (2009) "use it or lose it" – Government Warns New Farmers."

“[T]hose who do not use the land must immediately be removed and the land must be given to emerging farmers and cooperatives.”<sup>91</sup>

Following the increased exposure given to the minister’s suggested “use it or lose it” approach in the context of land restitution, various organizations, legal experts and academics released statements condemning the principle as violating constitutional rights and provisions. The organization *Lawyers for Human Rights* (LHR) issued a statement on its website describing the minister’s suggestion as “shocking”.<sup>92</sup> The *Right to Agrarian Reform for Food Sovereignty Campaign* (RARFSC), a Land Rights’ Group, released a statement arguing that it would resist the “use it or lose it” idea because it disempowered and further dispossessed the landless.<sup>93</sup> Professor Ben Cousins, the then director at the *Institute for Poverty, Land and Agrarian Studies* (PLAAS) argued that the minister was acting like “an authoritarian chief.”<sup>94</sup> A land reform specialist at the *Legal Resources Centre* (LRC), Kobus Pienaar, described Xingwana’s principle as “preposterous.”<sup>95</sup> In Private law, their arguments can easily be traced to the respect that is accorded to the *ius abutendi*, the latter which provides that an owner of property cannot be compelled to use their property in a prescribed way.<sup>96</sup> The *ius abutendi* entitles an owner of property to use the thing and destroy it as they please as long as this is done within the confines of the law.<sup>97</sup>

The minister’s suggested method to curb wasteful neglect of land is however not new to South African law. It is an expression, albeit a poor one, of the social-obligation norm of ownership.<sup>98</sup> As will be discussed in more detail in chapters four and five, the social-obligation norm of ownership encourages active, optimal and sustainable utilisation of property for the ultimate benefit of not only the individual owner, but others as well. The norm censures wasteful neglect of property. It assists with defining property rights in a way that provides a suitable environment for underprivileged and landless people to flourish.<sup>99</sup> This happens because the social obligation norm provides everyone with access to benefits

<sup>91</sup> Reuters (2009). “use it or lose it’ - Government Warns New Farmers.”

<sup>92</sup> Du Plessis L (2009) “use it or lose it” policy abused by Land Affairs <http://www.lhr.org.za/news/2009/use-it-or-lose-it-policy-abused-land-affairs> ‘ (Accessed 14 December 2009).

<sup>93</sup> Witbooi D (2009) Xingwana’s “use it or lose it” rejected by land rights campaign, Surplus People Project <http://www.ngopulse.org/press-release/xingwanas-use-it-or-lose-it-rejected-land-rights-campaign> (14 December 2009).

<sup>94</sup> Du Plessis L (2009).

<sup>95</sup> Du Plessis L (2009).

<sup>96</sup> See *Gien v Gien*, 1979 (2) SA 1113 (T) at 1120.

<sup>97</sup> Badenhorst J P and H Mostert (2006) *Silberberg and Schoeman's The Law of Property* 93.

<sup>98</sup> See a detailed discussion of the social-obligation norm in chapter four.

<sup>99</sup> Dalton T R (2012) “Rights for the Landless: Comparing Approaches to Historical Injustice in Brazil and South Africa” *Columbia Human Rights Law Review* (44) 198.

that are conferred by property ownership.<sup>100</sup> The norm promotes responsible and beneficial utilisation of resources. It is already applied, albeit indirectly, in the context of mineral law, to ensure optimal exploitation of South Africa's rich mineral and petroleum resources.<sup>101</sup> In the framework of mineral law, the social-obligation norm entails that the holder of a right to exploit minerals or petroleum must actively exercise such a right.<sup>102</sup> If the holder does not do so, they run the risk of losing such right to another player who is capable of, and willing to exploit the mineral resources actively.<sup>103</sup> The "use it or lose it" approach, which is basically a poorly expressed variation of the social-obligation norm, is regarded as justified in mineral law to discourage the formation of monopolies and to promote optimal exploitation of resources upon which a large part of the South African economy depends.<sup>104</sup>

If, however, the application of the social-obligation norm is extended to the broader setting of arable restituted land, which is also a limited resource in South Africa, it would mean that all beneficiaries of land under the government's land restitution program run the risk of losing their land if they are not using it productively. In terms of the social-obligation norm as explained in chapter seven, land owners would only lose their land when other interventions aimed at capacitating them with skills to utilise the land have been made first.

On the 11<sup>th</sup> of March 2009, Minister Lulu Xingwana effectively applied the "use it or lose it" approach when she seized Klopperbos Ostrich farm in Hammanskraal outside Pretoria.<sup>105</sup> On the occasion, the Minister was quoted as saying,

"Land must be fully utilized. No farm must be allowed to lie fallow. Those who are not committed to farming must be removed from the allocated farm and be replaced by those who have a passion for farming, including agricultural cooperatives."<sup>106</sup>

As discussed above, there was an outcry over the minister's approach at addressing the wasteful neglect of land by beneficiaries of land restitution. Various NGO's, human rights

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<sup>100</sup> Dalton T R (2012) *Columbia Human Rights Law Review* (44) 198.

<sup>101</sup> S51 Mineral and Petroleum Resources Development Act 28 of 2002; S22 Minerals Act 50 of 1991; In *Agri South Africa v The Minister of Minerals and Energy*, (55896/2007,10235/2008) [2009] ZAGPPHC 2) it was held (par15) that 'before a mining right can be granted, the Minister must be satisfied that the applicant ... can conduct the prospecting operations optimally.'

<sup>102</sup> See *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* (55896/2007,10235/2008) [2009] ZAGPPHC 2 (6 March 2009); S 51 Mineral and Petroleum Resources Development Act 28 of 2002; S22 Minerals Act 50 of 1991.

<sup>103</sup> See *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* (55896/2007,10235/2008) [2009] ZAGPPHC 2 (6 March 2009); S 51 Mineral and Petroleum Resources Development Act 28 of 2002; S 22 Minerals Act 50 of 1991.

<sup>104</sup> Mineral and Petroleum Resources Development Act 28 of 2002, s 51.

<sup>105</sup> Plantive C (2009) "Ostrich Farm a symbol of SA's failed land reforms" *Mail and Guardian* 8 April 2009 14.

<sup>106</sup> Plantive C (2009) 14.



activists as well as academics were opposed to this style of dealing with beneficiaries who did not utilise their land. In private law, one can argue that their arguments were based on what was perceived to be a disregard of ownership entitlements, more specifically the *ius abutendi*. However, as the discussion illustrates in chapter four, ownership is not absolute. It was not absolute in Roman law and there was no strict adherence to the *ius abutendi*.<sup>107</sup> An argument can be made that instead of a brutal “use-it-or-lose it” approach as was suggested by the minister, the social-obligation norm can be expressed positively in legislation and this will address the current problem of wasteful neglect of cultivable restituted land. This will also be particularly useful in as far as achieving an integrated and inclusive rural economy which alleviates poverty and promotes a higher quality of life for rural people as envisaged by the National Development Plan 2030 (NDP).<sup>108</sup>

The NDP concedes that poverty and underdevelopment are major challenges faced by rural communities in South Africa.<sup>109</sup> Black rural people generally experience the highest levels of poverty.<sup>110</sup> Rural poverty is estimated to be at 70.9% compared to the national average where it is thought to be at between 49% and 57%.<sup>111</sup> An estimated 70% of rural people are unemployed in comparison to about 46% in the whole country.<sup>112</sup> Most people in the rural areas derive their income from social grants, pensions and remittances from their loved ones in urban areas.<sup>113</sup> Schools, hospitals and clinics are poorly resourced and they do not operate as well as those in urban areas. Transport networks are poor and quite often, it is difficult to travel because of poor roads and even lack of transport services. Most of all, the majority of people living in the rural areas are food insecure although some of them have arable and cultivable land which could be worked to produce food.<sup>114</sup>

Cultivable land is a scarce primary resource which rural communities have which can be utilised to improve the rural economy.<sup>115</sup> Of course, the importance of land to the alleviation of poverty in rural areas is contested. Some scholars such as Vaughan argue that “...the

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<sup>107</sup> Birks P (1985) *The Roman Law Concept of Dominium and the Idea of Absolute Ownership* 1.

<sup>108</sup> See chapter six of the NDP.

<sup>109</sup> See chapter six of the NDP.

<sup>110</sup> Machethe CL (2004) “Agriculture and Poverty in South Africa: Can Agriculture Reduce Poverty” Paper presented at the Overcoming Poverty Conference Pretoria, 28-29 October 1.

<sup>111</sup> Jacobs P and Nancy A (2010) *Nourishing Rural Poverty – South Africa’s Unchanging Land Relations* Human Sciences Research Council 2.

<sup>112</sup> Jacobs P and Nancy A (2010) 2; Makgetla N (2008) “Land Reform plans do not get to the root of rural ills,” *Business Day*, 5 March.

<sup>113</sup> Daniela C and D Posel (2006) “Migration and remittances in South Africa” *Background document on migration and first set of draft questions for inclusion in the National Income Dynamics Study*.

<sup>114</sup> As the previous chapter has shown.

<sup>115</sup> See chapter six of the NDP.

notion that a broadly based smallholder agriculture can be created, and that it can transform the character of the agricultural production system is an inappropriate premise on which to build policy frameworks designed to improve livelihoods in rural South Africa.”<sup>116</sup> However agriculture and its related activities is the most effective way of dealing with poverty in rural areas.<sup>117</sup>

In its chapter six, the National Development Plan (NDP) envisages “an integrated and inclusive rural economy.”<sup>118</sup> According to the NDP, despite the notable progress that has been made towards addressing poverty in rural areas, people living in the rural communities of South Africa have not experienced meaningful development since 1994.<sup>119</sup> While poverty levels have dropped, household welfare has only improved largely because of improvements in the disbursement of social-grants as well as the rural-urban migration.<sup>120</sup> Of course, that the rural economy has to depend on social grants as well as remittances from people in urban areas is an untenable state of affairs. What is preferable is an approach that improves the livelihoods of rural dwellers and the rural economy in a sustainable and more permanent manner. To this effect, the NDP envisages that by 2030, rural communities should be able to fully participate in the country’s economy.<sup>121</sup> They should be able to access a high-quality life which gives them access to food and improved living conditions.<sup>122</sup>

The NDP regards agriculture as the primary activity that will transform the rural economy.<sup>123</sup> According to the NDP, agriculture has the potential to create approximately 1 million jobs by 2030.<sup>124</sup> In terms of the NDP, by 2030, all “rural economies (should) be supported by agriculture and, where possible, by mining, tourism, agro-processing and fisheries.”<sup>125</sup> The NDP also envisions a land reform programme which leads to infrastructure development, job

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<sup>116</sup> Quoted in Machethe CL (2004).

<sup>117</sup> Rukuni M (2011) “Traditional Agriculture: How can productivity be improved?” In *Advocates for Change – How to Overcome Africa’s Challenges* (ed) Moeletsi Mbeki 208; Delgado CL (1998) *Sources of Growth in Smallholder Agriculture in Sub-Saharan Africa: The Role of Vertical Integration of Smallholders with Processors and Marketers of High Value Added Items*. Paper presented at the Inter-Conference Symposium of the International Association of Agricultural Economists, Badplaas, South Africa, August 10-16; Machete et al (2004) *Smallholder Irrigation and Agricultural Development in the Olifants River Basin of Limpopo Province: Management Transfer, Productivity, Profitability and Food Security Issues*. Report to the Water Research Commission on the Project “Sustainable Local Management of Smallholder Irrigation in the Olifants River Basin of Limpopo Province, Durban: Indicator Press.

<sup>118</sup> National Development Plan – 2030.

<sup>119</sup> National Development Plan – 2030, 218.

<sup>120</sup> National Development Plan – 2030, 218.

<sup>121</sup> National Development Plan – 2030, 218.

<sup>122</sup> National Development Plan – 2030, 218.

<sup>123</sup> National Development Plan – 2030, 219.

<sup>124</sup> National Development Plan – 2030, 219.

<sup>125</sup> National Development Plan – 2030, 218.

creation as well as the reduction of poverty.<sup>126</sup> It also expects that arable land will be actively and optimally utilised and “human capital” will be provided and supported in order to realise agriculture’s potential in the rural areas.<sup>127</sup> According to the NDP, under-development in the rural areas should be addressed by agricultural development, improved land use management, infrastructural development as well as empowerment of rural dwellers.<sup>128</sup>

Rukuni argues that the socio-economic progress of people living in rural areas largely depends on increasing and improving agricultural productivity.<sup>129</sup> Delgado further states that “agriculture is too important *in the rural economy*<sup>130</sup> for employment, human welfare and socio-economic stability; to be ignored or treated as just another small adjusting sector of a market economy.”<sup>131</sup> Evidence from a study conducted in rural Limpopo by Machete shows that agriculture is a key source of income for people who live in rural areas.<sup>132</sup> It contributes more than 40% to the general household incomes in Limpopo.<sup>133</sup>

The dearth of active agriculture in many restitution farms is depriving many rural dwellers of employment as well as of a steady source of income.<sup>134</sup> The Directorate of Economic Services in the Department of Agriculture categorically admits that “agriculture unemployment deepens *and consolidates*<sup>135</sup> poverty in the rural areas.”<sup>136</sup> Social grants have now replaced agriculture as the mainstay of the rural economy.<sup>137</sup>

As this study shows, the social-obligation norm is a useful theoretical framework which can be utilised in order to encourage active, optimal and sustainable utilisation of land in rural areas as envisaged by the NDP. The norm will censure wasteful neglect of cultivable restitution farms. It will further suggest a land restitution process that should be adopted in terms of the RLA that will encourage all beneficiaries of particularly cultivable farms, to utilise those farms productively. In addition, in its preamble, the *Regulation of Agricultural*

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<sup>126</sup> National Development Plan – 2030, 218.

<sup>127</sup> National Development Plan – 2030, 218.

<sup>128</sup> National Development Plan – 2030, 218.

<sup>129</sup> Rukuni M (2011) 208.

<sup>130</sup> My emphasis.

<sup>131</sup> Delgado CL (1998).

<sup>132</sup> Machete et al (2004).

<sup>133</sup> Machete et al (2004).

<sup>134</sup> Aliber M Baiphethi M and Jacobs P (2007) *Evidence Based Employment Scenarios; Agricultural Employment Scenarios* Human Sciences Research Council 6.

<sup>135</sup> My own emphasis.

<sup>136</sup> Directorate of Economic Services in the Department of Agriculture (2010) *Estimate of the Contribution of the Agricultural Sector to Employment in the South African Economy* 2.

<sup>137</sup> Rukuni M (2011) 208.

*Holdings Bill*<sup>138</sup> also desires to “raise agricultural output and food security and to advance social justice and political stability by obtaining agricultural land to support and promote productive employment and income to poor and efficient small scale farmers.” Amongst other things, the Bill aims to promote employment within the agricultural sector as well as contribute to achieving food security.<sup>139</sup> As the thesis shows, the envisions of the NDP and the *Regulation of Agricultural Holdings Bill* can be achieved if the social-obligation norm is adopted as the framework upon which land restitution is carried out in South Africa.

The case of Zimbabwe has shown that repossessing once productive commercial farms for the sake of redressing past injustices without regard to the present role of these farms to food security, poverty levels and the country’s economy can have unintended consequences. It has also revealed the lack of wisdom in a land restitution process where the beneficiaries do not have the will and/or desire and/or means to ensure continued production on land awarded in terms of the country’s restitution project.<sup>140</sup> If no proper consumerist centred restitution policy framework is implemented to counter the present negative consequences of land restitution very likely, food security will be threatened, the poor will become even poorer, rural unemployment will soar while the economy will suffer.

## 1.5 Research Methodology

A lot of field-work has been done in the area of land restitution. Much has also been written on theories of property law. Conducting further fieldwork and empirical research was therefore not necessary. As a result, this research was a desk-top research project which utilised the secondary data of those that have conducted primary research. This includes literature, online sources, journal articles, reports as well as reported cases.

Although this thesis is not a comparative study, it alludes to international experiences of other countries that had to address unfair land dispossession carried out by undemocratic governments in a manner that did not compromise the productivity of the land. These countries are Germany and Brazil. While South Africa is obviously different from the two identified countries, its challenge with land restitution is not unique. Lessons can therefore be drawn from the experiences, successes and failures of these two countries with regard to land restitution.

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<sup>138</sup> No. 40697.

<sup>139</sup> See section 2(a) and (c) of the Bill.

<sup>140</sup> See *Kranspoort Community v Farm Kranspoort* 48 LS [2000] JOL 7526 (LCC).

## 1.6 Chapter Outline

The thesis has seven chapters. The first three chapters are the background of the thesis. They identify the problem with South Africa's land restitution process. The last four chapters provide the solution to the problem. The current chapter is an introduction to the study. It explains the background of the research, the research questions of the study as well as the motivation and theoretical concept of the thesis. The chapter also gives an outline of the other chapters in the thesis and their contents.

Chapter two gives an overview of land restitution in South Africa. The chapter argues that although the land restitution programme was an inevitable transformatory step aimed at addressing the wrongs of the past, its major weakness has been that it has failed to promote active utilisation of restituted land. Many once productive farms now lie fallow and unutilised. This is not sustainable in the context of food and job security. It contravenes the NDP's goals for a rural economy based on agriculture.

Chapter three analyses the *2011 Green Paper on South Africa's Land Reform Programme*. The chapter argues that policy makers have not been blind to the shortcomings of the country's land restitution programme. The *2011 Green Paper* was passed to address problems which result from neglect of land. However, the envisioned institutional changes in the *Paper* too will not address the problem.

Chapter four is a theory chapter. It discusses the social-obligation norm of ownership. In order to give a good understanding of the social-obligation norm, the chapter begins by discussing ownership and its entitlements. Through this discussion, a conclusion is made that ownership envisages responsibility on owners. This responsibility then translates into progressive property law theoretical underpinnings such as the social-obligation norm. This norm was popularised by Leon Duguit who was a French Jurist and scholar. The chapter concludes by discussing the different versions of the social-obligation norm that can be identified today.

Chapter five explains how the social-obligation norm is utilised in Brazil and Germany. The *Brazilian Land Statute*<sup>141</sup> for example, requires all owners of land to use their land in a manner that will benefit those that do not have it. In Brazil, despite the respect that is given to private property rights, an owner's title in land is only guaranteed by the way it benefits the

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<sup>141</sup> of 1964.

public as provided for in statute.<sup>142</sup> This principle is enshrined in the Brazilian Constitution.<sup>143</sup> In the case of Germany, the property clause in article 14 of the German Constitution provides for the private enjoyment of property which promotes public welfare. This approach is described by the German Federal constitutional Court as the “social function of property.”<sup>144</sup> These two examples are useful for the South African context because they address precisely similar proprietary problems such as the one that this thesis seeks to address.

Chapter six outlines how the social-obligation norm should be introduced in the land restitution process. The chapter argues that there already exists an indirect appreciation of the social-obligation norm in South African land restitution. However, this has to be formulated more positively as is the case in Germany and Brazil.

Chapter seven is a conclusion to the entire thesis. The chapter makes recommendations for the implementation of the social-obligation norm in the Constitution as well as in the RLA.



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<sup>142</sup> Brazilian Land Statute of 1964.

<sup>143</sup> Chapter III of the 1988 Constitution of the Federative Republic of Brazil.

<sup>144</sup> See also Van der Walt AJ (1997) *The Constitutional Property Clause* 8.

## CHAPTER TWO – RESTITUTION OF LAND IN SOUTH AFRICA

### 2.1 Introduction

State sanctioned forced removals of indigenous people from their land constitute one of the main wrongs committed by the erstwhile colonial and apartheid governments of South Africa.<sup>145</sup> The importance of dealing with the resultant racially skewed landownership patterns can therefore not be overemphasised. In an attempt to address this issue, the new South African government passed the Restitution of Land Rights Act (RLA).<sup>146</sup> This Act was the first substantive piece of transformative legislation in post-apartheid South Africa that aimed to return land to those from whom it was forcibly taken away.<sup>147</sup> This was a commendable move by the new government because the struggle against apartheid was, to a notable extent, also about achieving equitable landownership through, amongst other measures, restoring land to those who had been forced to lose it.<sup>148</sup>

Unfortunately, the land restitution process, however laudable, has not entirely achieved its intended results.<sup>149</sup> One of the main shortcomings of South Africa's land restitution programme is the failure to promote active, sustainable and productive use of land.<sup>150</sup> As a result, many once productive farms are now lying fallow and unutilised.<sup>151</sup> This in turn compromises food and job security which eventually threatens the rural economy. The focus of the current land restitution process has only been on restoring "quantities of hectares" of land to people by set timeframes and many once productive farms have been given to beneficiaries that are not utilising them productively.

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<sup>145</sup> *Agri SA v Minister for Minerals and Energy* 2013 (4) SA 1 (CC), para 1; *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* [2016] ZACC 22; Walker et al (2010) "Introduction" in (eds) Walker et al, *Land, Memory, Reconstruction and Justice* 1; For a comprehensive historical account of the land issue, see Mngxitama A (2005) 36 – 82; Cousins B (2009) *Land Reform in Post-apartheid South Africa – A Disappointing Harvest*; Letsoalo, (1987) 30; Gibson, (2009) 11; Hall and Ntsebeza (2007); Walker (2008); Bernstein (2005).

<sup>146</sup> 22 of 1994.

<sup>147</sup> Hall R (2004) "Land Restitution in South Africa: Rights, Development, and the Restrained State" *Canadian Journal of African Studies* Vol.38, No. 3 pp. 654-671 at 656; Hall R (2010) 21; Mostert H "Land Restitution, Social Justice and Development in South Africa" (2002) 119 *SALJ*, 405; *Uitenhage Local Transitional Council v Zenza* 1997 (8) BCLR 115 (SE).

<sup>148</sup> Mngxitama A (2005) 36 – 82.

<sup>149</sup> See *White Paper on South African Land Policy*, 1997. See also chapter six of the NDP; 2011 *Green Paper on Land Reform; Regulation of Agricultural Land Holdings Bill* no 40697 all which reiterate that amongst other things, land restitution must promote a vibrant rural economy based on agriculture which creates jobs, alleviates poverty and consolidate food security particularly for the vulnerable in society.

<sup>150</sup> Lahiff E (2008) 'Land Reform in South Africa: A Status Report. Programme for Land and Agrarian Studies.' *Research Report No. 38*, 1; Cousins B (2009) *Land Reform In Post-apartheid South Africa – A Disappointing Harvest*.

<sup>151</sup> Cousins B (2009); Ellse B (2013) *Costing Land Restitution 1994-2013* Research Unit, Parliament of the Republic of South Africa, 4.

This is a situation that the South African economy cannot afford. The current land restitution programme is costly and yet counterproductive. For instance, by 2013, the government had spent approximately R25.72 billion on land restitution.<sup>152</sup> According to the Commission on Restitution of Land Rights, in the period 2015/16, the government spent close to R3 billion on land restitution.<sup>153</sup> According to the minister responsible for land reform, Gugile Nkwinti, approximately 90% of land restitution farms acquired with this money since the inception of the land restitution programme, which used to be productive before their acquisition, are now completely unproductive and can be categorised as failures.<sup>154</sup>

This chapter gives an outline of land restitution in South Africa with particular reference to the RLA. Any discussion of the process of land restitution will be incomplete without reference to the history of the racially discriminatory processes which led to the current ethnically inequitable landownership patterns. In addition, any solution to land restitution problems in South Africa has to take into account the effects of colonial rule on existing landownership patterns.<sup>155</sup> The chapter therefore begins by outlining the erstwhile past contextual background that bore the milieu and need for land restitution in South Africa. It then explains the elements of land restitution as provided for in the RLA. The chapter then evaluates the land restitution process pointing out the negative results of the process.

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## **2.2 Legislative framework for land restitution in South Africa**

As discussed in chapter one, the colonial and apartheid governments endorsed large scale racially discriminatory expropriation of indigenous people's land. As a result, the post-apartheid South African government needed to undo this racially biased dispossession of indigenous people's land. At the very outset, it is imperative to point out that any discussion of the legal framework for land restitution in post-apartheid South Africa begins with a reference to the Constitution.<sup>156</sup> This is because the Interim Constitution provided the legal foundation for the enactment of the RLA while the final Constitution confirmed the property clause which provides for land restitution.

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<sup>152</sup> Ellse B (2013) *Costing Land Restitution 1994-2013* Research Unit, Parliament of the Republic of South Africa, 4.

<sup>153</sup> See Commission on the Restitution of Land Rights annual report 2015/16.

<sup>154</sup> See speech by Minister Gugile Nkwinti <http://www.info.gov.za/speeches/2017/10030311251002.htm> (Accessed 13. 02.2017).

<sup>155</sup> Everingham, M and Jannecke, C (2006) "Land Restitution and Democratic Citizenship in South Africa," *Journal of Southern African Studies*, vol 32(3) p547.

<sup>156</sup> Constitution of the Republic of South Africa, 1996.



Negotiations for the inclusion of a constitutional provision recognising the right to property started in the early 1990s. Commenting on these negotiations, Heinz Klug, an ANC lawyer remarked,

“The ANC constitutional Committee understood constitutionalism as a way both to enshrine rights and to direct State activity towards the achievement of the popular aspirations that infused the struggle against apartheid. However, only in the areas of property and economic rights in the Law Commission’s draft...was emphasis placed on *the recognition of individual and collective entitlements.*”<sup>157</sup>

These negotiations for the recognition of “individual and collective entitlements” in the “area of property” led to the inclusion of section 28 of the Interim Constitution.<sup>158</sup> This provision marked the first formal entrenchment of property entitlements in the country.<sup>159</sup> This interim property clause<sup>160</sup> was both positive and negative.<sup>161</sup> It was positive in that section 28(1) afforded the right for every person to acquire, hold and dispose of property.<sup>162</sup> On the other hand, it was negative in that section 28(2) and (3) dealt with deprivation and expropriation of property respectively.<sup>163</sup> It sought to address the legacy of apartheid where black people were deprived of access and rights to property.<sup>164</sup> The section also aimed to “guarantee general access to the legal institution of property, protect eligibility to acquire and hold rights in immovable property, subjecting to judicial scrutiny State action which arbitrarily denied people access to land”.<sup>165</sup>

In the final Constitution,<sup>166</sup> the property clause is section 25. It provides for restitution or equitable redress of all property lost by anyone after the 19<sup>th</sup> of June 1913 because of racially unfair and “discriminatory laws or practices.”<sup>167</sup> The final Constitution dropped the positive guarantee found in section 28(1) of the Interim Constitution<sup>168</sup> and set out new and elaborate provisions that relate to land restitution. As will be discussed in chapter six and seven, the positive guarantee should not have been dropped. Of course there were elaborate discussions

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<sup>157</sup> Klug H (2000) *Constituting Democracy: Law, Globalism and South Africa’s Political Reconstruction* 91.

<sup>158</sup> S 121 of the Constitution of the Republic of South Africa 200 of 1993.

<sup>159</sup> Van der Walt (1999) *Constitutional Property Clauses* 324.

<sup>160</sup> Van der Walt (1999) 324.

<sup>161</sup> The Interim Constitution provided that all people or communities who were racially deprived or dispossessed of their land qualify for restitution.

<sup>162</sup> Constitution of the Republic of South Africa 200 of 1993 s 28(1).

<sup>163</sup> Constitution of the Republic of South Africa 200 of 1993 s 28(2) and s 28(3).

<sup>164</sup> Chaskalson M “Property” in Stuart Woolman (et al) (2006) (eds), *Constitutional Law of South Africa* 31-6.

<sup>165</sup> Chaskalson M “Property” in Stuart Woolman (et al) (2006) 31-6.

<sup>166</sup> 1996 Constitution of the Republic of South Africa.

<sup>167</sup> S 25(7) 1996 Constitution of the Republic of South Africa.

<sup>168</sup> Chaskalson M “Property” in Stuart Woolman (et al) (2006) 31-6.

regarding whether the property clause should be phrased negatively or positively<sup>169</sup> but this thesis suggests that a positively phrased property is a useful foundation for positively framed land restitution legislation which will in turn make it easier to implement policies that encourage active and productive utilisation of land. The 1996 *White Paper on South African Land Policy* further confirmed the restitution leg of the land reform programme.<sup>170</sup> It reiterates that restitution aims to restore land and provide other restitutionary remedies to all those that were racially dispossessed of their land.<sup>171</sup>

The constitutional provisions of the Interim<sup>172</sup> and Final Constitution<sup>173</sup> set the scene for the enactment of the RLA.<sup>174</sup> In terms of the RLA, there would be a Commission on the Restitution of Land Rights (CRLR) created to investigate land claims.<sup>175</sup> The Act also gave birth to a Land Claims Court whose mandate is to arbitrate claims and “order land to be restored or grant orders for financial compensation”.<sup>176</sup>

Section 25 of the South African Constitution therefore provides the constitutional imperative upon which the land restitution programme should be conducted in South Africa. The RLA on the other hand provides the statutory foundation for land restitution.<sup>177</sup> These two instruments of land restitution were ground-breaking and commendable with regard to addressing the racially discriminatory land deprivations of the apartheid era.

As the RLA was enacted before the final Constitution,<sup>178</sup> it is therefore subject to item 2 of Schedule 6 of the Constitution. This Schedule provides that legislation which existed prior to the Constitution continues to be in force. However, such legislation is subject to (a) any amendment or repeal and (b) consistency with the Constitution.

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<sup>169</sup> See *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) par [70]-[75].

<sup>170</sup> 1997 *White Paper on South African Land Policy*, 4.13.

<sup>171</sup> 1997 *White Paper on South African Land Policy*, 4.13.

<sup>172</sup> S 121.

<sup>173</sup> S 25(7) 1996 Constitution of the Republic of South Africa.

<sup>174</sup> See introduction to the Act.

<sup>175</sup> See chapter 2 of the Act. See also *Tvl Agricultural Union v Minister of Land Affairs* 1996 12 BCLR 1573 (CC); 1997 2 SA 621 (CC).

<sup>176</sup> Preamble and S 4 of the RLA.

<sup>177</sup> Since its inception, the Act has been amended numerous times. In 1995 and 1996, the amendments to the Act focused on the procedure, structure as well as the power of the Land Claims Court. The Act was further amended in 1997 to bring it in line with the Constitution as well as to extend the cut-off date for lodgement of claims. The most interesting amendments were brought about by the Land Restitution and Reform Laws Amendment Act, 1999. These amendments removed the need for a claim to be taken to court where interested parties agreed on how the claim should be finalised. The minister now has the authority to unilaterally settle the claim without it having had to go to court.

<sup>178</sup> The RLA came into effect in 1994 on the 2<sup>nd</sup> of December. The 1996 Constitution of South Africa came, after the Act, on the 4<sup>th</sup> of February 1997.

The long title to the RLA provides that it seeks

“To provide for the restitution of rights in land to persons or communities dispossessed of such rights after 19 June 1913 as a result of past racially discriminatory laws or practices...”<sup>179</sup>

As reaffirmed by the Constitutional Court in *Alexkor and Another v Richtersveld Community*, the Act primarily seeks to reverse the harm that was caused by many years of apartheid rule.<sup>180</sup> In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits*, judge Moseneke also acknowledged the remedial purpose of the Act when he held that the Act seeks to give back land to all those that lost it because of apartheid racially discriminatory laws and practices.<sup>181</sup>

### 2.3 Statutory requirements for restitution of a right in land

Section 2 of the RLA,<sup>182</sup> read together with section 25(7) of the Constitution,<sup>183</sup> outlines so-called threshold requirements that a claimant has to meet in order to qualify for restitution or

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<sup>179</sup> Long title of the RLA.

<sup>180</sup> *Alexkor Ltd and Another v The Richtersveld Community and Others* 2004 (5) SA 460 (CC) (2003 (12) BCLR 1301; [2003] ZACC 18) para 98; See also *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) (2007 (10) BCLR 1027; [2007] ZACC 12) para 42.

<sup>181</sup> *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) (2007 (10) BCLR 1027; [2007] ZACC 12) para 42.

<sup>182</sup> It provides that “A person shall be entitled to restitution of a right in land if –

- a. He or she is a person dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
  - b. It is a deceased estate dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; or
  - c. He or she is the direct descendant of a person referred to in paragraph (a) who has died without lodging a claim and has no ascendant who –
    - i. Is a direct descendant of a person referred to in paragraph (a); and
    - ii. Has lodged a claim for the restitution of a right in land; or
  - d. It is a community or part of a community dispossessed of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices; and
  - e. The claim for such restitution is lodged not later than 31 December 1998.
1. No person shall be entitled to restitution of a right in land if –
    - a. Just and equitable compensation as contemplated in section 25(3) of the Constitution; or
    - b. Any other consideration which is just and equitable, calculated at the time of any dispossession of such right, was received in respect of such dispossession.
  2. If a natural person dies after lodging a claim but before the claim is finalised and-
    - a. leaves a will by which the right or equitable redress claimed has been disposed of, the executor of the deceased estate, in his or her capacity as the representative of the estate, alone or, failing the executor, the heirs of the deceased alone; or
    - b. does not leave a will contemplated in para (a), the direct descendants alone may be substituted as claimant or claimants.

If there is more than one direct descendant who have lodged claims for and are entitled to restitution, the right or equitable redress in question shall be divided not according to the number of individuals but by lines of succession.”

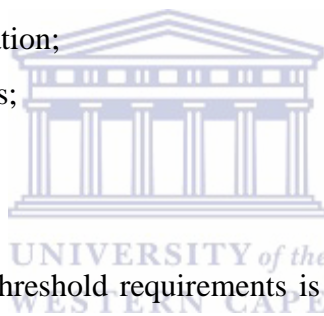
<sup>183</sup> Section 25(7) of the South African Constitution provides that “A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act or Parliament, either to restitution of that property, or to equitable redress.”

equitable redress. These threshold requirements,<sup>184</sup> provide individuals and communities who suffered racially based land deprivations, the right to have their land restituted and or where this is not possible, be equitably redressed for their loss.<sup>185</sup>

The Interim Constitution provided a “less focused and less reform centred approach.”<sup>186</sup> The final Constitution on the other hand provides for a “more reform-centred and more expansive land reform programme” in its section 25.<sup>187</sup> The final Constitution neither refers to direct descendants nor to the apportionment of restitution proceeds.<sup>188</sup> The RLA expanded the beneficiaries to include descendants of dispossessed people.<sup>189</sup>

The process of claiming for restitution of a right in land in terms of the Act can be divided broadly into six phases.<sup>190</sup> Pienaar summarises these as –

- a. Lodgement and registration;
- b. Screening and categorisation;
- c. Determination of qualification;
- d. Preparation of negotiations;
- e. Negotiations; and
- f. Implementation.



An individual analysis of these threshold requirements is necessary in order to provide the platform for identifying the shortcomings of the restitution process.

### 2.3.1 Person or community

Whereas the RLA refers to “a person”,<sup>191</sup> the Constitution refers to “a person or a community”<sup>192</sup> as qualifying for restitution of land that was lost as a result of apartheid racially discriminatory practices. Southwood gives more detail regarding what “person” or “community” in the context of the Act means.<sup>193</sup> For present purposes, it suffices to say that

<sup>184</sup> Badenhorst PJ, Pienaar JM and Mostert H (2006) *Silberberg and Schoeman’s The Law of Property* 5<sup>th</sup> ed footnote 504.

<sup>185</sup> Van der Walt AJ (2005) *Constitutional Property Law* 289.

<sup>186</sup> Pienaar J.M (2014) *Land Reform* 167.

<sup>187</sup> Pienaar J.M (2014) 167.

<sup>188</sup> *Former Highlands Residents Re: Area formerly known as The Highlands (now Newlands Extension 2) Pretoria In Re: Sonny v Department of Land Affairs* (LCC116/98) [1999] ZALCC 65 (30 November 1999) para [8].

<sup>189</sup> See s 2 (1) (c).

<sup>190</sup> Pienaar J.M (2014) 527. See also the exposition given in the *Restitution Implementation Manual* (2010) 24.

<sup>191</sup> S 2 of the RLA.

<sup>192</sup> S 25(7).

<sup>193</sup> Southwood MF (2000) *The Compulsory Acquisition of Rights* 244 – 245.

both natural and juristic persons can qualify for land restitution. According to section 2(1) (c) of the Act, a direct descendant of a person who would have qualified but died before or without lodging a claim, also qualifies.

The reference to “community” in the Constitution presents problems because numerous scholars ascribe various definitions to it in diverse contexts.<sup>194</sup> A very brief engagement with some of the diverse scholarly views on the term follows to illustrate the problem.

The first reference to what “community” is, is made by scholars such as Selznick<sup>195</sup> and Bernard.<sup>196</sup> They refer to community as a group of people in a specific geographical area that share a “common locality.” This understanding of “community” ignores the aspect of “shared social behavioural characteristics” that is found in the definitions of the term by others. Dikeni et al uses the term “community” by referring to persons who live in a “common locality.”<sup>197</sup> Kepe argues that it does not matter what definition is ascribed to the concept of community. What matters is the “spatial unit approach” to defining the term.<sup>198</sup> Kepe’s approach is popular particularly in developmental initiatives for rural areas in South Africa.<sup>199</sup> This approach is persuasive in that restitution of land cannot be detached from the spatial characteristic of a community. It is not necessary to elaborate further on this spatial aspect of a community as Kepe does this comprehensively in her work.<sup>200</sup>

A further view of the concept emphasises the idea of an “economic unit.”<sup>201</sup> Such a definition of a community does not regard geographical location or any other ties.<sup>202</sup> It only regards the

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<sup>194</sup> See Bernard J (1973) *The sociology of community*; Cousins B (1989) Community, class and grazing management in Zimbabwe's communal lands. In Cousins B (Ed), *People, land and livestock*. Proceedings of a workshop on the socio-economic dimensions of livestock production in communal lands of Zimbabwe. Centre for Applied Social Sciences (1975) *The community*, 3rd ed; Selznick P (1996) *In search of community* in Vitek, W & Jackson W (Eds), *Rooted in the land: essays on community and place*; McClain, R & Jones E (1997) Challenging 'community' definitions in sustainable natural resource management: the case of wild mushroom harvesting in the USA. *Gate Keeper Series No 68*; Booth Fowler R (1991) *The dance with community: the contemporary debate in American political thought*.

<sup>195</sup> Selznick P (1996) “In search of community” In Vitek, W & Jackson, W (Eds), *Rooted in the land: essays on community and place*.

<sup>196</sup> Bernard J (1973) *The sociology of community*.

<sup>197</sup> Dikeni L, Moorhead R & Scoones I (1996) *Land use and environmental policy in the rangelands of South Africa: case studies from the Free State and Northern Province*. Working Paper No 38.

<sup>198</sup> Thembela Kepe (1999) “The problem of defining ‘community’: Challenges for the land reform programme in rural South Africa” *Development Southern Africa*, 419.

<sup>199</sup> Thembela Kepe (1999) 419.

<sup>200</sup> Thembela Kepe (1999) 418-420.

<sup>201</sup> Dikeni L, Moorhead R & Scoones I (1996) *Land use and environmental policy in the rangelands of South Africa: case studies from the Free State and Northern Province*. Working Paper No 38. Johannesburg: Land and Agricultural Policy Centre; International Institute For Environment And Development (IIED), (1994) *Whose Eden? An overview of community approaches to wildlife management*.

<sup>202</sup> Thembela Kepe (1999) 420.

practice of similar activities for economic purposes. So for example, people who practise shared economic activities for a living can be rightfully referred to as a community.<sup>203</sup> As an illustration, all farmers in South Africa can be referred to as belonging to a farming community by virtue of their practice of, and interest in farming as an economic activity from which they derive their livelihoods.

A widespread definition is the reference to a community as a “web of kinship, social and cultural relations.”<sup>204</sup> Such a definition would include people who share customs, beliefs, history and also have blood relations. This is regardless of the people’s geographic location or economic activities. Emphasis is placed on blood relations, social beliefs, similar morals, customs and history.

In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*<sup>205</sup> the Court engaged the notion of a community substantively. The Court initially used the definition of a community as given in section 1 of the RLA where emphasis is on a group of people who share rights in land held in common with shared rules that determine how a member of the group can access such land. The Court also made use of the explanation of community as given in *Kranspoort*.<sup>206</sup> In the latter case, Dodson J held that in determining whether a group of people are a community or not for purposes of land restitution, those people must show sufficient cohesiveness as a group as well as an element of commonality between the group members.<sup>207</sup> Further, the court held that the concept of a community should not be limited to a tribal identity and hierarchy.<sup>208</sup>

In light of these assorted opinions of what a community is, the law makers made things easy by being specific with regard to what a “community” for purposes of restitution refers to.<sup>209</sup>

In terms of the RLA, a community refers to “any group of persons whose rights in land are derived from shared rules determining access to land held in common by members of the

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<sup>203</sup> Thembela Kepe (1999) 420; Dikeni L, Moorhead R & Scoones, I (1996) *Land use and environmental policy in the rangelands of South Africa: case studies from the Free State and Northern Province*. Working Paper No 38. Johannesburg: Land and Agricultural Policy Centre; International Institute For Environment And Development (IIED), (1994) *Whose Eden? An overview of community approaches to wildlife management*. London: IIED.

<sup>204</sup> Thembela Kepe (1999) 421.

<sup>205</sup> 2007 (6) SA 199 (CC), para 33-47.

<sup>206</sup> See para 2.3.2 and 6.2.2.ii.

<sup>207</sup> 2000 (2) SA 124 (LCC) para 83.

<sup>208</sup> Para 40 and 43.

<sup>209</sup> See also *Department of Land Affairs, Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC), para 33 - 45.

group, and includes part of the group.”<sup>210</sup> In a way, by being so specific, the RLA does try to address some of the potential problems that may arise as a result of the term.

Despite this specificity however, problems still do pop up over the term and these include conflicts regarding who belongs to which group. Different groups sometimes bring claims for restitution of one piece of land, each arguing that it is the rightful community that was dispossessed.<sup>211</sup>

A community qualifies to claim restitution in terms of the RLA even where that community is no longer intact or even in cases where its members are no longer all living together as a community.<sup>212</sup> This was espoused in *Ndebele-Ndzundza Community v Farm Kafferskraal*<sup>213</sup> where the court held that “members still constituted a community even though they were scattered over a broad area and that there was no admission of new members.”<sup>214</sup>

### 2.3.2 Dispossession

Only persons who were dispossessed of their land can qualify for restitution of their land under the land restitution programme.<sup>215</sup> The RLA does not define what “dispossession” means.<sup>216</sup> However, an indication of what the term means in terms of the RLA can be obtained from the court’s ruling in *Ndebele-Ndzundza Community v Farm Kafferskraal N.O.* In this case, the court referred to dispossession as,

“The cumulative effect of these racially discriminatory laws and practices, which over a period of time eroded the rights of the claimant to the farm, directly or indirectly induced the claimant to vacate the farm.”

It is not necessary for the claimants to prove that they were physically dispossessed of their land or forcefully removed from it.<sup>217</sup> There only needs to be a causal connection between the

<sup>210</sup> Badenhorst PJ, Pienaar JM and Mostert H (2006) *Silberberg and Schoeman’s The Law of Property* 5th ed 631; *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LCC) 1330A-B; see also *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC), para 42.

<sup>211</sup> See for example the case of *Ndebele-Ndzundza Community v Farm Kafferskraal* NO 181 JS 2003 (5) SA 375 (LCC).

<sup>212</sup> *Macleantown Residents Association: Re Certain Erven and Commonage in Macleantown* (LCC12/1996) [1996] ZALCC 3 (4 July 1996).

<sup>213</sup> NO 181 JS 2003 (5) SA 375 (LCC) paras [6] – [18] at 380B – 389C; see also Badenhorst PJ, Pienaar JM and Mostert H (2006) *Silberberg and Schoeman’s The Law of Property* 5<sup>th</sup> ed 631; Van der Walt AJ (2005) *Constitutional Property Law* 291.

<sup>214</sup> See para [17]; See also *Kranspoort Community* 2002 (2) SA 124 (LCC) para [22], [31] – [48].

<sup>215</sup> See section 25(7) and section 2 of the Act.

<sup>216</sup> See also *Abrams v Allie N.O. and Others* 2004 (4) SA 534 (SCA) para [11].

<sup>217</sup> Van der Walt AJ (2005) *Constitutional Property Law* 291; *Abrams v Allie* 2004 (4) SA 534 (SCA) para 11; *Botha Family Trust v The Ndebele-Ndzundza and Others* (SCA 106/2004).

dispossession of the land and the racially discriminatory legislation.<sup>218</sup> In *Kranspoort Community*,<sup>219</sup> the court emphasised that actual physical dispossession of property was not necessary. In *Abrams v Allie N.O. and Others*, the court held that dispossession simply required there to be “an element of compulsion which induced the alienation of the property without which the land owner would not have parted with his property.”<sup>220</sup> In *Alexkor*, the Constitutional Court expressed dispossession by stating that

“The concept of dispossession in section 25(7) of the Constitution and in section 2 of the Act is not concerned with the technical question of the transfer of ownership from one entity to another. It is a much broader concept than that, given the wide definition of a “right in land” in the Act.”<sup>221</sup>

From this statement by the Constitutional Court, one can deduce that dispossession is a substantive question which enquires whether loss of possession occurred as a result of pressure from outside or not. If indeed possession of land was lost as a result of outside pressure, the next enquiry relates to whether that pressure was a result of racially discriminatory law or practice. If the answer is affirmative, then dispossession is deemed to have occurred.

The court held in *Ndebele-Ndzundza Community v The Farms Kafferskraal no 181 JS*,<sup>222</sup> that dispossession is deemed to have occurred even in instances where a person was indirectly influenced to move. For example, in *Ex parte Pillay*<sup>223</sup> an individual sold his property because in two years’ time, the area in which the property was located was going to be declared a whites only area. The court decided that racially motivated dispossession had occurred because there was an element of compulsion, albeit indirect.

Dispossession is also deemed to have occurred where a person was prevented from inheriting land because of racially discriminatory practices.<sup>224</sup> A person’s right to inherit land falls within the ambit of the Act’s concept of right in land for purposes of restitution.<sup>225</sup>

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<sup>218</sup> Southwood MF (2000) *The Compulsory Acquisition of Rights* 244 – 245; see also *In Re Macleantown Residents Association* 1996 (4) 1272 (LCC) 1280D.

<sup>219</sup> *In re Kranspoort Community* 2002 (2) SA 124 (LCC) paras [52] – [69] at 156 F-162F.

<sup>220</sup> 2004 (4) SA 534 (SCA) para [11].

<sup>221</sup> *Richtersveld Community v Alexkor Ltd* 2003 (6) BCLR 538 (SCA).

<sup>222</sup> LCC 3/00, para [21].

<sup>223</sup> LCC 1/99.

<sup>224</sup> *Dulabh and Another v The Department of Land Affairs*, 1997 (4) SA 1108 (LCC) Par 31 at 1120 C-E; Van der Walt AJ (2005) *Constitutional Property Law* 292.

<sup>225</sup> Van der Walt AJ (2005) *Constitutional Property Law* 293; *Dulabh and Another Re: Erf 1687 King William's Town* (LCC14/96) [1997] ZALCC 1 (16 April 1997) para [26] – [27].



### 2.3.3 A right in land

The RLA refers to the dispossession of a “right in land” whereas the Constitution refers to the dispossession of “property.” For purposes of this section, “land” and “property” will be used interchangeably. In section 1, the RLA defines this “right in land” as

“any right in land whether registered or unregistered, and may include the interest of a labour tenant and sharecropper, a customary law interest, the interest of a beneficiary under a trust arrangement and beneficial occupation for a continuous period of not less than 10 years prior to the dispossession in question.”

This broad definition of the “right in land” allows a broad category of persons who were affected by apartheid and colonial era racial land deprivations to claim for restitution of their land. In *Richtersveld*<sup>226</sup> the court held that “a customary law interest in land that survived annexation by a colonial power qualified as a right in land for purposes of the Act, even if that right involved no more than seasonal, sparse and intermittent use of the land.”<sup>227</sup>

To claim for restitution under “beneficial occupation”, a claimant has to prove that they derived some benefit from their occupation of the land in question.<sup>228</sup> The community in the *Kranspoort*<sup>229</sup> case successfully claimed restitution of land belonging to the Dutch Reformed Church because they had always been allowed to use the land for their benefit and they administered it using their traditional systems. The Group Areas Act<sup>230</sup> had dispossessed the community of their right to use and benefit from the land and the court held that beneficial dispossession had occurred.<sup>231</sup> As a result, the community was entitled to restitution in terms of the Act.

In *Richtersveld*,<sup>232</sup> the Court held that the Richtersveld community held rights that were similar to common law rights of ownership and they constituted a “customary law interest.”<sup>233</sup> In this regard, the court held that the character of the community’s title to the land was a

“... right of communal ownership under indigenous law. The content of the right included the right to exclusive occupation and use of the subject land by members of the community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit

<sup>226</sup> *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 24 at 117 E-J.

<sup>227</sup> Van der Walt AJ (2005) *Constitutional Property Law* 293; See also *Richtersveld Community and Others v Alexkor Ltd and Another* 2003 (6) SA 104 (SCA) para 24 at 117 E-J.

<sup>228</sup> *Richtersveld Community v Alexkor Ltd* 2001 (3) SA 1293 (LCC) at 1321F-1322E; *Ndebele-Ndzundza Community v The Farm Kafferskraal no 181 JS* (LCC 3/100).

<sup>229</sup> *Kranspoort Community In re: The Farm Kranspoort 48 LS* (LCC 26/98) paras [46] – [69].

<sup>230</sup> 41 of 1950.

<sup>231</sup> *Kranspoort Community In re: The Farm Kranspoort 48 LS* (LCC 26/98).

<sup>232</sup> *Richtersveld Community v Alexkor Ltd* 2003 (6) BCLR 538 (SCA).

<sup>233</sup> Paras [28]–[29].

its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld Community had a right of ownership in the subject land under indigenous law.<sup>234</sup>

### 2.3.4 After 19 June 1913

The land restitution process only gives redress to persons who were dispossessed of their land after the 19<sup>th</sup> of June 1913.<sup>235</sup> This is the date when the Black Land Act 27 of 1913 was enacted into law. In *Alexkor Ltd and Another v The Richtersveld Community and Others*<sup>236</sup> the court held that a restitution case could be effectively disposed of on the assumption, without deciding the issue, that the relevant provisions of the Act did not have retrospective effect before the 19<sup>th</sup> of June 1913.<sup>237</sup> This date excludes claims arising from actions of the pre-19 June 1913 colonial governments.

### 2.3.5 Racially discriminatory laws or practices

Claimants must have been dispossessed of their land as a result of racially discriminatory laws or practices.<sup>238</sup> Badenhorst asserts that “for purposes of the Act, the dispossession suffered must have been both the *factual* and *legal* result of a discriminatory law or practice.”<sup>239</sup> The applicants in *Boltman v Kotze Community Trust*<sup>240</sup> had their restitution claim rejected because, although they had been dispossessed of their property, the dispossession had not been racially motivated. The court held that the subdivision that led to their dispossession had been racially neutral acts.<sup>241</sup> In *Minister of Land Affairs v Slamdien*,<sup>242</sup> the issue was whether the dispossession of land for the establishment of a coloured school constituted dispossession for purposes of the Act. The court held that the dispossession should be directly or indirectly aimed at curbing the exercise of land rights.<sup>243</sup> The court further stated, that “this was not the type of racially discriminatory practice which was contemplated in section 2(1) (a) of the Act.” The dispossession must have been as a result of the Group Areas Act.<sup>244</sup> There must be a causal connection between a person’s

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<sup>234</sup> Para [62].

<sup>235</sup> There are discussions over whether or not this year/date should be revised backwards.

<sup>236</sup> 2004 (5) SA 460 (CC) para [37] at 475C-D.

<sup>237</sup> See also Van der Walt AJ (2005) *Constitutional Property Law* 293.

<sup>238</sup> *Department of Land Affairs, Popela Community and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC) para 67-69.

<sup>239</sup> Badenhorst PJ, Pienaar JM and Mostert H (2006) 635.

<sup>240</sup> (LCC5/99).

<sup>241</sup> pars [28]–[29].

<sup>242</sup> 1999 (4) BCLR 413 (LCC).

<sup>243</sup> Para [33].

<sup>244</sup> Para [41].

dispossession of land and the unfair discriminatory legislation.<sup>245</sup> In *Department of Land Affairs and Others v Goedgelegen Tropical Fruits*, the Court held that another way of determining a causal connection between dispossession and unfair legislation is to rely on the “but for” test.<sup>246</sup> This test asks whether “but for the act or omission labelled as the possible cause, the result would have occurred.”<sup>247</sup> All dispossessions which had not been as a result of laws or practices intended to divide South Africa into separate racial groups did not qualify for purposes of the Act.<sup>248</sup>

### 2.3.6 Did not receive compensation

Section 2(a) and (b) of the Act prohibits restitution for any person who received “just and equitable compensation” or “any other consideration which is just and equitable, calculated at the time of any dispossession of such right, received in respect of such dispossession.”<sup>249</sup> This position was reaffirmed in *Harvey v Umhlatuze Municipality and Others*.<sup>250</sup> Claimants who had received compensation can file for restitution where they can prove that the compensation that they received was neither just nor reasonable.<sup>251</sup> In *Hermanus v Department of Land Affairs*<sup>252</sup> the claimant, Mr R E Hermanus, sought additional restitutionary compensation from the Department of Land Affairs. The claimant had been forced to sell his property in terms of the Group Areas Act. While the market value of his property was R 5 500, he was forced to sell it for R3 760. This was R1 740 less than the property’s market value. He successfully brought and was granted a restitution claim for the difference between what he was forced to sell his property for and its market value. In *Haakdoornbult Boerdery CC and Others v Mphela and Others*, the court held that a person who was fairly compensated for their loss should not be compensated again.<sup>253</sup> This would unjustly enrich him.

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<sup>245</sup> *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC), para 50.

<sup>246</sup> See also *Boltman v Kotze Community Trust* [1999] JOL 5230 (LCC); *Minister of Land Affairs and Another v Slamdien and Others* 1999 (4) BCLR 413 (LCC); [1999] 1 All SA 608 (LCC) at paras 37-38; *In Re Former Highlands Residents: Naidoo v Department of Land Affairs* 2000 (2) SA 365 (LCC) at 368G-369C.

<sup>247</sup> *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* 2007 (6) SA 199 (CC), para 50.

<sup>248</sup> *Richtersveld Community v Alexkor Ltd*, 1338D-H; Badenhorst PJ, Pienaar JM and Mostert H (2006) 636.

<sup>249</sup> See also *Florence v Government of the Republic of South Africa* (CCT 127/13) [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) (26 August 2014), para 132.

<sup>250</sup> 2011 (1) SA 601 (KZP), para 135.

<sup>251</sup> *Hermanus v Department of Land Affairs*, (LCC39/98) [2000] ZALCC 38 (15 September 2000).

<sup>252</sup> (LCC39/98) [2000] ZALCC 38 (15 September 2000).

<sup>253</sup> 2007 (5) SA 596 (SCA) para 48.

In *Florence v Government of the Republic of South Africa*<sup>254</sup> the court addressed the issue of financial compensation for loss of land as a result of unfair discriminatory practices. In this case, the court had to decide on two issues relating to compensation. The first one was whether, when a court makes an award of equitable redress in the form of financial compensation under the RLA, the Consumer Price Index is an appropriate metric to calculate “changes over time in the value of money.” The second issue was whether the Land Claims Court had the power to make an order directing the state to pay for a memorial plaque the applicant wanted erected on the subject property. This plaque would form part of equitable redress awarded to the applicant for the hurt her family suffered when they were dispossessed of their home under past racially-discriminatory laws. The latter issue is not relevant for the present context so it will not be addressed.

Regarding the first issue, the court held that the amount of compensation has to be just and equitable reflecting a fair balance between public interest and the interest of those affected after considering relevant circumstances listed in section 33 of the Restitution Act.<sup>255</sup> Further, the court held that fair compensation is not necessarily equal to the monetary value of the dispossessed property and restitution has little or nothing to do with investing or commercial transactions.<sup>256</sup> It has to do with addressing enormous social and historical injustice.<sup>257</sup> Beyond a mere calculation of financial loss, a court must have regard to several non-financial considerations listed in section 33 of the Restitution Act.<sup>258</sup> It is also important to note that compensation in terms of the RLA is neither punitive nor retributive.<sup>259</sup> It should also not be likened to a delictual claim which awards damages that can be calculated with precision.<sup>260</sup> Compensation for loss of land as envisaged in the RLA is a constitutionalised scheme paid out of public funds in order to find equitable redress to a tragic past.<sup>261</sup> The court further held that what is ultimately just and equitable compensation should “be evaluated not only from the perspective of the claimant but also of the State as the custodian of the national fiscus and the broad interests of society as well as all those who might be affected by the order made.”<sup>262</sup>

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<sup>254</sup> (CCT 127/13) [2014] ZACC 22; 2014 (6) SA 456 (CC); 2014 (10) BCLR 1137 (CC) (26 August 2014).

<sup>255</sup> Para 124.

<sup>256</sup> Para 137.

<sup>257</sup> Para 137.

<sup>258</sup> Para 137.

<sup>259</sup> Para 125.

<sup>260</sup> Para 125.

<sup>261</sup> Para 125.

<sup>262</sup> Para 125.

Financial loss is also compensated as at the time of dispossession and “not based on the fiction of continued ownership of the property.”<sup>263</sup>

## 2.4 Overview of the land restitution process

Where a person/community meets the above threshold requirements, they can invoke the process of restitution for their lost land in terms of the RLA. In its introduction, the RLA reaffirms its aim of providing for restitution of land to all persons who were dispossessed of their land rights by past colonial/apartheid discriminatory practices. The Act also confirms the constitutional context in which land restitution will be carried out. In chapter 2, the Act establishes a Commission on Restitution of Land Rights which will assist with handling claims for restitution. The Act outlines procedures that a claimant has to follow in order to lodge a claim with the Commission.<sup>264</sup> Where a person meets the requirements of section 2, they can lodge a claim for restitution with the Commission in terms of section 10.<sup>265</sup> In the claim, a person is required to describe the land being claimed and the nature of the right in land for which restitution is being claimed.<sup>266</sup> The claim should not be “frivolous or vexatious” and it should be lodged in the manner proposed in the Act.<sup>267</sup> The Commission investigates, mediates and attends to all issues relating to the claim.<sup>268</sup>

Section 12, 13 and 14 of the Act provides that the Commission’s role is investigative, mediatory as well as facilitative. The Commission’s main purpose is to manage the procedure for land restitution.<sup>269</sup> Section 6(1)(a) of the Act provides that the Commission is the first port of call for any claimant who seeks restitution of their land. In terms of section 6(2)(e) of the Act, the Commission may do anything that relates to or is “incidental to the expeditious finalisation of claims.” The Commission is mandated by the Act in section 6(1)(c), to assist any claimant with preparing anything relating to making a claim for their land. Where claimants do not qualify for restitution of their land, the Commission may give advice to the

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<sup>263</sup> Para 133.

<sup>264</sup> S 10; See also *Farjas (Pty) Ltd v Regional Land Claims Commissioner, KwaZulu Natal* 1998 (2) SA 900 (LCC) at 907C.

<sup>265</sup> Before the claim is ultimately settled, it goes through a number of phases. Phase one is the Lodgement and registration phase. The second phase screens and categorises the claim. Phase three determines qualification for restitution in terms of section 2. The fourth phase prepares for negotiations where there are disputes arising out of the claim. Phase five is the negotiation phase while phase six implements the claim if it is successful.

<sup>266</sup> S 10(1).

<sup>267</sup> S 11.

<sup>268</sup> S 6 (1)(cA) and (cB).

<sup>269</sup> See s 6 of the RLA; Carey-Miller D L & Pope A (2000) *Land Title in South Africa* 240-341.

minister regarding the most suitable relief under the circumstances.<sup>270</sup> The Act envisages that claims which affect a “substantial number of persons” should be given priority.<sup>271</sup>

The Act also gives the Commission extensive powers of investigating claims.<sup>272</sup> In this respect, the Commission may delegate any of its members, the duty to investigate and also validate all claims that relate to the Commission.<sup>273</sup> Where there are many parties claiming the same land, the Commission is given the power to mediate between the parties.<sup>274</sup> In this respect, the Commission is the first stop of adjudication where it will seek to resolve an impasse over land in a non-confrontational manner.<sup>275</sup>

In the event that mediation and negotiation do not resolve the impasse between parties interested in the same land, the matter is referred to the Land Claims Court (LCC).<sup>276</sup> A matter may be referred to the LCC where parties agree in writing that it is impossible to resolve the dispute through mediation and negotiation.<sup>277</sup> The matter may also be referred to the LCC where the regional land claims commissioner concedes that it is impossible to resolve the impasse by mediation and negotiation, or where the matter is deemed to be ready to be heard by the LCC.<sup>278</sup> Section 14 (3)(A) outlines other reasons which may lead to the matter being referred to the LCC. These include questions of law arising out of the agreement, doubt regarding the validity of the parties’ agreement, vague or contradictory agreements as well as “any other good reason.”

The LCC has the same status as the High Court.<sup>279</sup> It can hear matters at a national level.<sup>280</sup> The LCC can preside over any matters relating to land reform, including determining the appropriateness of compensation for land.<sup>281</sup> It is similar to a provincial division of the High Court in civil proceedings.<sup>282</sup> Initially, the power of the LCC was limited only to restitution claims brought to the court in terms of sections 121 – 123 of the interim Constitution. However, its jurisdiction was extended by sections 29 and 32 of the Land Reform (Labour

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<sup>270</sup> S 6(2) (b).

<sup>271</sup> S 2(d).

<sup>272</sup> S 12.

<sup>273</sup> S 6(2) and (3).

<sup>274</sup> S 13.

<sup>275</sup> Mostert H (2002) “Land Restitution, Social Justice and Development in South Africa” 119 *SALJ*, 414.

<sup>276</sup> S 14.

<sup>277</sup> S 13(1)(a).

<sup>278</sup> S 14(b).

<sup>279</sup> S 22 (2)(a).

<sup>280</sup> S 22 (2).

<sup>281</sup> S 22.

<sup>282</sup> S 22(2).

Tenants) Act.<sup>283</sup> The extension of the powers of the LCC includes all disputes that arise out of the Land Reform Act.<sup>284</sup> The Extension of Security of Tenure Act<sup>285</sup> also extended the jurisdiction of the LCC to include matters dealing with security of tenure in rural areas. Generally, the LCC compliments the Commission.<sup>286</sup> The court usually hears those disputes which could not be resolved administratively in the Commission.

There are several different orders that the LCC can make regarding a claim. These potential orders are outlined in section 35 and they include restoration of land, payment of compensation as well as granting of alternative relief.<sup>287</sup> In terms of section 35(1)(a)-(e), in instances where the land is owned by the State, the court may order (a) restoration of that land, (b) granting of alternative relief, (c) payment of compensation or (d), grant the claimant alternative land. In deciding on the right order to make, the court will consider certain factors in terms of section 33 of the Act. These factors include the desirability of providing restitution, the requirements of equity and justice, the feasibility of restoration, and the desirability of avoiding a major social disruption, among others.

## 2.5 Evaluative overview of the land restitution programme

It is undeniable that the land restitution programme has been a positive step towards redressing the unjust land dispossession suffered by many black indigenous people.<sup>288</sup> People whose land was taken away because of unjust pre-democratic era laws expected to have restitution of their land. The right to restitution has a “moral weight.”<sup>289</sup> It is claimed because the claimant was aggrieved and suffers the memory of that grievance.<sup>290</sup> According to Fay and James, “those that unjustly experienced a loss of material, territorial basis of identity and livelihood” are entitled to redress through restitution of their land.<sup>291</sup> Since its inception in 1995, the programme has awarded as much as 3 million hectares of land through restitution.<sup>292</sup> Between 1 April 2012 and 31 March 2013 alone, the programme had returned

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<sup>283</sup> Act 3 of 1996.

<sup>284</sup> Act 3 of 1996.

<sup>285</sup> Act 62 of 1997.

<sup>286</sup> Carey-Miller & Pope (2000) *Land Title in South Africa* 368.

<sup>287</sup> See also *Farjas Pty Ltd v Land Claims Commissioner, Kwa Zulu Natal* 1998 (2) SA 900 (LCC); Mostert H (2002) “Land Restitution, Social Justice and Development in South Africa” 119 *SALJ*, 417-418.

<sup>288</sup> Hall R (2004) “Land Restitution in South Africa: Rights, Development, and the Restrained State” *Canadian Journal of African Studies* Vol.38, No. 3, pp. 654-671 at 655; Mngxitama A (2005) 36 – 82; T Roux (2004) “Pro poor court, anti-poor outcomes: Explaining the performance of the South African Land Claims Court” 20 *SAJHR* 522.

<sup>289</sup> Fay D and James D, (2009) “Restoring what was ours” (eds) *The Rights and Wrongs of Land Restitution* 4.

<sup>290</sup> Fay D and James D, (2009) 4.

<sup>291</sup> Fay D and James D, (2009) 4.

<sup>292</sup> Commission on Restitution of Land Rights, 2012-2013 Annual Report, p6.

land to 111,278 people.<sup>293</sup> During this time, the department out-performed itself by settling 602 claims against a target of 133 claims.<sup>294</sup> The process also finalised 376 outstanding claims against a target of 380.<sup>295</sup> In the 2015/16 reporting period, 617 claims were settled against a target of 463.<sup>296</sup> Further, 560 claims were finalised against a target of 373.<sup>297</sup>

However, despite this phenomenal and numerically based success in returning land to those who were forced to lose it, the process has not entirely produced the desired results.<sup>298</sup> It has failed to improve the livelihoods of the beneficiaries and also failed to be a means through which jobs are created, food security is achieved and through which the economy of rural South Africa is transformed.<sup>299</sup> Of course not everyone agrees that land restitution in South Africa has been a failure and this thesis does not argue that land restitution was a complete failure. There are some successful examples of land restitution. Scholars such as Bertus De Villiers and Marlize Van Den Berg argue that there are notable land restitution success narratives.<sup>300</sup> They contend that it is unfortunate that focus is only given to the failures of the process while little attention is given to the triumphs of land restitution.<sup>301</sup> More scholars such as Aliber<sup>302</sup> also advocate for more focus to be placed on examples of successful land restitution projects. Interestingly though, while they point to the success narratives of land reform as examples,<sup>303</sup> they do not deny that the successes of the process are outweighed by the failures of the process.

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<sup>293</sup> Commission on Restitution of Land Rights, 2012-2013 Annual Report, p9.

<sup>294</sup> Commission on Restitution of Land Rights, 2012-2013 Annual Report, p9.

<sup>295</sup> Commission on Restitution of Land Rights, 2012-2013 Annual Report, p9.

<sup>296</sup> Commission on Restitution of Land Rights, 2015-2016 Annual Report, p20.

<sup>297</sup> Commission on Restitution of Land Rights, 2015-2016 Annual Report, p20.

<sup>298</sup> Walker C (2008) *Landmarked – Land Claims and Land Restitution in South Africa*. 198; Greenberg, S (2004) *The Landless People's Movement and the Failure of Post-Apartheid Land Reform*; James, D *Gaining Ground: Rights and Property in South African Land Reform* 90; Kleinbooi, K (2009) *Umhlaba Wethu 7: A PLAAS bulletin tracking Land Reform in South Africa*.; Hall R and Ntsebeza L (2007) 3; Lahiff, E (2008) 'Land Reform in South Africa: A Status Report. Programme for Land and Agrarian Studies.' *Research Report No. 38* 1; Minister of Rural Development and Land Reform Mr Nkwinti, G (2010) in a Speech Presented to the National Council of Provinces on the occasion of the Debate on the Policy Vote 32 on the 25<sup>th</sup> of March 2010 online at [http://www.ruraldevelopment.gov.za/DLA-Internet/content/document\\_pages/Ministry\\_Speeches\\_M\\_Latest.jsp](http://www.ruraldevelopment.gov.za/DLA-Internet/content/document_pages/Ministry_Speeches_M_Latest.jsp) (Accessed 13.06.2010).

<sup>299</sup> There are a few success stories but these are quite a drop in the ocean compared to the failure narratives.

<sup>300</sup> Bertus De Villiers and Marlize Van Den Berg (2006) *Land reform: Trailblazers Seven successful case studies*.

<sup>301</sup> Bertus De Villiers and Marlize Van Den Berg (2006) 2.

<sup>302</sup> Aliber M (et al) (2013) *Livelihoods after Land Reform: Trajectories of Change in Limpopo Province South Africa*.

<sup>303</sup> Bertus De Villiers and Marlize Van Den Berg (2006); see also Umhlaba Rural Service 2008, "A Review of LRAD Project Performance (2001 – 2006)," Report commissioned by the Department of Land Affairs.



The failures that confront the land restitution programme are fundamental and reach to the fabric of the rural South African society.<sup>304</sup> This is despite broad consensus in the government and civic organizations on the need for a restitution process that fosters development and promotes job creation as well as a vibrant rural economy.<sup>305</sup> Almost since its beginning, the programme has faced relentless criticism for failing to reach its targets of redistribution of wealth and opportunities, and contributing to economic growth.<sup>306</sup> The failure to achieve intended restitution goals is linked to the government's approach to the restitution process which results in land merely being "parcelled out" to landless black people.<sup>307</sup> Little attention is given to empowering the beneficiaries with critical skills for working the land.<sup>308</sup> A closer analysis of the Rural Development and Land Reform annual reports, since 1995, shows that the focus is only on *how many* hectares have been restituted or *how many* claims have been settled, as opposed to whether the beneficiaries' livelihoods have actually been improved.

This particular focus has resulted in thousands of once productive farms being given to beneficiaries who are not using them.<sup>309</sup> This has happened at the expense of a well-planned and calculated land restitution process that gives the beneficiaries skills for working the land. The focus on transferring *specific quantities* of land while the new landowners lack support for productive use of land has led to an even bigger problem, namely farm failures.<sup>310</sup> Beneficiaries of the land restitution programme have not received adequate post-settlement support and their livelihoods have not improved.<sup>311</sup>

This non- or sub-optimal use of arable restitution farm land is a situation that needs urgent attention in the context of food security, economic growth and job creation.<sup>312</sup> The minister responsible for land reform, Mr Gugile Nkwinti, conceded that as much as 90% of formerly

<sup>304</sup> Hall R (2004) 654-671 at 655.

<sup>305</sup> See chapter six of the NDP; 2011 *Green Paper on Land Reform* sections 3, 4 and 6; Walker C (2008) 198.

<sup>306</sup> Lahiff E (2008) 'Land Reform in South Africa: A Status Report. Programme for Land and Agrarian Studies.' *Research Report No. 38*, 1.

<sup>307</sup> Minister of Rural Development and Land Reform Mr Nkwinti, G (2010) in a Speech Presented to the National Council of Provinces on the occasion of the Debate on the Policy Vote 32 on the 25<sup>th</sup> of March 2010. This was also confirmed by Ruth Hall in "Land Restitution in South Africa: Rights, Development, and the Restrained State" *Canadian Journal of African Studies* Vol.38, No. 3 (2004), pp. 654-671 at 655.

<sup>308</sup> Minister of Rural Development and Land Reform Mr Nkwinti, G (2010) in a Speech Presented to the National Council of Provinces on the occasion of the Debate on the Policy Vote 32 on the 25<sup>th</sup> of March 2010 online at [http://www.ruraldevelopment.gov.za/DLA-Internet/content/document\\_pages/Ministry\\_Speeches\\_M\\_Latest.jsp](http://www.ruraldevelopment.gov.za/DLA-Internet/content/document_pages/Ministry_Speeches_M_Latest.jsp) (Accessed 13.06.2010).

<sup>309</sup> Lahiff E (2008) 1.

<sup>310</sup> Lahiff E (2008) 1.

<sup>311</sup> Cousins, B (2009) *Land Reform In Post-apartheid South Africa – A Disappointing Harvest*.

<sup>312</sup> See speech by Gugile Nkwinti on <http://www.info.gov.za/speeches/2010/10030311251002.htm> (Accessed 13. 12.2010).

productive restitution farms now lie fallow and are on the brink of collapse as they are being unexploited.<sup>313</sup> The programme has almost completely failed to provide adequate post-settlement support and has often worsened the beneficiaries' livelihoods.<sup>314</sup> Many supposed "beneficiaries" of land restitution have essentially not benefited from the current programme because - despite its return - the land has not changed their livelihoods.<sup>315</sup>

The delayed conclusion of the restitution process has also led to the problem of landless people illegally occupying and settling on vacant pieces of land, commonly known as squatting.<sup>316</sup> While this problem confronts many cities in the developing and underdeveloped countries, it is particularly endemic in South Africa.<sup>317</sup> It is an old problem that has been fuelled by the lingering demand for land in South Africa.<sup>318</sup> Many rural dwellers are relocating to urban areas because (among other reasons) they do not have land of their own and this has led to a swollen size of informal settlements.<sup>319</sup> Following the exposition of unproductive restitution farms in 2009,<sup>320</sup> President Jacob Zuma conceded the need for an alternative process of dealing with the land issue.<sup>321</sup> This further increased calls for a transformed land restitution programme.<sup>322</sup>

The following section lists and illustrates some of the negative results of the current land restitution programme. These can be addressed if the social-obligation norm is adopted as the ethic upon which land restitution is carried out.

### 2.5.1 Poor post-settlement support

One of the reasons why the land restitution process has failed to promote productivity on the farms is because the beneficiaries lack adequate post-settlement support.<sup>323</sup> This is a major

<sup>313</sup> See speech by Gugile Nkwinti <http://www.info.gov.za/speeches/2010/10030311251002.htm> (Accessed 13.12.2010).

<sup>314</sup> Cousins B (2009).

<sup>315</sup> Of course, there are instances where beneficiaries' livelihoods have changed but these are few as compared to when the beneficiaries' livelihoods have become worse.

<sup>316</sup> Gibson J L (2009) 132.

<sup>317</sup> Gibson J L (2009) 132.

<sup>318</sup> Gibson J L (2009) 132.

<sup>319</sup> Gibson J L (2009) 132.

<sup>320</sup> See <http://www.thezimbabwetimes.com/?p=12616> (Accessed 15 December 2009).

<sup>321</sup> See Karol Boudreaux (2009), "Land Reform as Social Justice: The Case of South Africa" *Working Paper No. 09-37*, October 2009.

<sup>322</sup> Karol Boudreaux (2009) 09-37.

<sup>323</sup> Hall R, Jacobs P and Lahiff E (2003) "Final Report: Evaluating Land and Agrarian Reform in South Africa." *An Occasional Paper Series No.10*. Programme For Land and Agrarian Studies, University of the Western Cape; Kepe T and Cousins B (2002) "Radical Land Reform Is Key to Sustainable Rural Development in South Africa" *Policy Brief No.3, Programme for Land and Agrarian Studies*, University of the Western Cape; Jacobs P (2003) "Support for Agricultural Development." Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. *Evaluating land and agrarian reform in South Africa series, no.4*; Andrew M,

weakness of the land restitution programme which is worsened by the fact that the RLA does not have any direct provisions relating to post-settlement support. Provision of post-settlement support is left to the court to order in terms of sections 33 and 35 of the Act.<sup>324</sup> The Act is silent regarding post-settlement support in instances where the matter does not end up in court.

Hebinck and Leynseele argue that “at the post-settlement stage when land rights have been formally settled, extracts from a developmentalist language of production are inserted into the process.”<sup>325</sup> This means that post-settlement is vaguely part of the process and discussions around it only seriously occur after land rights have been formally settled. Even then however, there is very little if any actual post-settlement support given to the beneficiaries. The government simply returns lost land to those from whom it was deprived during the erstwhile apartheid eras and this appears to be an end of the process itself. As mentioned before, the process is bent on simply meeting set restitution quantities.<sup>326</sup>

The absence of adequate post-settlement support only results in non-transformatory consequences.<sup>327</sup> It dooms a lot of the beneficiaries to failure. It also severely stigmatises beneficiaries as people who are unable to farm commercially.<sup>328</sup> The lack of adequate post-settlement support is in contrast to the apartheid era when white farmers received significant financial support and subsidies which enabled them to build skills and, with time, they became productive commercial farmers.<sup>329</sup>

A major part of the problem also results from the institutional separation of the Department of Rural Development and Land Reform, and the Department of Agriculture. Although both these Departments deal with land, their separation means that they each have different goals, different policies and priorities. The former is focused on simply returning land so its goals,

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Ainslie A and Shackleton C (2003) “Land Use and Livelihoods.” Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. *Evaluating land and agrarian reform in South Africa series, no.8.*

<sup>324</sup> Even in these sections, there is no explicit reference to post-settlement support but rather, “feasibility of restoration.”

<sup>325</sup> Hebinck P and Leynseele VY “Through the prism: Local reworking of land restitution settlements in South Africa in Fay D and James D, (eds)*The Rights and Wrongs of Land Restitution*165.

<sup>326</sup> Hall R (2004) “Land Restitution in South Africa: Rights, Development, and the Restrained State” *Canadian Journal of African Studies* Vol.38, No. 3 pp. 654-671 at 657; Jacobs, P (2003) “Support for Agricultural Development.” Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. *Evaluating land and agrarian reform in South Africa series, no.4*; Andrew, M., A. Ainslie and C. Shackleton.. “Land Use and Livelihoods.” Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. *Evaluating land and agrarian reform in South Africa series, no.8.*

<sup>327</sup> Hall R (2004) 654-671 at 664.

<sup>328</sup> Hall R (2004) 654-671 at 664.

<sup>329</sup> Gibson J L (2009) 11.

budgets and policies are geared towards solely returning land. The Department of Agriculture is focused exclusively on agriculture so naturally the goals, budgets and policies reflect this. For this reason, land restitution has not been closely tied with post-settlement support for agriculture.

There are a number of examples of restitution farms that failed due to poor post-settlement support in the land restitution programme. It is impossible and also unnecessary to discuss all of them here but a few examples would be useful to illustrate the consequences of poor post-settlement support.

The first example is Elandskloof farm (Elandskloof) in the Western Cape.<sup>330</sup> Elandskloof was one of the first restitution projects in post-apartheid South Africa.<sup>331</sup> Situated approximately two hours' drive north of Cape Town, the farm is in the fertile citrus growing area of Cederberg. In 1861, the Dutch Reformed Church took ownership of the farm in order to set up a mission station.<sup>332</sup> The farm was sold to two brothers in 1960, who, by invoking the Group Areas Act 77 of 1957, forced the original occupants from the farm.<sup>333</sup> However, the two brothers allowed a small group to continue squatting on a portion of the farm.<sup>334</sup> The desire to return to their land remained with this small group of squatters who intermittently tried, albeit unsuccessfully, to move back onto their original land.<sup>335</sup> The two brothers built a primary school on the farm that was used by children from the community and ran a thriving citrus fruit farming enterprise which employed many people from the community and produced thousands of Rands worth of citrus fruit every year.

In 1994, with the passing of the RLA, the Elandskloof claim became a priority of the new Land Claims Commission. A rigorous negotiation process for restitutionary resettlement of the displaced community followed.<sup>336</sup> A settlement was reached in June 1996 and the original occupants of Elandskloof farm took restitutionary possession of their land on 16 December 1996. It was a thriving, productive farm which was also a source of employment for many local people.

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<sup>330</sup> Some of the information about this restitution project was obtained from community members in the area.

<sup>331</sup> See *Elandskloof Vereniging Re: Plase Elandskloof* Nr 475 en 476 (LCC20/96) [1996] ZALCC 4; [1996] ZALCC 4 (15 October 1996).

<sup>332</sup> *Elandskloof Vereniging*.

<sup>333</sup> *Elandskloof Vereniging*.

<sup>334</sup> *Elandskloof Vereniging*.

<sup>335</sup> *Elandskloof Vereniging*.

<sup>336</sup> *Elandskloof Vereniging*.

Today, however, the farm is neglected. It lies fallow, is unutilised and abandoned. There is no productive activity taking place on the farm despite its location on fertile and highly productive land. The once successful producer of citrus fruits has ceased all productive activity. The community seems to be worse off now than before the restitution of the farm because those who were previously employed on the farm are now unemployed. The primary school is now also in shambles.

When the farm was restituted, the beneficiaries did not receive any training or technical expertise on how to use the land. There was an assumption that because some of them had been workers on the farm, they possessed the technical expertise to keep the farm running. They were simply given back the land and were left to utilise it without any assistance from the government. This state of affairs has negative implications for the community itself. It has undermined the jobs that were on the farm, the school and the general economy of the area.

There are numerous other examples of such farm failures in South Africa which result from poor post-settlement support given to beneficiaries. In another example visited by the author, Northridge farm in Ceres (Western Cape) was bought for R4.6 million and given to 148 beneficiaries in 2002. Although the farm held a lot of promise initially, in just less than a year after restitution, the farm was placed under liquidation after experiencing unprecedentedly low harvests while owing the Land Bank in excess of R4.5 million. Of the 153 employees on the farm, 150 were rendered jobless.<sup>337</sup> In an attempt to investigate the cause of the failure, a management firm<sup>338</sup> was invited to conduct aptitude tests on farm management.<sup>339</sup> The firm concluded that no one was suitable to manage the farm because they had “poor management profiles, poor numerical concepts and poor visual perception.”<sup>340</sup> The beneficiaries did not receive any post-settlement assistance from the government on how to utilise and run a commercial farming project. Similar to the example of Elandskloof, the beneficiaries, were simply left to their own inabilities regarding farm management.

On the 28<sup>th</sup> of September 2003, local media reported on a land restitution initiative involving the biggest citrus plantation in the southern hemisphere. Details emerged of how Zebediela citrus estate, 50 km out of Potgietersrus in Limpopo Province, had been returned to the

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<sup>337</sup> *Famers' Weekly*, June 2012.

<sup>338</sup> Thomas International.

<sup>339</sup> *Famers' Weekly*, June 2012.

<sup>340</sup> *Famers' Weekly*, June 2012.

Bjatladi community in a successful land claim.<sup>341</sup> A reported 331 households were “returned to their ancestral land”.<sup>342</sup>

On the day of the restoration, a Ministerial spokesperson was quoted as saying that the Zebediela land claim had been “lodged in response to the government’s Land Restitution Programme after the community lost its land rights in 1914.”<sup>343</sup> The spokesperson continued to say - “[T]hrough the current provincial department of agriculture, the land is to be released with all its immovable assets which include orchards and buildings with an estimated value of R61.4 million to the Bjatladi Community.”<sup>344</sup> With this successful restitution claim, the community would now own all of the land that it lost during apartheid – totalling 13 785 hectares.<sup>345</sup> The community would also own 35 per cent shareholding in the farm’s trading company.<sup>346</sup>

Before restitution, Zebediela citrus farm produced some 15 000 cases of oranges daily.<sup>347</sup> The production capacity of the farm was of such a magnitude that the *Reader’s Digest’s Illustrated Guide to Southern Africa* reported that the farm produced enough oranges to give “one for every eight people on earth” and this was confirmed by the MEC for agriculture at the time, Dr Motsoaledi.<sup>348</sup> Because the rainfall in the area is very minimal, the farm relied heavily on irrigation water for its water supplies mainly from many boreholes. The farm boasted state of the art farming equipment which included “citrus-packing houses, sorting and grading systems, a discussed railway link, farm houses, shops, a guest-house, extensive fencing, demarcated grazing camps, boreholes, electric cabling, water pumps, reservoirs, livestock water points, livestock handling facilities, workshops and store rooms.”<sup>349</sup>

However, by 2007 the situation on the farm had deteriorated. The *Farmers’ Weekly* of April 2004 reported that only three tractors and four spray carts were functional.<sup>350</sup> In addition, only ten boreholes of the 200 boreholes that were once operational were still functioning.<sup>351</sup>

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<sup>341</sup> Bertus De Villiers and Marlize Van Den Berg (2006) *Land reform: Trailblazers Seven successful case studies* Konrad-Adenauer-Stiftung, Johannesburg, 5.

<sup>342</sup> Bertus De Villiers and Marlize Van Den Berg (2006) 5.

<sup>343</sup> <http://www.buanews.gov.za/news/03/03092909461011> (Accessed 14.06.2011).

<sup>344</sup> <http://www.buanews.gov.za/news/03/03092909461011> (Accessed 14.06.2011).

<sup>345</sup> Bertus De Villiers and Marlize Van Den Berg (2006) 5.

<sup>346</sup> Bertus De Villiers and Marlize Van Den Berg (2006) 6.

<sup>347</sup> Bertus De Villiers and Marlize Van Den Berg (2006) 7.

<sup>348</sup> Tilley S and Lahiff E (2007) *Research Report 31* “Batladi Community Restitution Claim” PLAAS, 8.

<sup>349</sup> Tilley S and Lahiff E (2007) 8.

<sup>350</sup> *Farmers’ Weekly*, April 2004.

<sup>351</sup> Tilley S and Lahiff E (2007) 9.

The irrigation pipes were also no longer operational, as they had been destroyed.<sup>352</sup> The new owners started selling assets and farming equipment from the farm.<sup>353</sup> Matters deteriorated to such an extent that the new owners failed to pay creditors and failed to cover operating expenses and wages.<sup>354</sup> The quality of the fruit dropped.

In interviews conducted with the beneficiaries, all of them conceded that the failure of the farm rested squarely on the fact that they did not have adequate technical expertise to farm. A local Chief<sup>355</sup> in the area bemoaned the lack of assistance from the government. He said,

“the government simply buys land and dumps people on that land expecting them to be able to farm it. It will not work. A lot of these people have not gone to school. They know how to farm but they do not have other skills to make their farming productive and sustainable.”

The importance of giving beneficiaries of commercial farm land adequate post-settlement support can never be emphasized enough. Farming is a trade that requires different skills which range from good management to proper planning abilities. In *Baphiring*, the importance of adequate post-settlement support was acknowledged by the Land Claims Court.<sup>356</sup> Mia AJ held that it was important for the Baphiring community to receive resources and support if it were to be successfully given back its land.<sup>357</sup> The lack of post-settlement support should weigh against restoration of the land to the dispossessed community.<sup>358</sup>

The lack of adequate post-settlement support is a critical gap that needs to be addressed if the land restitution process is to be a success and contribute meaningfully to the development of the lives and skills of the beneficiaries, and of the country as a whole.<sup>359</sup> Many scholars acknowledge that South Africa has a poor post-settlement support structure for beneficiaries of land restitution and this impacts negatively on the programme.<sup>360</sup> While the programme has indeed returned land to those who lost it in colonial and apartheid times in some

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<sup>352</sup> Tilley S and Lahiff E (2007) 9.

<sup>353</sup> Tilley S and Lahiff E (2007) 9.

<sup>354</sup> Tilley S and Lahiff E (2007) 9.

<sup>355</sup> Name not included here to protect the identity of the Chief.

<sup>356</sup> *Baphiring Community v Uys and Others* 2010 (3) SA 130 (LCC); [2010] 3 All SA 353 (LCC) par 26.

<sup>357</sup> *Baphiring Community v Uys and Others* 2010 (3) SA 130 (LCC); [2010] 3 All SA 353 (LCC) par 26.

<sup>358</sup> *Baphiring Community v Uys and Others* 2010 (3) SA 130 (LCC); [2010] 3 All SA 353 (LCC) par 26.

<sup>359</sup> Turner S (1997) *Mid-term review of the Land Reform Programme* Pretoria: Department of Land Affairs in association with DANIDA, the European Commission and UK-DFID; May J and Roberts B (2000) *Monitoring and evaluating the quality of life of land reform beneficiaries: 1998/1999*. Summary Report prepared for the Department of Land Affairs, 19 June.

<sup>360</sup> Hall R (2004) “A political economy of land reform in South Africa” *Review of African Political Economy*. No.100 *Land Redistribution for Agricultural Development. Case studies in three provinces*. Unpublished Report. Integrated Rural Development Division, HSRC, Pretoria October 2003; Wegerif, M (2004) *A critical appraisal of South Africa’s Market-based land reform policy: The case of the Land Redistribution for Agricultural Development (LRAD) programme in Limpopo* (RR.19).

instances, it has made their lives even worse because people have been given land which they cannot utilise, plunging them into more poverty and difficulties.<sup>361</sup> For example, in 2005 the Minister for Agriculture revealed that 70% of failed land restitution projects in Limpopo were as a result of poor farming skills and lack of expertise.<sup>362</sup>

### 2.5.2 Only focuses on the rights of the dispossessed

Another weakness of the land restitution programme is that it simply focuses on the rights of dispossessed persons and ignores the rights of other citizens. James and Fay posit that land restitution in South Africa seeks to redress the material loss of the plaintiffs.<sup>363</sup> The process repairs damage only of the dispossessed, very much like what the private law principles of restitution seek to achieve, and ignores the rights of others who also derive their livelihood from the claimed land such as, for example, those employed on the farms as farm labourers. It focuses on returning land to dispossessed people and undermines the rights of the few black indigenous people presently employed on the land. The restitution process simply enables beneficiaries to “reclaim spaces and territories which formed the basis of earlier identities and livelihoods.”<sup>364</sup>

The undermining of minorities’ rights in favour of dispossessed people’s rights contravenes the spirit and purport of the Constitution. In *S v Makwanyane*, Chaskalson CJ reiterated the importance of protecting minorities’ rights when he held that the law also exists “to protect the rights of minorities and others who cannot protect their rights through the democratic process.”<sup>365</sup>

Land is so important to everyone that the 2011 Green Paper on Land Reform refers to it as “a national asset.”<sup>366</sup> Every citizen must benefit from it. For this reason, restitution of land cannot be simply about repairing personal injury of the dispossessed. Proper land restitution should be a robust process that also considers the rights of other citizens. Allowing the restitution process to only repair personal injury of the claimants while infringing on other people’s rights is a paradox of correcting a wrong by the commission of another wrong.

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<sup>361</sup> Hall R (2004); Wegerif, M. 2004. (RR.19).

<sup>362</sup> “Didiza offers reasons for Limpopo Failures”, in *Farmers Weekly*, 18 November 2005.

<sup>363</sup> Fay D and James D, (2009) “Restoring what was ours” (eds) *The Rights and Wrongs of Land Restitution* 1.

<sup>364</sup> Fay D and James D, (2009) 1.

<sup>365</sup> *S v Makwanyane and Another* 1995 (3) SA 431 (CC). See also *West Virginia State Board of Education v Barnette* 319 US 624 (1943) at 638.

<sup>366</sup> *Green Paper on Land Reform* (2011), Introduction; See generally Mostert H, *Land as a 'National Asset' under the Constitution: The System Change Envisaged by the 2011 Green Paper on Land Policy and What this Means for Property Law under the Constitution* (June 7, 2013).



While there are numerous examples of situations where people lost livelihoods when land was restored, two examples are worthy of mention. The first one is the Magwa tea project. This project is located in the Lusikisiki area of the Eastern Cape. The Magwa tea estate is the largest tea estate in the southern hemisphere.<sup>367</sup> At its peak, the estate had a turnover of “over R65 million a season and it employed some 3 500 people.”<sup>368</sup> The workers at Magwa were the best paid workers in the industry, earning five times more than those who worked in the same industry in Malawi.<sup>369</sup>

In 1998, the government purchased the estate and gave it to the workers as part of the land restitution programme.<sup>370</sup> Subsequent to this restitution, the estate began a downward spiral into unproductivity; parts of the once productive estate turned into squatter camps or desolate veld. The farm’s operations came to a temporary halt in February 2011 when the workers downed their tools because they wanted pay increases.<sup>371</sup> Stretching some 2 500 hectares and once producing 3,5 million kilograms of good quality tea annually, the estate is on the verge of collapse. Production has reached a record low of only 955 000 kilograms annually.<sup>372</sup> The biggest challenge which resulted from this is the loss of jobs. A number of people who were employed on the farm but had nothing to do with the restitution process of the farm lost their jobs. Therefore, while the programme addressed one problem by returning land to those from whom it was forcibly taken away, it created another by resulting in job losses.

Another example is Gallawater farm in the Eastern Cape. In Gallawater, 105 families received ownership and occupation of Gallawater farm in 1995. The farm was previously owned by a white farmer who practised plant and animal agriculture.<sup>373</sup> He conducted his farming activities on 198 ha of land where he produced crops and reared animals.<sup>374</sup> He also employed close to a hundred employees.<sup>375</sup> However, after restitution, the beneficiaries failed

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<sup>367</sup> See generally Thembela Kepe (2005) “Magwa Tea Venture in South Africa: Politics, Land and Economics, Social Dynamics” *A journal of African studies*, 31:1, 261-279; Harrison, J (1988) “Tea growing in Transkei” Unpublished manuscript; Porter, G and Phillips-Howard, K. (1996) “Tensions and transformation in a tea enterprise, Transkei, South Africa,” in *Geographical Journal* 162(3):287- 94; Gina Porter & Kevin PhillipsHoward (1997) “Agricultural issues in the former homelands of South Africa: the Transkei,” *Review of African Political Economy*, 24:72, 190.

<sup>368</sup> *Mail and Guardian*, “Magwa Tea’s failure bitter to swallow” 9 March 2012.

<sup>369</sup> *Mail and Guardian*, “Magwa Tea’s failure bitter to swallow” 9 March 2012.

<sup>370</sup> *Mail and Guardian*, “Magwa Tea’s failure bitter to swallow” 9 March 2012.

<sup>371</sup> *Mail and Guardian*, “Tea plantation faces collapse after worker rampage” 15 June 2011.

<sup>372</sup> *Mail and Guardian*, “Tea plantation faces collapse after worker rampage” 15 June 2011.

<sup>373</sup> Etienne Nel and Jack Davies (2012) “Farming against the odds : an examination of the challenges facing farming and rural development in the Eastern Cape province of South Africa.”

<sup>374</sup> Etienne Nel and Jack Davies.

<sup>375</sup> Etienne Nel and Jack Davies.

to maintain the productivity of the farm and as a consequence, many people lost their jobs.<sup>376</sup> The irrigation system collapsed due to poor management and the farm ceased all commercial farming activities.<sup>377</sup> The new beneficiaries simply restricted themselves to subsistence farming and any income earned went towards trying to repay the loan received in the purchase of the farm.<sup>378</sup>

It is clear that simply repairing personal injury by returning land to beneficiaries at the expense of other people who derive their livelihood from the land contravenes South Africa's developmental goals. As the Green Paper states, land is a national asset.<sup>379</sup> It should be handled in a manner that benefits all citizens. Restituting it while at the same time undermining the productive potential of land is counter-productive to the economy.

### **2.5.3 Fosters irresponsible ownership of land**

Another weakness of the land restitution process is that it regards the return of land as an end of the restitution process. This leaves room for irresponsible ownership of land. It simply returns ownership of land without also encouraging its responsible use. The RLA has no direct provisions regarding how the restored land should be utilised. Because of this, it is common to find land restitution projects in South Africa which are being utilised unsustainably and or without much care.

Arable land in South Africa is scarce and therefore the little that is available should be handled responsibly, especially because ownership also entails responsibilities.<sup>380</sup> A form of ownership which does not envisage responsibility is problematic to any society. To illustrate the importance of responsible ownership, there are numerous public and private law limitations that are placed on private property owners.<sup>381</sup> Since Roman law times, it has not been feasible to have a form of ownership which does not confer responsibility to the owner.<sup>382</sup> Ownership has never been unfettered.<sup>383</sup>

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<sup>376</sup> Etienne Nel and Jack Davies.

<sup>377</sup> Etienne Nel and Jack Davies.

<sup>378</sup> Etienne Nel and Jack Davies.

<sup>379</sup> 2011 Green Paper on Land Reform.

<sup>380</sup> See Hellen Zille "Land Reform – Redressing apartheid's 'original sin'", in *Cape Times*, 25 January 2013, 9.

<sup>381</sup> *Silberberg & Schoeman Property* 93–94; *Wille's Principles* 406.

<sup>382</sup> Visser DP (1985) "The 'Absoluteness' of Ownership: The South African Common Law in Perspective" *Acta Juridica* 43.

<sup>383</sup> Visser DP (1985) *Acta Juridica* 39; Birks P (1985) "The Roman law concept of dominium and the idea of absolute ownership" *Acta Juridica* 1; Lewis C (1985) "The Modern Concept of Ownership of Land" *Acta Juridica* 243; Scott H (2011) "Absolute ownership and legal pluralism in Roman law: Two arguments" *Acta Juridica* 23.

Unfortunately, the general conventional understanding in South Africa is that private ownership “insulates individuals” absolutely from external interference in their handling of property.<sup>384</sup> This idea has seeped into ownership of land awarded in terms of the restitution process. For example, Van der Merwe describes ownership as the “most comprehensive right embracing not only the power to use (*ius utendi*), to enjoy the fruits (*ius fruendi*) and to consume the thing (*ius abutendi*), but also the power to possess (*ius possidendi*), to dispose of (*ius disponendi*), to reclaim the thing from anyone who wrongfully withholds it or to resist any unlawful invasion of the thing (*ius negandi*).”<sup>385</sup> According to Mostert, this conventional approach to ownership as “absolute” fails to explain that this is only with reference to “medieval feudalism than to the demands of the modern socio-economic context” of ownership.<sup>386</sup> It does not mean ownership is total and unlimited control over property.<sup>387</sup>

Ownership envisages responsibility (described as the “social-obligation norm” by Alexander<sup>388</sup>) and for this reason, it is little surprise that all definitions of ownership always emphasize the power to enjoy a thing *within the confines of the law*. In *King v Dykes*<sup>389</sup> for example, the appellant sued the respondent for damages to the appellant’s farm which occurred as a result of a veld fire which spread from the respondent’s farm. The appellant alleged that the defendant had a legal duty to stop the fire and by not stopping the fire, he had breached that duty. The defendant however denied that he had the duty to stop the fire. The court held that

“[t]he idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that *an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds his land in trust for future generations.*”<sup>390</sup>

<sup>384</sup> Gregory S Alexander “The social-obligation norm in American property law” *Cornell Law Review*, (94) 745, 747; Thomas W Merrill (1998) “Property and the Right to Exclude” 77 *NEB L. REV* 730; see also Mostert H’s discussion in *Land as a 'National Asset' under the Constitution: The System Change Envisaged by the 2011 Green Paper on Land Policy and What this Means for Property Law under the Constitution*, 14 (June 7, 2013).

<sup>385</sup> Van der Merwe C (2002) “Things” in *The Law of South Africa* Vol 27 First Reissue, paras 296, 298; see also a discussion of ownership in Van der Walt AJ “Property, social justice and citizenship: Property law in post-apartheid South Africa” (2008) *Stell LR* 325; Cowen DV (1984) *The transformation of the concept of ownership as plena in re potestas* 8-9; Scott H (2011) “Absolute ownership and legal pluralism in Roman law: Two arguments” *Acta Juridica* 23; Birks P (1985) *Acta Juridica* 1; Visser D (1985) *Acta Juridica* 39. .

<sup>386</sup> Mostert H, *Land as a 'National Asset' under the Constitution: The System Change Envisaged by the 2011 Green Paper on Land Policy and What this Means for Property Law under the Constitution*, 14 (June 7, 2013).

<sup>387</sup> Mostert H, *Land as a 'National Asset' under the Constitution: The System Change Envisaged by the 2011 Green Paper on Land Policy and What this Means for Property Law under the Constitution*, 14 (June 7, 2013).

<sup>388</sup> Gregory S Alexander “The social-obligation norm in American property law” *Cornell Law Review*, (94) 745, 747.

<sup>389</sup> 1971 (3) SA 540 (RA).

<sup>390</sup> *King v Dykes* 1971 (3) SA 540 (RA), MacDonald ACJ said at 545 G-H.

This statement by MacDonald ACJ is telling of the anticipated responsibility that owners have to exercise regarding their property. To illustrate the importance of this statement to the restitution context: - in the Eastern Cape area of Kokstad, there are twenty crop and dairy farms which, according to community members, were bought by the government from white commercial farmers in the area for R11.6 million and returned to communities in the area. These have all long ceased all farming activities and have now become informal settlements. This is despite the availability of land which can be used for settlement in the area. Using farm land for residence when there is alternative land which can be used for residential purposes amounts to irresponsible landownership.

According to the *Farmers' Weekly*, in Nquthu, KwaZulu-Natal, a once thriving potato farm was given to a community as part of the restitution programme.<sup>391</sup> It is now a makeshift informal soccer field. In addition, a R22 million irrigation system built by the government to supply water to new farmers in the area is just lying neglected.<sup>392</sup> In Limpopo, a former multimillion-rand tea estate in Magoebaskloof is now an overgrown forest.<sup>393</sup> All these examples of farm land which is not being used for farming illustrate how the restitution process fosters irresponsible behaviour with the land. While some of the neglect is attributable to poor land use skills, some of it is certainly a result of the failure of the land restitution process to encourage responsible use of land.

The law has always been responsive to irresponsible use of property, even when this happened within the confines of the law. For example, a curator could be appointed to a prodigal son who was negligent and wasteful of his inheritance.<sup>394</sup> The prodigal was expected to behave responsibly with his inheritance. A person who “neglected husbandry could lose ownership in favour of one who could farm better.”<sup>395</sup> As part of encouraging responsible use of arable restituted land, the restitution process has to have institutional safeguards against irresponsible use of arable land.

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<sup>391</sup> Farmers Weekly, “The on-going battle for sustainable land reform in South Africa” May 22, 2015.

<sup>392</sup> Farmers Weekly, *ibid.*

<sup>393</sup> Farmers Weekly, *ibid.*

<sup>394</sup> See Scott SP (1973) “The Opinions of Paul in *The Civil Law* Cincinnati Publishers 3.4a.7. 235 on note 42.

<sup>395</sup> Birks, P (1985) P “The Roman Law Concept of Dominium and the Idea of Absolute Ownership” *Acta Juridica 1* (1985) 19.

In *Regal v African Superslate (Pty Ltd)*,<sup>396</sup> Steyn CJ suggested that while owners have the right to use their property as they please, they should not neglect it if such neglect would cause harm to their neighbours. This would amount to nuisance.<sup>397</sup> As Cowen put it,

“The right to consume, and to destroy looms large, ... in regard to the ownership of a piece of firewood; or a leg of mutton; but land hunger or hunger and thirst for the loveliness of a nature area, cannot be adequately satisfied by dwelling upon a theoretical right to destroy land. Here, the power to enjoy and to use sensibly, and here the social obligations of ownership, are the essence.”<sup>398</sup>

Many things lie neglected in the society and their neglect does not cause controversy. No one would stop to ask why an old bicycle is no longer being used by its owner or why an owner is neglecting their computer. Strahilevitz explains that normal people neglect many things such as clothes and furniture and no one questions their conduct.<sup>399</sup> Sometimes, people even neglect and get rid of expensive and valuable things such as jewellery.<sup>400</sup> Such neglect is tolerable as it does not really affect anyone. However, there is certain property which has to be used responsibly because their uses affect society. A case in point is the land which in South Africa has been referred to as “a national asset.”<sup>401</sup>

Alexander argues that “no system of private property can ignore that property involves responsibilities.”<sup>402</sup> In *Monhunram v National Director of Public Prosecutions and Another*, the Constitutional Court noted that “the right to property carries with it important duties to use, manage or look after it in a *responsible* manner.”<sup>403</sup>

As indicated above, the idea of responsible handling of property is not a new idea.<sup>404</sup> Numerous traditional rules of neighbour law attest to the fact that responsible handling of property is an unwritten rule that underpins the relationship between owners and their

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<sup>396</sup> 1963 (1) SA 102 (A) at 106H-107A.

<sup>397</sup> See Van der Walt AJ (2010) *The Law of Neighbours* 33.

<sup>398</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students' Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 71.

<sup>399</sup> Lior Jacob Strahilevitz (2005) “The Right to Destroy” *The Yale Law Journal* 114 (783).

<sup>400</sup> Lior Jacob Strahilevitz (2005) “The Right to Destroy” *The Yale Law Journal* 114 (783).

<sup>401</sup> 2011 *Green Paper on Land Reform*, “introduction.”

<sup>402</sup> Alexander G (1998) “Critical Land Law” in Bright and Dewar (eds) *Land Law – themes and perspectives* 77.

<sup>403</sup> *Monhunram v National Director of Public Prosecutions and Another* 2007 4 SA 222 (CC).

<sup>404</sup> Lameti D (2010) “The objects of virtue” in Alexander and Penalver (eds) *Property and community* 1-37.

things.<sup>405</sup> Neighbours should not use and enjoy their property in a way that infringes on their neighbours' use and enjoyment of their properties.<sup>406</sup> For example, with regard to lateral support, neighbours have the duty to ensure that their conduct on their land does not disturb the condition of lateral stability of the adjoining land. Where for instance a donga<sup>407</sup> forms on an owner's land, which could potentially extend to an owner's land, that owner must take steps to prevent the donga from extending to their neighbour's property. The law would not condone an owner's neglect of the land where the donga has developed, where the donga extends to their neighbour's land.<sup>408</sup>

As is discussed in paragraph 4.2.2, irresponsible use of property is also forbidden in mineral law. The Mineral and Petroleum Resources Development Act (MPRDA) obliges holders of mining rights the duty to actively exercise such right.<sup>409</sup> If a holder of a mining right neglects the mining right, the right will be given to another actor who will exploit the resources.<sup>410</sup>

It is also worthwhile to consider the situation in Germany briefly because South African property law shares certain similarities with German property law.<sup>411</sup> Both have their roots in Roman law and also, German Pandectism strongly influenced South African property law.<sup>412</sup> Besides, the drafters of the South African Constitution's property provision strongly relied on German Constitutional property law.<sup>413</sup>

The German Constitution acknowledges that property must be used responsibly so that it serves the community. It provides that "[O]wnership entails obligations. Its use should also serve the public interest."<sup>414</sup> Such a departure immediately rules out irresponsible handling of property where the public interests would be compromised. This insight is helpful for South African law particularly when addressing the problem of neglect of farm land by land reform beneficiaries. The German system provides that property should benefit not only those that have it but also the society at large. "Property rights must be exercised responsibly, not to

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<sup>405</sup> Such rules would include encroachment, lateral support, drainage, maintenance of party walls and fences as well as the elimination of danger.

<sup>406</sup> See Van der Walt AJ (2010) *The Law of Neighbours*; see also *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A).

<sup>407</sup> Ditch formed by the erosion of soil.

<sup>408</sup> See *London and South African Exploration Co. v Rouliot* (1890) 8 SC 74.

<sup>409</sup> Section 19(2)(b) read with section 17(5).

<sup>410</sup> Section 19(2)(b) read with section 17(5).

<sup>411</sup> Van der Walt AJ (2005) *Constitutional Property Law* 32 ff.

<sup>412</sup> See also Andre van der Walt (1992) "The South African law of ownership: A historical and philosophical perspective" 2 *De Jure* 454; Andre van der Walt (2006) "Transformative Constitutionalism and the development of South African Property Law (part 2)" *J. S. Afr. L.* 1.

<sup>413</sup> Jorg Fedtke (2000) *Die Rezeption von Verfassungsrecht* 329-33.

<sup>414</sup> Grundgesetz für die Bundesrepublik Deutschland, art. 14(2).

benefit only the individual owner but also the community at large.”<sup>415</sup> While the German system does not explicitly censure neglect, it does however provide for “socially responsible conduct with property.”<sup>416</sup> The German model supports “*socially responsible conduct with property.*”<sup>417</sup> Property that has more social relevance to the community is regulated more than that which does not have much social relevance.<sup>418</sup> This is helpful for the South African land context where many restitution farms are lying idle and neglected.

Beneficiaries should be responsible with their land even when they do not have adequate post-settlement support. For example, an average land owner knows that they cannot let grass grow unattended because this would lead to the risk of a fire hazard in the dry season. An average land owner knows this or at least should know this. Landowners cut grass and remove weeds from their yards because besides being a fire hazard, these attract pests and dangerous animals. Landowners also protect their yards from soil erosion as a result of rain or wind. In short, they are responsible with their land.

#### **2.5.4 Undermines the enhancement of the socio-economic right to food**

The current land restitution process undermines the socio-economic right to food which is constitutionally protected in South Africa.<sup>419</sup> This right seeks to guarantee that everyone must have access to food. It is entrenched - like other rights - and the State is mandated to do everything that it can to ensure the realisation of this right. Despite the existence of this right, there are some 14 million people facing severe food insecurity in South Africa.<sup>420</sup> In order to fully understand the importance of this right in the Constitution, a brief historical context is necessary.

In apartheid times, the State had a Native Affairs Department (NAD) which was mandated “with overseeing the African Reserves, and therefore, with intervening in rural crises like famine.”<sup>421</sup> Wylie explains that the NAD was preoccupied with providing relief and

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<sup>415</sup> 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) (2) *South African Law Journal* 248.

<sup>416</sup> *BVerfGE* 25, 112 at 118; *BVerfGE* 52, 1 at 32-33; See also Mostert H (2010) (2) *South African Law Journal* 248.

<sup>417</sup> Mostert H (2010) (2) *South African Law Journal* 248.

<sup>418</sup> Mostert H (2010) (2) *South African Law Journal* 248.

<sup>419</sup> Section 27(1)(b) of the Constitution; see also Liebenberg S (2010) *Socio-Economic Rights: adjudication under a transformative Constitution.*

<sup>420</sup> See Food Bank SA (2011) “Banking on food security for South Africa’s hungry” online at [http://www.sagoodnews.co.za/general/banking\\_on\\_food\\_security\\_for\\_sa\\_s\\_hungry.html](http://www.sagoodnews.co.za/general/banking_on_food_security_for_sa_s_hungry.html) (Accessed 15.07.2011).

<sup>421</sup> Diana W (2001) *Starving on a Full Stomach: Hunger and the Triumph of Cultural Racism in Modern South Africa* Charlottesville; University Press of Virginia, 61.

“uplifting” black people.<sup>422</sup> To this effect, the NAD provided relief for three famines which occurred between 1912 and 1946.<sup>423</sup> This was not motivated by genuine sympathy, but by political strategy: by providing drought relief to those affected, the State would “win political support by being perceived as the giver of gifts.”<sup>424</sup> This paternalistic relief was, however, not always there when needed. Even during the times when it was provided, it was inadequate.<sup>425</sup> The administrators in the NAD were often impatient with the hungry and needy masses and wanted them to suffer.<sup>426</sup>

In 1949, the National Party realised that there was a need for a school feeding programme because black peoples’ health was deteriorating.<sup>427</sup> However, it resisted the scheme because it promoted dependency and State pauperism while reducing parental responsibility.<sup>428</sup> This led to a severe reduction in funding schemes for feeding school children.<sup>429</sup> The government denied responsibility for, and the existence of, hunger amongst black people.<sup>430</sup> What made matters worse were the parallel seizures of agriculturally productive land as well as the discriminatory resettlement schemes that forced black people to go and live in townships and other crowded areas.<sup>431</sup>

The food insecurity situation that had been created by the apartheid government needed to be addressed in the new Constitution. To this effect, section 27 was included in the final Constitution which established the right to access food for every South African. Without proper and pro-active measures to guarantee every South African’s right to access food, South Africa would not be adequately transformed. This is more so because the land restitution process does not promote people’s right to access food. Millions of South Africans still face endemic hunger and malnutrition and the land restitution process is not helping the situation.<sup>432</sup> They still aspire for a time when they will have their right to *access* food literally realised.

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<sup>422</sup> Diana W (2001) 60.

<sup>423</sup> Diana W (2001) 60.

<sup>424</sup> Diana W (2001) 61.

<sup>425</sup> Diana W (2001) 215.

<sup>426</sup> Diana W (2001) 61.

<sup>427</sup> Kristin G L (2003) *The Constitutional Right to Food in the Republic of South Africa: A Critical Examination of the History of Section 27 and an Evaluation of its Enforcement* 4.

<sup>428</sup> Kristin G L (2003).

<sup>429</sup> Diana W (2001) 218-219.

<sup>430</sup> Diana W (2001) 225.

<sup>431</sup> Beresford D (1986) “How the Reality of Apartheid is Now Driven Home/Removal of Blacks from Shanty Towns to Homelands in South Africa,” (*London*) *The Guardian*, 8 August.

<sup>432</sup> Graeme H “Twelve million going to bed hungry in SA” *The Times* 30 January 2013.



When the land is allowed to lie fallow, it will not produce food. When food is scarce, people cannot work to develop themselves. Life becomes difficult. They suffer from malnutrition and poor health. They become prone to diseases. Various regional and International Human Rights instruments ratified by South Africa recognise the right to food for every human being. Instruments such as the Universal Declaration of Human Rights (UDHR) as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) require States, individually or through cooperation, to put in place measures that will improve access to food.<sup>433</sup> The Copenhagen Declaration on Social Development also recognises the centrality of food to people.<sup>434</sup>

Indigenous black South Africans from rural communities in South Africa, who lost their land as a result of apartheid racially discriminatory practices, led the impetus for land restitution.<sup>435</sup> The restitution programme was introduced as a direct way of giving back land to these communities instead of being a programme for “wider agrarian restructuring.”<sup>436</sup> Of course, the programme later changed to include claims in urban areas but originally, its main aim was to return land to rural communities.<sup>437</sup> This original aim created a lasting problem of undermining the enhancement of the socio-economic right to food in land restitution.

The Department of Land Affairs explained one of the roles of the restitution programme as balancing land rights while simultaneously promoting development.<sup>438</sup> Hall acknowledges this and states that restitution should be a process which helps in the redistribution of wealth, promotion of reconciliation as well as the “strengthening of the rural economy.”<sup>439</sup> The simultaneous restoration of land and promotion of development are two diverse and competing objectives. These are objectives which South Africa has consistently struggled to meet. Scholars such as Ntsebeza and Hall also acknowledge the challenge with meeting these objectives and even go so far as to ask whether it is ever possible to have a land restitution

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<sup>433</sup> See article 25 of the Universal Declaration of Human Rights (1948) and article 11 of the International Covenant on Economic, Social and Cultural Rights (1966).

<sup>434</sup> The Copenhagen Declaration on Social Development (1995) provides in commitment no. 2 that the focus of States’ policies and efforts should be at addressing poverty and its causes. This should include eliminating hunger and malnutrition through food security.

<sup>435</sup> Hall R “Land Restitution in South Africa: Rights, Development, and the Restrained State” *Canadian Journal of African Studies* Vol.38, No. 3 (2004), pp. 654-671 at 656.

<sup>436</sup> Hall R (2004), pp. 654-671 at 656.

<sup>437</sup> Hall R (2004), pp. 654-671 at 656.

<sup>438</sup> Department of Land Affairs, 1997.

<sup>439</sup> Hall R (2004), pp. 654-671 at 664.

programme which returns land while also reducing poverty and transforming the economy.<sup>440</sup> Returning land alone is insufficient especially when the return does not enhance the socio-economic situation of the beneficiaries.

Arable land is a resource which, if properly harnessed, can obviously be used to enhance socio-economic rights. The failure of the land restitution programme to encourage responsible use of land as well as the programme's poor post-settlement support system both undermine the enhancement of socio-economic rights. In its foreword, the National Development Plan provides that it seeks to "reduce poverty and eliminate inequality." It also states that South Africa will use its available resources to reduce poverty.<sup>441</sup> One of the goals of restitution stated in the 1997 White Paper on Land Policy is the restoration of land in such a way as to "support reconciliation, reconstruction *and development*."<sup>442</sup> The reduction of poverty, elimination of inequality as well as the development of South Africa as envisaged by the National Development Plan, are all efforts at enhancing people's socio-economic rights.

In *Kaunda and Others v President of The Republic of South Africa and Others*<sup>443</sup> the Constitutional Court held that the commitment to respect, protect, promote and fulfil socio-economic rights is integral to our identity as a nation. It guides the way the government treats South Africans and informs it of its duty towards its people.<sup>444</sup> In everything that the State does, there has to be evidence of the commitment to respect, protect, promote and fulfil socio-economic rights.<sup>445</sup> Socio-economic rights provide for various entitlements to things which are necessary for the welfare of human beings.<sup>446</sup> These things are material conditions such as water, housing and food, among others. The way these rights are formulated influences how they impose obligations and what entitlements they create.<sup>447</sup>

Danie distinguishes three groups of socio-economic rights in the South African Constitution.<sup>448</sup> The first group is what he terms "*qualified* socio-economic rights." These are access rights which follow a standard formulation. They impose duties on the State. The

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<sup>440</sup> Hall R and Ntsebeza L (2007) (eds) *The Land Question in South Africa: The Challenge of Transformation and Redistribution* 1.

<sup>441</sup> Foreword to the National Development Plan, 11 November 2011.

<sup>442</sup> P 52, section 4.13; see also Roodt, M (et al) (1998) *Land Restitution in South Africa, a Long Way Home* Idasa 46.

<sup>443</sup> 2005 (1) SACR 111 (CC).

<sup>444</sup> Para [157] – [159].

<sup>445</sup> Para [157] – [159].

<sup>446</sup> Brand D (2005) "Introduction to socio-economic rights in the South African Constitution" in Danie Brand and Christof Heyns (eds) *Socio-Economic Rights in South Africa* Pretoria University Law Press, Pretoria, 1.

<sup>447</sup> Brand D (2005) 1.

<sup>448</sup> Brand D (2005) 3.

second group is “basic socio-economic rights.”<sup>449</sup> The third group prohibits certain forms of conduct. They do not directly entitle persons to particular things.<sup>450</sup>

Section 7(2) provides that “the State must respect, protect, promote and fulfil the rights in the Bill of Rights.” This specific obligation on the State is significant. It is made all the more significant by the provisions of section 8. The latter binds the legislature, the executive, the judiciary and all organs of State with regard to the fulfilment of socio-economic rights. This means that the State is primarily burdened with, amongst other duties, the duty to provide all South Africans with access to food in terms of sec 27. Thus, the Constitution requires the State to take reasonable legislative and other measures within available resources to promote access to, among others, sufficient food and water and social security.<sup>451</sup> Undermining food security through the current land restitution process directly contravenes the Constitution’s envisaged right of every South African to access food.

In *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* the court recognised the nexus between land restitution and the socio-economic right to food.<sup>452</sup> It held that “it cannot be excluded that excessive underutilization of “agricultural land,” be it arable land or grazing land, may result in an inadequate availability of food.”<sup>453</sup> This means that even in the way the country returns land to those who were forced to lose it during apartheid, there has to be evidence that the government is committed to realising people’s socio-economic right to food. With the current land restitution programme, this commitment is conspicuously missing. People who are given productive farmland are allowed to let it lie fallow and unutilised. There is nothing in the RLA which sanctions against this. This undermines food security because, as the court held in *Wary*, there is a link between food production and agricultural land use.<sup>454</sup>

A good practical example of how the restitution programme undermines the right to food can be seen in the Free State province. The Free State is located in the heart of South Africa and it produces a lot of grain. It is referred to by various names that attest to its productive potential

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<sup>449</sup> Examples of these are sections 29(1)(a), 28(1)(c) and section 35(2)(e).

<sup>450</sup> Examples are section 26(3) and 27(3).

<sup>451</sup> *Women's Legal Centre Trust v President of The Republic of South Africa and Others* 2009 (6) SA 94 (CC), para [16] – [18].

<sup>452</sup> 2009 (1) SA 337 (CC).

<sup>453</sup> Para [85].

<sup>454</sup> 2009 (1) SA 337 (CC).

and these include, the “granary of South Africa” or “the country’s breadbasket.”<sup>455</sup> It produces more than 70% of South Africa’s grain.<sup>456</sup> It is the largest producer of maize and wheat in the country.<sup>457</sup> In 2005, the province produced field crops worth R2, 905-million.<sup>458</sup> The province’s agriculture contributes to about “7% to the province’s gross domestic product (GDP) and it also generates about 14% of the entire country’s agriculture.”<sup>459</sup> The Free State also produces notable quantities of the country’s sorghum (53%), sunflowers (45%), wheat (37%), maize (34%), potatoes (33%), groundnuts (32%), dry beans (26%), wool (24%) and almost all of its cherries (90%).<sup>460</sup> The province also has a thriving dairy and red-meat industry.<sup>461</sup> In the year 2008/09, “the export of animals and animal products created about R188 million worth of revenue.”<sup>462</sup>

On the 5<sup>th</sup> of October 2010, Minister Gugile Nkwinti revealed in Parliament that 20 land reform farms were lying abandoned in Free State.<sup>463</sup> He further revealed that 114 farms, although in use, were completely unproductive.<sup>464</sup> This shows the urgent need with which the current land restitution and redistribution paradigms need to be revisited so that owners are encouraged to utilise their land optimally and productively. For 20 land reform farms to lie abandoned while another 114 are completely unproductive is a matter that no doubt negatively impacts the province’s economy, jobs and food security in general. A land reform process that allows this to continue is not sustainable. For this reason, it is necessary to employ a land reform paradigm that compels all beneficiaries of land to actively utilise their land and not leave it lying fallow and unattended.

<sup>455</sup> Free State Provincial Overview available online at <http://www.culturalguiding.com/MyCourses/DownloadPDF.asp?ContentComponentID=1577&vpa=no> (access 13.01.2013).

<sup>456</sup> Free State Provincial Overview.

<sup>457</sup> [http://www.freestatebusiness.co.za/pls/cms/ti\\_secout.secout\\_prov?p\\_sid=1&p\\_site\\_id=169](http://www.freestatebusiness.co.za/pls/cms/ti_secout.secout_prov?p_sid=1&p_site_id=169) (Accessed 13.02.2011).

<sup>458</sup> <http://www.africancrisis.co.za/Article.php?ID=19248&> (Accessed 14.03.2011).

<sup>459</sup> [http://www.freestatebusiness.co.za/pls/cms/ti\\_secout.secout\\_prov?p\\_sid=1&p\\_site\\_id=169](http://www.freestatebusiness.co.za/pls/cms/ti_secout.secout_prov?p_sid=1&p_site_id=169) (Accessed 13.02.2011).

<sup>460</sup> [http://www.freestatebusiness.co.za/pls/cms/ti\\_secout.secout\\_prov?p\\_sid=1&p\\_site\\_id=169](http://www.freestatebusiness.co.za/pls/cms/ti_secout.secout_prov?p_sid=1&p_site_id=169) (Accessed 13.02.2011).

<sup>461</sup> [http://www.freestatebusiness.co.za/pls/cms/ti\\_secout.secout\\_prov?p\\_sid=1&p\\_site\\_id=169](http://www.freestatebusiness.co.za/pls/cms/ti_secout.secout_prov?p_sid=1&p_site_id=169) (Accessed 13.02.2011).

<sup>462</sup> [http://www.freestatebusiness.co.za/pls/cms/ti\\_secout.secout\\_prov?p\\_sid=1&p\\_site\\_id=169](http://www.freestatebusiness.co.za/pls/cms/ti_secout.secout_prov?p_sid=1&p_site_id=169) (Accessed 13.02.2011).

<sup>463</sup>

<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=202592&sn=Detail&pid=71656> (13.02.2011).

<sup>464</sup>

<http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71656?oid=202592&sn=Detail&pid=71656> (13.02.2011).

The constitutional right to food as provided for in section 27 creates a platform for all South Africans to have access to food. The mandate for communities and their leaders to provide for conditions that will assist people to access food has been there for a long time.<sup>465</sup> This mandate starts within the family circle where the elders of the family are morally required to provide food and / or access to it for their families. With time, this mandate extended beyond the limits of parents to include elderly relatives of the entire family, the entire community, the State and the entire international community.<sup>466</sup> As previously mentioned, the right to food is guaranteed by various provisions in the Constitution. The State is required to “respect, protect and fulfil them.”<sup>467</sup> The State is required to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation” of the right to access food.<sup>468</sup>

Land is central to the realisation of the right to access food because food and/or the raw materials used in food production come from the land. Proper land restitution should help in the realisation of this right.

### **2.5.5 Undermines the importance of agriculture**

Another weakness of the land restitution programme is that it sometimes returns farm land to people who are not interested in farming. This feeds into the wider problem of neglecting arable land. Where land which is subject to restitution is arable and is being used productively for farming, it should only be returned to beneficiaries who are also interested in farming. A notable trend with some beneficiaries of land is that after receiving the land, they do not move onto the land. Instead, they send other people such as family members to go and live on the land. They “straddle” between life in town and occasional visits to the restored land.<sup>469</sup>

To illustrate this - in 2009, Ms Veronica Moos received Yzervarkfontein farm as part of the land restitution programme. She was given an infrastructural grant of R200 000 to assist her

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<sup>465</sup> Rolf K (2002) “The Right to Adequate Food: Violations Related to its Minimum Core Content” in Danie Brand and Sage Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* 72.

<sup>466</sup> Rolf K (2002) “The Right to Adequate Food: Violations Related to its Minimum Core Content” in Danie Brand and Sage Russell (eds) *Exploring the Core Content of Socio-Economic Rights: South African and International Perspectives* 73.

<sup>467</sup> See s 7(2).

<sup>468</sup> See section 27(2) of the Constitution of the Republic of South Africa.

<sup>469</sup> Andrew M, Ainslie A and Shackleton C (2003) “Land Use and Livelihoods.” Cape Town: Programme for Land and Agrarian Studies, University of the Western Cape. Evaluating land and agrarian reform in South Africa series, no.8.

with continuing farming on the piece of land.<sup>470</sup> However, instead of occupying the farm, Ms Moos sublet the farm to a third party. She was clearly not interested in farming.<sup>471</sup>

In another example, in 2001, the Western Cape government initiated the formation of Toekomsrust Smallholders Trust. The Trust was composed of 47 members, each of whom received a R20 000 support grant.<sup>472</sup> They got restitution of Groenfontein farm, a 30 ha piece of land that had huge agricultural potential. While they bought some equipment, nothing resulted from the project.<sup>473</sup> It later emerged that the biggest challenge to the project was that of the 47 beneficiaries, only 17 of them were interested in farming.<sup>474</sup> Unfortunately, these 17 beneficiaries did not have any knowledge of, interest or expertise in farming.<sup>475</sup>

## 2.6 Conclusion

In this chapter land restitution in South Africa and the legislative framework for it was discussed. It was noted that the RLA and the Constitution are the two main instruments that provide for land restitution. The restitution leg of the land reform programme is a constitutional imperative designed to provide land to all those who were previously dispossessed of it by the erstwhile colonial and apartheid regimes.<sup>476</sup> In its preamble, the RLA<sup>477</sup> reiterates this remedial purpose of the restitution process. The Act provides that all those who lost their land “after 19 June 1913 as a result of past racially discriminatory laws or practices” should have their land returned to them.<sup>478</sup>

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<sup>470</sup> Sapa (2009). Government confiscates Yzervarkfontein farm, SABC online at <http://www.sabcnews.com/portal/site/SABCNews/menuitem.5c4f8fe7ee929f602ea12ea1674daeb9/?vgnnextoid=affd3a8ebf680210VgnVCM10000077d4ea9bRCRD&vgnnextfmt=default> (12 December 2009).

<sup>471</sup> Sapa (2009). Government confiscates Yzervarkfontein farm, SABC online at <http://www.sabcnews.com/portal/site/SABCNews/menuitem.5c4f8fe7ee929f602ea12ea1674daeb9/?vgnnextoid=affd3a8ebf680210VgnVCM10000077d4ea9bRCRD&vgnnextfmt=default> (12 December 2009).

<sup>472</sup> *Vukuzenzele* available online at [http://www.info.gov.za/vukuzenzele/Download/Vukuzenzele\\_Jan12.pdf](http://www.info.gov.za/vukuzenzele/Download/Vukuzenzele_Jan12.pdf) (29 January 2012).

<sup>473</sup> *Vukuzenzele* available online at [http://www.info.gov.za/vukuzenzele/Download/Vukuzenzele\\_Jan12.pdf](http://www.info.gov.za/vukuzenzele/Download/Vukuzenzele_Jan12.pdf) (29 January 2012).

<sup>474</sup> *Vukuzenzele* available online at [http://www.info.gov.za/vukuzenzele/Download/Vukuzenzele\\_Jan12.pdf](http://www.info.gov.za/vukuzenzele/Download/Vukuzenzele_Jan12.pdf) (29 January 2012).

<sup>475</sup> *Vukuzenzele* available online at [http://www.info.gov.za/vukuzenzele/Download/Vukuzenzele\\_Jan12.pdf](http://www.info.gov.za/vukuzenzele/Download/Vukuzenzele_Jan12.pdf) (29 January 2012).

<sup>476</sup> Hall R and Cliffe L (2009) “Introduction” in (eds) Ruth Hall *Another Countryside? Policy Options for Land and Agrarian Reform in South Africa* 5; van der Walt AJ (2005) *Constitutional Property Law* 289; S 25(7) of the Constitution of the Republic of South Africa, 1996; 1997 White Paper on South African Land Policy, 4.13; De Villiers B (2003) *Land Reform: Issues and Challenges - A Comparative Overview of experiences in Zimbabwe, Namibia, South Africa and Australia* 51.

<sup>477</sup> 22 of 1994.

<sup>478</sup> See the pre-ambule to the act. There are debates, however, as to whether 1913 ought to be the cut-off year for restitution. On the 12<sup>th</sup> of January 2013, President Jacob Zuma mentioned that the cut-off year would be revised to 30 June 2019.

The land restitution process must contribute to the objectives of socio-economic transformation, constitutional departure from apartheid to democracy as well as the country's "wider land reform ambitions."<sup>479</sup> It should be a process through which transformative constitutionalism is achieved. Through land restitution, the country is presented with "a particular socio-legal context within which unusually boundless possibilities for social and political agency may crystallize."<sup>480</sup> James and Fay argue that land restitution in South Africa should "set right the earlier breaking apart of the social fabric."<sup>481</sup>

Unfortunately, the current process simply aims to settle outstanding land claims without putting any measures in place that will encourage the proper use of that land.<sup>482</sup> It is not a mechanism of transformation. Land restitution in South Africa is too legalistic in nature.<sup>483</sup> According to Turner and Ibsen, the South African land restitution programme was "designed as a stand-alone, legally driven programme without linkages to other planning or development processes."<sup>484</sup> Its core responsibility is to simply fulfil the constitutional imperative of "just and equitable redress."<sup>485</sup> "Its remit has thus been restricted to the formal resolution of land rights."<sup>486</sup> It lacks "strategic advance planning" and as a result, "much of the subsequent activity has been outsourced."<sup>487</sup>

The 1997 White Paper on South African Land Policy set the goals of restitution as also "providing support to the vital process of reconciliation."<sup>488</sup> It further states that the land reform process seeks to carry out "restitution ... of land to promote justice and reconciliation."<sup>489</sup> There is poor post-settlement support for the beneficiaries. The programme only addresses personal injury for the claimants through simply returning lost land and does nothing more to improve the livelihoods of the beneficiaries. The programme does not

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<sup>479</sup> Hall R (2010) "Reconciling the Past, Present, and Future – the parameters and practices of land restitution in South Africa" in *Land, Memory, Reconstruction and Justice – Perspectives on Land Claims in South Africa* (eds) Walker (et al) 1.

<sup>480</sup> Beyers, C (2005) *Land Restitution in District Six, Cape Town: Community, citizenship and social exclusion*, DPhil dissertation Sussex University.

<sup>481</sup> Fay D and James D, (2009) 3.

<sup>482</sup> Hall R (2010) 2.

<sup>483</sup> Hebinck P and Leynseele VY "Through the prism: Local reworking of land restitution settlements in South Africa in Fay D and James D, (eds) *The Rights and Wrongs of Land Restitution* 164.

<sup>484</sup> Turner S and Ibsen H (2000) *Land and Agrarian Reform in South Africa*, Research Report No. 6, Programme for Land and Agrarian Studies, Cape Town: University of the Western Cape, 12.

<sup>485</sup> Hebinck P and Leynseele VY (2009) "Through the prism: Local reworking of land restitution settlements in South Africa in Fay D and James D, (eds) *The Rights and Wrongs of Land Restitution* 164.

<sup>486</sup> Hebinck P and Leynseele VY (2009) 165.

<sup>487</sup> Hebinck P and Leynseele VY (2009) 165.

<sup>488</sup> White Paper on South African Land Reform Policy, 1997 section 4.13.

<sup>489</sup> White Paper on South African Land Reform Policy, 1997 section 4.13.

encourage responsible use of land which constructs society and improves people's lives. Land restitution should be a process and not an end in itself.<sup>490</sup>

The lack of adequate post-settlement support as well as simply giving land without responsibility fosters irresponsible ownership. This has fed into the general failure of the land restitution programme. Although the restitution programme is a major step towards returning land to its original owners, shortcomings of the Act have meant that the process is not able to produce the desired results. It has failed to create better socio-economic conditions and opportunities for beneficiaries, as well as contributing to economic growth.<sup>491</sup> A closer analysis of the Rural Development and Land Reform annual reports shows that focus is only on *how many* hectares have been returned, as opposed to whether the beneficiaries have the capacity to work the land.<sup>492</sup>

The focus on transferring specific quantities of land while the new landowners lacked support for productive use of land has led to an even bigger problem, namely farm failures. Beneficiaries of the land reform programme have not received adequate post-settlement support and their livelihoods have not improved.<sup>493</sup>

Consequently, many farms are now lying unused, a situation that needs urgent attention in the context of food security, economic growth and job creation. The Minister responsible for land reform, Mr Gugile Nkwinti, conceded that as much as 90% of formerly productive farms now lie fallow and are on the brink of collapse because of being unexploited.<sup>494</sup>

In the Green Paper on Land Reform which was passed in 2011 an attempt was made to provide solutions to the problems, as pointed out above, relating to the land reform process. The Green paper will be discussed in greater detail in the next chapter but for now it suffices to say that it too does not provide solutions to the problem of wasteful neglect of restitution land.

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<sup>490</sup> Hall R (2010) 2.

<sup>491</sup> Lahiff E (2008) 'Land Reform in South Africa: A Status Report. Programme for Land and Agrarian Studies.' *Research Report No. 38*, 1.

<sup>492</sup> Hall R (2004) 654-671 at 657.

<sup>493</sup> Cousins, B (2009) *Land Reform In Post-apartheid South Africa – A Disappointing Harvest*.

<sup>494</sup> See his speech online at <http://www.info.gov.za/speeches/2010/10030311251002.htm> (Accessed 13.12.2010).



## CHAPTER THREE: THE 2011 GREEN PAPER ON LAND REFORM

### 3.1 Introduction

Scholars, NGOs and various legal entities have long voiced their concerns about the current shortcomings of the land restitution process as discussed in the previous chapter. Various stakeholders have also pointed to the need for an alternative land restitution route which is not only expedient but which also improves the livelihoods of beneficiaries, and contributes to the economy.<sup>495</sup> Besides failing to improve the rural economy and being inconclusive, the programme has failed to impact significantly on the land tenure systems prevailing on commercial farms and in the communal areas.<sup>496</sup> It has almost completely failed to provide adequate post-settlement support and has often worsened the beneficiaries' livelihoods.<sup>497</sup> It fosters irresponsible ownership of cultivable land and undermines the socio-economic goals of the country.<sup>498</sup> Many supposed "beneficiaries" of land reform, particularly land restitution, have essentially not benefited from the current programme.<sup>499</sup> The programme has neither reached its targets nor achieved historical redress, redistribution of wealth and opportunities, and it has hardly made any meaningful contribution to economic growth.<sup>500</sup>

The policy makers have neither been blind to the failures of the land restitution process nor deaf to the calls for a transformed land restitution process. The President and the department of Rural Development and Land Reform have also acknowledged the need for a restitution process which improves the livelihoods of the beneficiaries.<sup>501</sup> The concern with the land restitution process climaxed with the release of the 2011 *Green Paper on Land Reform* (Green Paper). This Paper ignited the process of consultation over an intended new trajectory for land reform. It marked a timely stride in discussions and efforts aimed at creating a new legislative paradigm which would, amongst others, address the failures of the land restitution process.

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<sup>495</sup> Lahiff E (2008) 'Land Reform in South Africa: A Status Report. Programme for Land and Agrarian Studies.' *Research Report No. 38*, 1; Hall R (2004) pp. 654-671 at 655; Section 2011 *Green Paper on Land Reform* sections 3, 4 and 6; Walker C (2008) *Landmarked – Land Claims and Land Restitution in South Africa*. 198.

<sup>496</sup> See generally Walker C (2008) *Landmarked – Land Claims and Land Restitution in South Africa*.

<sup>497</sup> See discussion in chapter two above; Cousins B (2009) *Land Reform In Post-apartheid South Africa – A Disappointing Harvest*.

<sup>498</sup> See discussion in chapter two above.

<sup>499</sup> See article in *The Times* (2014) "Land Reform not benefitting blacks" 6.

<sup>500</sup> Lahiff E (2008) 1.

<sup>501</sup> See speech by Gugile Nkwinti <http://www.info.gov.za/speeches/2010/10030311251002.htm> (Accessed 13.12.2014); see also Karol Boudreaux (2009), "Land Reform as Social Justice: The Case of South Africa" *Working Paper No. 09-37*, October 2009.

This section identifies the absence of a social-obligation norm as the main shortcoming of the Green paper. The section argues that if the Green paper does not incorporate a social-obligation norm of ownership, the institutional changes that it envisages will not solve the problems identified in section 5 (a), (f) and (g) of the paper, particularly “a fragmented beneficiary support system”, “declining agricultural contribution to the GDP” and the “unrelenting increase in rural unemployment” respectively. While others may argue that such an analysis of the Green Paper may seem too hasty at this stage as it is only a draft policy document which envisages potential legislation, such an examination is nonetheless necessary as the Green Paper points to potentially far reaching policy changes to the existing process of land restitution. According to Rudman, the Paper “informs South Africa’s legislative future in terms of ownership, food production and combating poverty” and it is therefore important to subject it to critical analysis before it becomes official policy.<sup>502</sup>

In addition, the importance of critically analysing legislative drafts before they become official policy cannot be emphasized enough. Mostert argues that decisions in cases such as *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others*<sup>503</sup> and *Minister of Minerals and Energy v Agri South Africa*<sup>504</sup> demonstrate the perils of letting legislative drafts go without critical analysis.<sup>505</sup> *Tongoane* compelled the law makers to reconsider the Communal Land Rights Act<sup>506</sup> (CLARA) after it was declared unconstitutional. *Minister of Minerals and Energy v Agri South Africa* shows that legislation which has not been adequately subjected to scrupulous and critical analysis would lead to a torrent of expensive litigious confrontations amongst interested stakeholders. Mostert elaborates by arguing that it is important to avoid the mistakes made in the Communal Land Rights Act<sup>507</sup> as well as the contentious provisions of the Mineral and Petroleum Resources Development Act<sup>508</sup> by critically analysing draft legislation in order not only to save costs but also to suggest useful legislation that will change the livelihoods of those for whom it is drafted.<sup>509</sup>

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<sup>502</sup> Rudman A (2012) “Redefining National Sovereignty: The Key to Avoid Constitutional Reform? Reflections on the 2011 Green Paper on Land Reform” *Stellenbosch Law Review* Vol 23(3) 423.

<sup>503</sup> *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).

<sup>504</sup> *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA).

<sup>505</sup> Mostert H, *Land as a 'National Asset' under the Constitution: The System Change Envisaged by the 2011 Green Paper on Land Policy and What this Means for Property Law under the Constitution* (June 7, 2013), 4.

<sup>506</sup> Act 11 of 2004.

<sup>507</sup> 11 of 2004 – It was declared unconstitutional.

<sup>508</sup> 28 of 2002.

<sup>509</sup> Mostert H (June 7, 2013), 3.

In another example similar to CLARA, the Constitutional Court in *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others*<sup>510</sup> declared the Restitution of Land Rights Amendment Act<sup>511</sup> invalid largely due to lack of adequate public consultation in accordance with section 72(1)(a) of the Constitution. The *Land Access Movement* case is also interesting because section 9(cA)(ii) of the Draft Amendment Act intended to amend section 33 of the Restitution of Land Rights Act by demanding that Restitution of a Right in Land should happen in circumstances where a claimant will be able to utilise the land productively. This suggestion however did not form part of the final Restitution of Land Rights Amendment Act. While reasons for this omission are not given, this is a lacuna in land restitution legislation which this thesis seeks to address. On a more contextual note, the *Land Access Movement* case, as in *Tongoane*, illustrates the importance of subjecting draft legislation to scrutiny before it is enacted into law.

This chapter's main focus is the Green Paper's key provisions found in section 6 of the Paper. These provisions are aimed at creating a "New Trajectory for Land Reform." The purpose of analysing these provisions is to show that although the policy makers have realised the shortcomings of the country's land restitution programme, the Green Paper does not offer an adequate solution to these shortcomings. While it suggests numerous potentially positive changes to the land reform arena, the paper is vague, increases bureaucracy and some of its provisions border on unconstitutionality.

The chapter gives a general overview of the Green Paper. It then analyses some of the Paper's key provisions, pointing out the problem areas. The chapter then concludes by arguing that although the Green Paper is a commendable step towards addressing the failures of the land restitution programme, the policy envisaged in it will also not adequately solve the problem of wasteful neglect of cultivable land. Consequently, the rural economy will not be improved.

### **3.2 The 2011 Green Paper on Land Reform**

The Green Paper on Land Reform was published on the 31<sup>st</sup> of August 2011. Its publication brought euphoria amongst those that have an interest in the land reform issue in South Africa because it had been long been overdue. The Paper seeks to replace land reform policy which

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<sup>510</sup> (CCT40/15) [2016] ZACC 22 (28 July 2016).

<sup>511</sup> 15 of 2014.

has existed since 1997 with a new “trajectory for land reform.”<sup>512</sup> To this effect, it suggests a number of policy proposals which “attempt to break from the past without significantly disrupting agricultural production and food security, and avoid redistributions that do not generate livelihoods, employment and incomes.”<sup>513</sup>

The publication of the Green Paper commenced a nationwide process of consultation over its provisions. Although it is only a Green Paper, its importance is underscored by the fact that it points to a novel and probable new route that legislation on land reform will take. It is also an important document because the land issue has been at the heart of South Africa’s protracted attempts at resolving the country’s socio-economic inequalities for some time now.

### 3.2.1 Political undertones

What may be unnerving for most people is the politically charged language used in the Green Paper. The language seems to suggest that the Paper might deviate from following a constitutionally guided land reform process.<sup>514</sup> Indications that the Paper may deviate from the constitutionally laid guidelines can be inferred from statements such as –

The Truth and Reconciliation Commission (the TRC) has adequately demonstrated the capacity and political will of black people, in general, and the African majority, in particular, to forgive. BUT, this goodwill should not be taken for granted, because it is not an inexhaustible social asset. It is an asset around which we should work together to build our collective future. That is the spirit of this Draft Green Paper.<sup>515</sup>

Rudman argues that the language used in the Green Paper suggests that the new path envisaged for land reform may not be totally dependent on the guidelines set in the Constitution.<sup>516</sup> The language further suggests that land reform will no longer be viewed as an instrument through which South Africa can achieve transformation.<sup>517</sup> Instead, land reform will be an “anti-colonial struggle where repossession of land lost through force or deceit and the restoration of indigenous culture are at the forefront.”<sup>518</sup> Mostert confirms that the language used in the Green Paper point to reforms that will be far-reaching and will lead to

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<sup>512</sup> See section 6 of the *2011 Green Paper on South African Land Reform*.

<sup>513</sup> See media statement by Minister of Rural Development and Land Reform Mr G Nkwinti available on <http://www.pmg.org.za/policy-documents/2011/08/30/land-reform-green-paper> (accessed 10.06.2014).

<sup>514</sup> Rudman A 2012 “Redefining National Sovereignty: The Key to Avoid Constitutional Reform? Reflections on the *2011 Green Paper on Land Reform*” *Stellenbosch Law Review* Vol 23(3) 423.

<sup>515</sup> *2011 Green Paper on Land Reform* – Introduction, 3.

<sup>516</sup> Rudman A (2012) “Redefining National Sovereignty: The Key to Avoid Constitutional Reform? Reflections on the *2011 Green Paper on Land Reform*” *Stellenbosch Law Review* Vol 23(3) 423.

<sup>517</sup> Rudman A (2012) 23(3) 423.

<sup>518</sup> Rudman A (2012) Vol 23(3) 423.

“upheaval of existing positions.”<sup>519</sup> The Paper makes it clear that patience regarding the land issue is over because it is not “an inexhaustible asset.”<sup>520</sup>

In its introduction, the Green Paper refers to land as a “national asset” which is essential “in the resolution of the race, gender and class contradictions in South Africa.” So highly is the land regarded in the Paper that it is viewed as defining the country’s “national sovereignty.”<sup>521</sup> The Paper further argues that any debate that relates to the land issue in South Africa should acknowledge land as a “national asset.”<sup>522</sup> Without this acknowledgement, such debates about “land reform and food security” would be a waste of time.<sup>523</sup> The Green Paper reiterates that resolution of the land issue will aid promoting socio-economic equality in South Africa.<sup>524</sup> The Paper further states that “the long road necessarily starts with the crafting of a new pragmatic but fundamentally altered land tenure system for the country.”<sup>525</sup> If this is not done, the prevailing underdevelopment and socio-economic fragmentation would be perpetuated.<sup>526</sup>

The Green Paper notes that South Africa’s present economic frame continues to nurture the apartheid progeny of undermining “development amongst those historically dispossessed of their land.”<sup>527</sup> The Paper’s vision is to “promote optimal land utilization in all areas and sectors.”<sup>528</sup> This is a laudable stance because, as chapter 2 illustrated, one of the main problems with the current land restitution process is that it leads to wasteful neglect and underutilization of land. This has negative consequences on food security, employment as well as the rural economy. The Paper also seeks to administer “rural ... lands in a sustainable and productive way.”<sup>529</sup> It states that one of its principles is to achieve “a sustained production discipline for food security.”<sup>530</sup> Its long term goal is the achievement of “social

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<sup>519</sup> Mostert H, *Land as a 'National Asset' under the Constitution: The System Change Envisaged by the 2011 Green Paper on Land Policy and What this Means for Property Law under the Constitution* (June 7, 2013), 5.

<sup>520</sup> 2011 Green Paper on Land Reform – Introduction, 3.

<sup>521</sup> 2011 Green Paper on Land Reform – Introduction, 1; see also Pienaar J.M (2014) *Land Reform* 242.

<sup>522</sup> 2011 Green Paper on Land Reform – Introduction, 1.

<sup>523</sup> 2011 Green Paper on Land Reform – Introduction, 1.

<sup>524</sup> 2011 Green Paper on Land Reform – Introduction, 2; see also Pienaar J.M (2014) *Land Reform* 242.

<sup>525</sup> 2011 Green Paper on Land Reform, 3.

<sup>526</sup> 2011 Green Paper on Land Reform, 3.

<sup>527</sup> S 2.3.

<sup>528</sup> S 3.4.

<sup>529</sup> S 3.4.

<sup>530</sup> S 4.1 (c).

cohesion and development.”<sup>531</sup> This incorporates relative growth, income equality, employment and prosperity amongst all South Africans.<sup>532</sup>

### 3.2.2 Acknowledgement of failures of the land reform programme

Section 5 of the Green Paper acknowledges and lists the current challenges and weaknesses of the land reform programme.<sup>533</sup> The eight challenges and weaknesses of the current land reform programme can be summarised as the inconclusiveness of the programme as well as the failure to promote active and optimal utilisation of land that benefits the country’s economy. Section 5 of the Paper is evidence that the law makers have not been blind to the failures of the programme as discussed in chapter two above.

In section 5(f), the Green Paper notes that a major challenge to the current land reform programme is the reduced agricultural production which negatively affects the country’s GDP. It also notes that the current land reform programme has resulted in an increase in the number of unemployed rural South Africans.<sup>534</sup> As discussed above, these are old problems that have long been identified and the Green Paper seeks to provide a trajectory that will address them.

However, while the Green Paper successfully identifies the challenges and weaknesses of the land reform programme, it will be shown below that the institutions it envisages and that are meant to address these challenges will not be able to successfully do that. The thesis, however, will set out a theoretical framework in chapter four that will successfully, in the words of the Green Paper, “promote optimal land utilization...and sustainable rural production systems.”<sup>535</sup>

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<sup>531</sup> S 4.2.

<sup>532</sup> S 4.2.

<sup>533</sup> These Challenges and Weaknesses or Rationale for Change are listed as -

- (a) The land acquisition strategy / willing-buyer willing-seller model (a distorted land market);
- (b) a fragmented beneficiary support system;
- (c) beneficiary selection for land redistribution;
- (d) land administration / governance, especially in communal areas;
- (e) meeting the 30% redistribution target by 2014;
- (f) declining agricultural contribution to the GDP;
- (g) unrelenting increase in rural unemployment; and,
- (h) a problematic restitution model and its support system (communal property institutions and management)

<sup>534</sup> Section 5(g).

<sup>535</sup> S 3.4.

The Green Paper also notes that the current restitution programme is very problematic particularly because its post-settlement support system is poor.<sup>536</sup> It suggests an “Improved Trajectory for Land Reform” in section 6. The trajectory should promote agricultural production as well as enhance food security.<sup>537</sup> Land reform must not allow redistribution and restitution processes which do not enhance livelihoods that are sustainable to beneficiaries and local communities.<sup>538</sup> The processes should enhance employment and income generation for the beneficiaries and local communities.<sup>539</sup>

### **3.2.3 Proposals aimed at addressing the failures**

The general issue that the Green Paper tries to address is how South Africa can carry out an expedient land reform process that does not undermine the productivity of land as well as impact negatively on job security and the economy. The major policy proposals introduced by the Green Paper which are aimed at promoting optimal, sustainable and productive use of restituted land are found in section 6 of the Paper. Here, the Green Paper describes its suggested policy proposals as “An Improved Trajectory for Land Reform.”

Section 6.2 of the Green Paper lists a number of programmes and institutions that are aimed at supporting the Improved Trajectory for Land Reform. A notable programme is the “Recapitalisation and Development Programme.”<sup>540</sup> This programme seeks to achieve optimum agricultural output from all land reform farms.<sup>541</sup> It will focus on all land reform farms that were acquired through the State as well as those that were acquired privately since 1994.<sup>542</sup> This will be achieved through partnering with commercial farmers who will also share the risk.<sup>543</sup>

While this is in principle a noble suggestion, there is no detail as to how it will actually be implemented. In this regard the thesis will make a contribution and suggest that the adoption of the social-obligation norm as the guide through which land reform should be carried out, will assist in achieving optimal farm land production as envisaged by the Green Paper.

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<sup>536</sup> S 5(h).

<sup>537</sup> S 6.1 (a).

<sup>538</sup> S 6.1 (b).

<sup>539</sup> S 6.1 (b).

<sup>540</sup> S 6.2 (a).

<sup>541</sup> S 6.3.

<sup>542</sup> S 6.3.

<sup>543</sup> S 6.3.

Section 6 emphasizes the need for an enhanced land reform perspective whose focus should be agricultural production and food security.<sup>544</sup> This trajectory should also curb job losses as well as improve the livelihoods of the beneficiaries and provide income for those who receive land.<sup>545</sup> According to the Green Paper, these ideals should be complemented by a number of programmes and institutions. These programmes and institutions listed in the Green Paper are the following –

- a. A recapitalisation and development programme;
- b. A single land tenure system with four tiers;
- c. A Land Management Commission;
- d. A Land Valuer-General;
- e. A Land Management Board;
- f. Common Property Institutions;
- g. A Land Tenure Security Bill.

The Green Paper explains the anticipated purposes and functions of these programmes and institutions. It is therefore unnecessary to repeat these here. What the chapter will now do is to analyse the potential implications of this intended “New Trajectory for Land Reform” with a particular focus on the Land Management Commission, the Land Valuer General and the Land Rights Management Board. The focus is limited to these three institutions because they are the main instruments which will be tasked with spearheading the envisaged “New Trajectory for Land Reform.”

### **3.3 Evaluative overview**

#### **3.3.1 A Land Management Commission**

According to the Green Paper, the Land Management Commission (LMC) will “be autonomous, but not independent of the Ministry and Department.”<sup>546</sup> The LMC will be required to account to the Ministry through the Department. All of its reports will be submitted to the Department. All the LMC’s finances will be handled by a financial manager who will report to the Department’s accounting officer. All persons with an interest in the land issue as well as those persons with exceptional attributes appointed by the minister will make up the LMC.

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<sup>544</sup> S 6.1 (a).

<sup>545</sup> S 6.1(b).

<sup>546</sup> S 6.5.



The LMC will be an advisory body to all Departments and State organs with an interest in all land related matters. It will also be in charge of coordinating government departments, land management agencies and other stakeholders interested in the land issue. It will also manage the regulatory environment that “ensures that lands are managed in a manner that will protect the quality and values.”<sup>547</sup> It will also audit, monitor and ensure the integrity of the State’s inventory and all land that belongs to the public.<sup>548</sup> The Green Paper expects the LMC to be a reference point for all matters relating to the land issue in South Africa.<sup>549</sup> It is however not clear how the LMC will fit into the current legal framework that already has courts, the prosecution as well as the Registrar of Deeds. Of this, Pienaar comments and says that the enquiry regarding the alignment of the LMC with existing structures cannot be addressed satisfactorily at this stage because possibly, developments may still be in the pipeline that may shed more light.<sup>550</sup> This is further evidenced by the publication of a *Land Management Commission Bill* of 2013.<sup>551</sup>

The LMC will have the power to subpoena any person to come before it and answer questions that relate to their interest in land or their holding of the land.<sup>552</sup> The LMC can take the initiative to make enquiries regarding the land from anyone or can make the enquiries subsequent to requests from any interested person.<sup>553</sup> The LMC will have the power to verify, validate or invalidate title deeds.<sup>554</sup> It can also demand that any landholding be declared with all the required documentation for such declaration.<sup>555</sup> The LMC will also have the power to grant amnesty and or initiate prosecution, seize or confiscate land acquired illegally.<sup>556</sup>

While a surface reading of the LMC and its functions and powers point to a creation that is well-meaning, a closer scrutiny of the LMC exposes potential problems for its functions and the land issue in general. It is unrealistic to expect the LMC to service all persons, the government departments, municipalities, organs of State as well as the different levels of government who have an interest in or are responsible in the land issue. Burdening a single entity with the responsibility to service and handle all concerned persons’ interest in land is

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<sup>547</sup> S 6.5.1(c).

<sup>548</sup> S 6.5.1(d).

<sup>549</sup> S 6.5.1(e).

<sup>550</sup> Pienaar J.M (2014) *Land Reform* 247.

<sup>551</sup> Published for comment on the 27<sup>th</sup> of September 2013.

<sup>552</sup> S 6.5.2(a).

<sup>553</sup> S 6.5.2(b).

<sup>554</sup> S 6.5.2(c).

<sup>555</sup> S 6.5.2(d).

<sup>556</sup> S 6.5.2(e) and (f).

too onerous and will only increase bureaucracy and unnecessary administration. One of the problems with the current land issue is poor institutional governance and creating another government agency will not solve the problem.

It is inconceivable to expect one entity to service the following other departments with an interest in the land issue – Agriculture, Forestry and Fisheries; Environmental Affairs; Human Settlements; Mineral Resources; Public Works; Tourism; Traditional Affairs; Transport; as well as Water Affairs. In addition to these State Departments, other entities which would be serviced by the LMC include South African Forestry Company Ltd, Transnet Ltd, the Land and Agriculture Bank of South Africa, Eskom Holdings Ltd, Airports Company of South Africa and many others. Expecting the LMC to service all these will only render the LMC incompetent and a waste of the State's resources. The LMC would not be able to develop the necessary skills, expertise and capability to provide auditing services, give advice, coordinate, regulate and manage the regulatory environment for all these stakeholders as they are too many and too diverse to be managed by a single entity.

The other potential problem with the LMC is that it will have the power to preside over matters that involve fraudulently and or corruptly acquired land.<sup>557</sup> The LMC will seize such land, grant amnesty or initiate prosecution of persons involved in corrupt and fraudulent activities. Although this may be well intended - it however borders on unconstitutionality. This is because the Constitution provides for “any dispute’ to be decided in a court of law or independent tribunal<sup>558</sup> not a Commission which is answerable to the government.

### **3.3.2 A Land Valuer-General**

As part of the “Improved Trajectory for Land Reform,” the Green Paper proposed the establishment of a Land Valuer-General (LVG). The LVG will be a statutory office expected to, amongst other duties, “determine financial compensation in cases of land expropriation under the Expropriation Act or any other policy and legislation, in compliance with the Constitution.”<sup>559</sup> This provision, like the LMC also borders on unconstitutionality. This is because section 25(2) and (3) lay down the requirements for compensation of expropriated property as well as other incidentals that relate to expropriation of property. Of course, the potential unconstitutional consequences can be averted if the LVG operates as only a resource point that is used by the government when it determines compensation amounts.

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<sup>557</sup> S 6.5.2(e) and (f).

<sup>558</sup> S 34 of the 1996 Constitution of the Republic of South Africa.

<sup>559</sup> S 6.6.2.

The expectation that the LVG will provide “fair and consistent land values for rating and taxing purposes” sets the LVG on a collision course with existing municipal legislation. For example, section 2(1) of the Municipal Property Rates Act 6 of 2004 provides that

- (1) A metropolitan or local municipality may levy a rate on property in its area.
- (2) (a) A district municipality may not levy a rate on property except on property in a district management area within the municipality.  
(b) Any reference in this Act to the area of a municipality must, in the case of a district municipality, be read as a reference to a district management area within the district municipality.
- (3) A municipality must exercise its power to levy a rate on property subject to-
  - (a) section 229 and any other applicable provisions of the Constitution;
  - (b) the provisions of this Act; and
  - (c) the rates policy it must adopt in terms of section 3.

Giving the LVG the responsibility regarding rating and taxing purposes would certainly create problems between the Department and municipalities. The powers that the LVG will have are also not clearly spelt out.<sup>560</sup>

### **3.3.3 A Land Rights Management Board**

Section 6.7 provides for the creation of a Land Rights Management Board (LRMB). The LRMB will be composed of persons appointed by the Minister in light of their exceptional skills and ability to provide professional services to the board. The LRMB will provide the communication of changes that would have been made in law to beneficiaries of land, owners of farms and to all those who live on farms.<sup>561</sup> It will also build institutional capacity in order to give advice to, and support those who hold rights in land as well as provide for their active use of the law.<sup>562</sup> The Board will also work with the Chief Deeds Registrar to create efficient systems for recording and registering rights on land which are accessible to the public.<sup>563</sup> It will also provide legal representation for those affected by the land issue and who need such representation.<sup>564</sup> The LRMB will also encourage non-litigation solutions to disputes and problems.<sup>565</sup>

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<sup>560</sup> See also Du Plessis, E. “Silence is golden: The lack of direction on compensation for expropriation in the 2011 Green Paper on Land Reform.” *PER* 2014, vol.17, n.2, pp. 806.

<sup>561</sup> S 6.7.2(a).

<sup>562</sup> S 6.7.2(b).

<sup>563</sup> S 6.7.2(c).

<sup>564</sup> S 6.7.2(e).

<sup>565</sup> S 6.7.2(d).

The LRMB will have the power to establish and or dissolve Land Rights Management Committees (LRMCs).<sup>566</sup> The LRMB will generally police the LRMCs, providing for the standards that LRMCs should adhere to; overturn the decisions of LRMCs and other incidental matters relating to the functions of LRMCs.

Like other envisaged establishments, the LRMB will only further increase bureaucracy and costs with regards to the handling of the land issue.

### 3.4 The Property Valuation Act

In an attempt to address the challenges of the slow pace of land restitution, particularly challenges that were brought about by the “willing-buyer willing-seller,” the government promulgated the Property Valuation Act 17 of 2014 (PVA).<sup>567</sup> In its introduction, this Act provides that it aims to “provide for the establishment, functions and powers of the Office of the Valuer-General and for the regulation of the valuation of property that has been identified for land reform as well as property that has been identified for acquisition or disposal by the Department of Rural Development and Land Reform.”<sup>568</sup>

In section 12, the PVA provides that the Valuer-General will be authorised to determine the price of land that should be paid by the State for land reform purposes. The value of property, as defined in the Act, is determined with reference to the test for compensation payable upon expropriation set out in section 25(3) of the Constitution.<sup>569</sup> Instead of determining value of property by solely using its market value, the PVA in section 25(3) argues that market value is only one of a range of factors that should be considered in balancing the public interest and the interest of those affected. This effectively abolishes the willing buyer-willing seller method of acquiring land. In the words of the President, “Once implemented the [Property Valuation Act] will stop the reliance on the Willing Buyer-Willing Seller method in respect

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<sup>566</sup> S 6.7.3.

<sup>567</sup> While this thesis does not discuss the progress of the land restitution programme in detail, the slow pace of the land restitution process is one of the challenges that has faced the land reform programme. See brief analogy of this issue in paragraph 1.2.

<sup>568</sup> See Introduction as well as section 2 of Act 17 of 2014.

<sup>569</sup> “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.”

of land acquisition by the State.”<sup>570</sup> There will therefore be no need to negotiate and agree on a price between a willing buyer and a willing seller. The idea is to prevent sellers from inflating the prices of their property and speed up the acquisition process since there will be no delays that result from protracted negotiations over the price of property. In summary, the PVA seeks to expedite land reform by regulating how the price of land will be determined without spending too much time on negotiations.

### **3.5 Conclusion – not the solution either**

Both the Green Paper as well as the PVA make useful proposals regarding land and agrarian reform. The Green Paper lays a “constructive foundation for further discussions” regarding the resolution of the land issue.<sup>571</sup> For example, the idea of bringing certainty and clarity regarding land valuations and expropriations will be a welcome policy introduction.<sup>572</sup> The payment of just and equitable compensation by the State is very much in line with the Constitution.<sup>573</sup> This policy document does provide an opportunity for dialogue on the land issue in South Africa. It sets the stage for consultations around the intended policy and gives the public the chance to dialogue on policy proposals meant to improve land reform in South Africa.

The Paper however does not offer a comprehensive appreciation of the realities of the land issue in South Africa. It is mostly vague.<sup>574</sup> It does not properly deal with the current land problems. It fails to offer a critical analysis of the nature and shortcomings of the current land reform paradigm. Instead, as the chapter has shown, the Paper introduces more administrative bureaucracy and numerous restrictions on landownership. It fails to answer some of the land and agrarian reform’s key questions such as how land and agrarian reform can be expediently carried out in a manner that creates employment, promotes productivity of the land and contributes to the general socio-economic well-being of beneficiaries and the country as a whole.

As Pienaar puts it, the Green Paper “envisages a magnitude of new bodies and institutions but does not have the necessary alignment” that takes into account these envisaged bodies and

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<sup>570</sup> The Presidency, *State of the Nation Address 2015*, <http://www.thepresidency.gov.za/pebble.asp?re lid=14960> (accessed 21 July 2017).

<sup>571</sup> Rudman A (2012) “Redefining National Sovereignty: The Key to Avoid Constitutional Reform? Reflections on the 2011 Green Paper on Land Reform” *Stellenbosch Law Review Vol 23(3)* 423.

<sup>572</sup> See s 6.6.2.

<sup>573</sup> See section 6.6.2.b.

<sup>574</sup> Pienaar J.M (2014) *Land Reform 271*.

institutions.<sup>575</sup> The proposed systems and structures appear too complex and “top heavy with manifold levels and bodies involved” and this will promote bureaucracy and inevitably slow down the land restoration process altogether.<sup>576</sup> These envisaged bodies and institutions will further demand financial and human capital for them to not only take off the ground but to be also efficient.

A major problem with the Green Paper is that from its reading, one is left still unclear regarding how it will really address the problems that it identified. It seems that the Paper loses “sight of the weaknesses and challenges it aimed to address.”<sup>577</sup> As an example, in section 5, the Paper identifies eight critical areas that need intervention but then the Paper later only identifies only five that may be assisted. The others may only be *partially* addressed by the new approaches and institutions. As Pienaar argues, three of the identified challenges i.e. declining agricultural contribution to the GDP, rural unemployment and the restitution model and support system, do not even resonate in the Green Paper.”<sup>578</sup>

The Paper does not provide adequate guidance on the most important questions regarding land and agrarian reform in South Africa. Despite the discernible progress that has been made, land and agrarian reform is an area where transformation is lagging behind. Land reform targets have consistently not been met. The majority of land reform projects have not created sustainable livelihoods. Instead, rural unemployment has been on the rise while agriculture’s productive potential and contribution to the economy has been undermined.

The PVA also has potential challenges that may likely arise. While the PVA remains relatively untested, some experts have already identified potential challenges that it might present. For example, Spoor argues that the proposal to abolish the willing buyer-willing seller made by the PVA will counteract the progress made in the land reform programme.<sup>579</sup>

Spoor argues that the biggest likely challenge with the PVA is that it will result in a notable decrease of the number of claims that are settled.<sup>580</sup> Many claims that would have ordinarily been settled between parties will end up being referred to the Land Claims court as parties argue over the price of property. Effectively, this will significantly slow the process of land restitution and reverse the initial intentions of speeding up the process. To date no regulations

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<sup>575</sup> Pienaar J.M (2014) *Land Reform* 271.

<sup>576</sup> Pienaar J.M (2014) *Land Reform* 271.

<sup>577</sup> Pienaar J.M (2014) *Land Reform* 271.

<sup>578</sup> Pienaar J.M (2014) *Land Reform* 271.

<sup>579</sup> Spoor R (2014) “Land Reform and the law of unintended consequences.”

<sup>580</sup> Spoor, *ibid.*

have been established, to set out the criteria, procedure as well as the guidelines that are contemplated in section 12 (1)(a) of the PVA, including too how the Act will actually operate.



# CHAPTER FOUR: THE SOCIAL OBLIGATION NORM OF OWNERSHIP

## 4.1 Introduction

So far, one of the main shortcomings of South Africa's land restitution programme has been highlighted in this study, namely - the failure to promote active, sustainable and productive use of land. As was discussed in chapter two, while the government's efforts at returning land to its original owners through the land restitution programme are laudable, the restoration process undermines productivity on the farms and the rural economy in general. This in turn compromises food and job security which eventually has negative consequences for the economy in general. As also highlighted in chapters one and two, the focus of the current land restitution process has only been on restoring "quantities of hectares" of land to people by set timeframes. As a result of such a quantitative approach to land restitution, many once productive farms have been returned to beneficiaries who are not utilising them productively.

The current land restitution programme is costly and yet counterproductive. For instance, by 2013, the government had spent approximately R25.72 billion on land restitution.<sup>581</sup> In 2014/15, a further estimated R3 billion was spent on restitution.<sup>582</sup> Paradoxically, approximately 90% of land restitution farms acquired with this money, which used to be productive before their acquisition, are now completely unproductive and can be categorised as failures.<sup>583</sup> As noted in the previous chapters, there is general consensus on the need for a new land restitution trajectory that encourages optimal, sustainable and productive use of all agricultural land. While the *2011 Green Paper on Land Reform* is a notable stride towards this intended "new trajectory," it too will not solve the problem as was discussed in chapter three.

In this chapter it is argued that the absence of a social- obligation norm in land restitution is the main reason why land that has been returned to its previous owners is often neglected and unutilised. Ownership is still conceived in classical liberal lenses which accept that an owner has absolute power to do with his property as he pleases even if it means neglecting cultivable land. This seems to be in line with what Blackstone echoed when he stated that

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<sup>581</sup> Ellse B (2013) *Costing Land Restitution 1994-2013* Research Unit, Parliament of the Republic of South Africa, 4.

<sup>582</sup> See Commission on the Restitution of Land Rights annual report 2015/16.

<sup>583</sup> See speech by minister of Minister of Rural Development and Land Reform Gugile Nkwinti on <http://www.info.gov.za/speeches/2015/10030311251002.htm> (Accessed 13. 07.2015).



“[I]f man be the absolute tenant in free-simple...he may commit whatever waste his own discretion may prompt him to, without being impeachable or accountable for it to anyone.”<sup>584</sup>

As highlighted in chapter one, a number of court decisions such as *Drymiotis v Du Toit*,<sup>585</sup> *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others*<sup>586</sup> as well as *Bozzone and Others v Secretary for Inland Revenue*<sup>587</sup> give the impression that ownership is absolute except in instances where the public interest requires otherwise.<sup>588</sup> Such a classical liberalist understanding of ownership is erroneous. There are numerous reasons sounding in social contractarian moral as well as socio-economic theory for a disdain of wasting or neglecting cultivable land. As discussed in chapter two, allowing cultivable restitution land to be wasted imposes social harms. To this effect, the chapter argues that ownership of land should serve a social obligation. Different versions of the social-obligation norm exist but while they are all diverse, they all impose a positive obligation on the owner of property to utilise his property in a manner that also benefits others.

The chapter concedes that the social-obligation norm will not provide a complete solution to the problems of South Africa's land restitution programme. The two main weaknesses of the norm will be discussed. However, despite its weaknesses, the norm provides a better solution to the current problem, and as chapter five will show, it has been utilised successfully in Germany and Brazil.

## 4.2 What is ownership?

Various scholars of property law discuss ownership in detail.<sup>589</sup> It is therefore unnecessary to go into a comprehensive and substantial discussion of the concept here. What this section provides however, is a brief historical analysis of ownership to see whether or not it ever

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<sup>584</sup> Blackstone W (1765) *Commentaries on the Laws of England*, Book III chapter 14. See also Book III, chapter 18.

<sup>585</sup> 1969 (1) SA 631 (T).

<sup>586</sup> 1996 (4) SA 499 (A), p 504.

<sup>587</sup> 1975 (4) SA 579 (A), p 585.

<sup>588</sup> See also Van der Walt AJ (2010) *The Law of Neighbours* 1.

<sup>589</sup> For example, Milton JRL (1996) “Ownership” in (eds) Reinhard Zimmermann and Daniel Visser *Southern Cross: Civil Law and Common Law in South Africa*, and Co, Ltd 657-758; “Ownership” in Guest (ed) *Oxford Essays in Jurisprudence* (1961) 112 and 113; Lawson FH and Rudden B (2002) *The Law of Property* (3<sup>rd</sup> Edition); Badenhorst PJ, Pienaar J, and Mostert H (2006) *Silberberg and Schoeman's The Law of Property*; Mostert and Pope (eds) (2010) *The Principles of The Law of Property in South Africa*; CG Hall (1976) *The Law of Property 10<sup>th</sup> ed*; Van der Merwe, CG and de Waal MJ (1993) *The Law of Things and Servitudes*; McCaffery EJ (2001) “Must we have a right to waste?” in Munzer RS (eds) *New Essays in the Legal and Political Theory of Property – Cambridge Studies in Philosophy and Law*, 76-105.

allowed for wasteful neglect of property - specifically cultivable land. This discussion of ownership will show that while the initial definition of the concept lent itself more towards a classical liberal approach, this understanding changed over time and the current conception of ownership realizes limitations that are placed on ownership. The chapter will also discuss the *ius abutendi* as an entitlement of ownership which has been erroneously understood as allowing neglect of property.

As the discussion below shows, a universal definition of ownership is elusive in our law.<sup>590</sup> This is surprising given the fact that it is an integral part of our everyday life.<sup>591</sup> Honorè once remarked, “[A] people to whom ownership was unknown, or who accorded it a minor place in their arrangements, who meant by *meum* and *tuum* no more than ‘what I (or you) presently hold’ would live in a world that is not our world”.<sup>592</sup> According to Gallie, the specific meaning of ownership is “essentially contested.”<sup>593</sup> What it means differs from one community and circumstance to another.<sup>594</sup> This lack of a clear and precise definition of ownership has its origins in Roman law. Borkowski and Du Plessis argue that the Romans neither had nor needed a clear definition of ownership because the structure of the Roman society did not leave much room for property disputes.<sup>595</sup> The head of the family usually exercised complete control of people and things in his household.<sup>596</sup> With regard to land, the Romans considered it as public property even if it was enjoyed privately.<sup>597</sup>

With time however, the socio-economic and legal changes to the Roman Republic necessitated a transition from an undifferentiated concept of ownership to a more specific

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<sup>590</sup> *MEC for Local Government and Finance, KwaZulu-Natal v North Central & South Central Local Councils, Durban and others* [1999] 3 All SA 5 (N), 14; Wessels J in *Johannesburg Municipal Council v Rand Townships Registrar and others* 1910 TPD 1314, 1319; Badenhorst PJ, Pienaar J, and Mostert H (2006) *Silberberg and Schoeman's The Law of Property* 91; Mostert and Pope (eds) (2010) *The Principles of The Law of Property in South Africa* 91.

<sup>591</sup> See Bhalla RS (1981) “Legal Analysis of the Rights to Property” *Anglo-American Law Review* 180.

<sup>592</sup> Tony Honorè (1961) ‘Ownership’ in AG Guest (ed) *Oxford Essays in Jurisprudence* 107.

<sup>593</sup> W B Gallie (1956) “Essentially Contested Concepts” *Journal of the Aristotelian Society* 167.

<sup>594</sup> Lawson FH and Rudden B (2002) *The Law of Property* (3<sup>rd</sup> Edition) 90; Mostert and Pope (2010) (eds) *The Principles of The Law of Property in South Africa* 91-92; Milton JRL (1996) “Ownership” in (eds) Reinhard Zimmermann and Daniel Visser *Southern Cross: Civil Law and Common Law in South Africa*, and Co, Ltd 657-758; Van der Walt AJ and Pienaar GJ (2009) *Introduction to the Law of Property* 6<sup>th</sup> edition Cape Town: 39.

<sup>595</sup> Borkowski A and Du Plessis P (1996) *Textbook on Roman Law* 3<sup>rd</sup> Edition 157; see also the discussion by JRL Milton “Ownership” in (eds) Reinhard Zimmermann and Daniel Visser *Southern Cross: Civil Law and Common Law in South Africa*, and Co, Ltd 639-664.

<sup>596</sup> Borkowski A and Du Plessis P (1996) *Textbook on Roman Law* 3<sup>rd</sup> Edition 157; Thomas JAC (1978) *Textbook of Roman Law* 133 .

<sup>597</sup> Borkowski A and Du Plessis P (1996) 157; see also Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students’ Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 52-57.

notion in classical law.<sup>598</sup> Various interests in property made it necessary to have a clearer definition of ownership.<sup>599</sup> Jurists of the late Republic and early Empire emerged with the concept of *dominium*.<sup>600</sup> *Dominium* in due course became the “highest and most absolute form of title to property” which was different from other lesser forms of title.<sup>601</sup> The owner of property became its “lord and master” (*dominus*).<sup>602</sup> Where someone else took that property, the owner was entitled to secure his rights through *vindicatio*.<sup>603</sup> Consequently *dominium* became the definitive form of title to property and it was distinguishable from other forms of title such as servitudes and pledges.<sup>604</sup> The term differentiated between the supreme title that a person could have in respect of a thing and other lesser rights in things.<sup>605</sup>

Although the concept of *dominium* started clarifying the exact content of ownership, it was also a difficult term to define comprehensively. Even more recent cases such as *Johannesburg Municipal Council v Rand Townships Registrar and Others* acknowledged that “the exact scope of *dominium* is a controversy and it has been for a long time.”<sup>606</sup> In another contemporary case of *Chetty v Naidoo*,<sup>607</sup> the difficulty of defining *dominium* comprehensively was recognized. Jansen JA held that “[I]t may be difficult to define *dominium* comprehensively, but there can be little doubt that one of its incidents is the right of exclusive possession of the *res*...”<sup>608</sup>

For *dominium* to exist, a person had to prove that the thing was capable of being owned privately (*commercio*), they had the right to own the thing (*commercium*) and that they had acquired the thing appropriately (*mancipatio* or *cession*).<sup>608</sup> These tripartite attributes of *dominium* became the basis of ownership.<sup>609</sup>

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<sup>598</sup> Borkowski A and Du Plessis P (1996) 157.

<sup>599</sup> Borkowski A and Du Plessis P (1996) 157.

<sup>600</sup> Borkowski A and Du Plessis P (1996) 157.

<sup>601</sup> Borkowski A and Du Plessis P (1996) 157.

<sup>602</sup> Borkowski A and Du Plessis P (1996) 157.

<sup>603</sup> Borkowski A and Du Plessis P (1996) 158.

<sup>604</sup> Borkowski A and Du Plessis P (1996) 157.

<sup>605</sup> Thomas JAC (1978) *Law* 133; Buckland WW (1963) *A Textbook of Roman Law - from Augustus to Justinian* 3<sup>rd</sup> ed. 189.

<sup>606</sup> 1910 T.S. 1314 at 1319.

<sup>607</sup> 1974 (3) SA 13 (A).

<sup>608</sup> Borkowski A and Du Plessis P (1996) *Textbook on Roman Law* 3<sup>rd</sup> Edition 158.

<sup>609</sup> Borkowski A and Du Plessis P (1996) 157-159; Quoted in JRL Milton (1996) “Ownership” in (eds) Reinhard Zimmermann and Daniel Visser *Southern Cross: Civil Law and Common Law in South Africa*, and Co, Ltd 692.

The concept of ownership received continuous attention from numerous scholars.<sup>610</sup> Bartolus de Saxoferato<sup>611</sup> and Hugo Grotius<sup>612</sup> gave definitions of ownership which have heavily influenced the definition in South African law.<sup>613</sup> Bartolus is credited with the first attempt at defining ownership.<sup>614</sup> He defined ownership as “the right of disposal over a corporeal thing within the limits of the law.”<sup>615</sup> Grotius modified this definition<sup>616</sup> by adding that “ownership is complete if someone may do with the thing whatever he pleases, provided that it is permitted in terms of the law.”<sup>617</sup> This resulted in a definition of ownership in the South African common law in *Gien v Gien*, as “the most comprehensive real right that a person can have in respect of a thing.”<sup>618</sup> Further the court in *Gien* held that as a starting point, “a person can, in respect of immovable property, do with and on his property as he pleases.”<sup>619</sup> Ownership ordinarily triggers an idea of individual rights and not necessarily obligations to others.<sup>620</sup> For example, FH Lawson expresses this classical view in the following way –

“In principle, owners can do anything they like with what they own: use it, use it up, neglect it, destroy it, give it away entirely or for a time, lend it, sell or lease it, pledge it, leave it by will, and so on. Furthermore the owner is perfectly free to do nothing at all with the thing: in principle, the law of property imposes no positive duties on an owner.”<sup>621</sup>

From this, it follows that ownership is the most complete real right that a person can have over a thing. The right allows him to do as he wishes with his thing within the confines of the law.<sup>622</sup> Emphasis is placed on the completeness of the real right that a person has with a thing.

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<sup>610</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students’ Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 68 and 70.

<sup>611</sup> *D 41 2 17 1* fn 4.

<sup>612</sup> *Inleidinge 2 3 10*.

<sup>613</sup> Scott (2005) *Stell LR* 376.

<sup>614</sup> Milton JRL (1996) “Ownership” in (eds) Reinhard Zimmermann and Daniel Visser *Southern Cross: Civil Law and Common Law in South Africa*, and Co, Ltd 692; AJ van der Walt, “Bartolus se Omskrywing van *Dominium* en die Interpretasies Daarvan Sedert die Vyftiende Eeu”, (1986) 49 *THRHR* 305.

<sup>615</sup> *D 41 2 17 1* fn 4.

<sup>616</sup> Visser DP (1985) 43.

<sup>617</sup> *Inleidinge 2 3 10*; Quoted in Milton JRL (1996) “Ownership” in (eds) Reinhard Zimmermann and Daniel Visser *Southern Cross: Civil Law and Common Law in South Africa*, and Co, Ltd 692, see footnote 222.

<sup>618</sup> 1979 (2) SA 1113 (T) 1120.

<sup>619</sup> 1979 (2) SA 1113 (T) 1120.

<sup>620</sup> See also Alexander GS “The Social-Obligation Norm in American Property Law” *Cornell L. Rev* Volume 94 (4) 746.

<sup>621</sup> Lawson FH and Rudden B (2002) *The Law Of Property* 90.

<sup>622</sup> *Johannesburg Municipal Council v Rand Townships Registrar and others* 1910 TPD 1314, 1319; *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) 106; *Gien v Gien* 1979 (2) SA 1113 (T) 1120; Van der Walt

During the early years of the Roman-Dutch law in South Africa, the concept of ownership went through different changes from the European form to what it is currently understood in South Africa.<sup>623</sup> Before the 20<sup>th</sup> century, there had been no attempt to define ownership as it existed in South African law and the courts relied on the modified definition of ownership given by Grotius.<sup>624</sup> The courts also acknowledged the 1806 definition given by Johannes van der Linden where he defined ownership as “the right by which something belongs to a person to the exclusion of others.”<sup>625</sup> Van der Linden argued that ownership is best understood by looking at its consequences which include – “the right to enjoy the fruits of a thing; the right to use a thing as the owner pleases; the right to alter the thing; the right to destroy the thing; the right to prevent others from using the thing; the right to alienate the thing.”<sup>626</sup>

As alluded to at the beginning of this paragraph, the idea of ownership has evolved over time.<sup>627</sup> It has been affected by changing economic, cultural, social and political circumstances.<sup>628</sup> Cowen, in his influential 1984 lecture, “New Patterns of Landownership, The Transformation of the Concept of Ownership as *Plena in Re Potestas*” acknowledged this changing nature of ownership.<sup>629</sup> Despite the evolved nature of ownership however, Cowen noted that there are fundamental similarities between the Romans, Roman-Dutch and contemporary scholars’ understanding of ownership.<sup>630</sup> He acknowledged that the “Roman-Dutch writers added nothing to the Classical and Justinian Roman learning on the subject while furthermore, these Roman and Roman-Dutch ideas (of ownership as *plena in re potestas*) are also found in South African cases without modification.”<sup>631</sup> For example, in *Johannesburg Council v Rand Townships Registrar*<sup>632</sup> the court defined ownership using Von Savigny’s definition – “the unrestricted and exclusive control which a person has over a

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(1986) 49 *THRHR* 305-21; Pienaar 1986 *TSAR* 295-308; Lawson FH and Rudden B *The Law of Property* (3<sup>rd</sup> Edition) 2002.

<sup>623</sup> Milton JRL (1996) “Ownership” in (eds) Reinhard Zimmermann and Daniel Visser *Southern Cross: Civil Law and Common Law in South Africa* 692.

<sup>624</sup> Milton (JRL (1996) 694.

<sup>625</sup> Johannes van der Linden quoted by JRL Milton (1996) 695.

<sup>626</sup> Johannes van der Linden quoted by JRL Milton (1996) 695.

<sup>627</sup> Visser DP (1985) 39.

<sup>628</sup> Visser DP “The ‘Absoluteness’ of Ownership: The South African Common Law in Perspective” *Acta Juridica* 1985 p39.

<sup>629</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students’ Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 68 and 70.

<sup>630</sup> Visser DP “The ‘Absoluteness’ of Ownership: The South African Common Law in Perspective” *Acta Juridica* 1985 p 39.

<sup>631</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* 68 and 70.

<sup>632</sup> 1910 T.P.D 1314 at 1319.

thing”. The court held that although old, Savigny’s definition reflected how South Africa defined ownership. In *Dadoo Ltd v Krugersdorp*<sup>633</sup> Wessels J also used another old definition of ownership, describing it as including “all rights of use and abuse.”<sup>634</sup>

There is general consensus that ownership assures certain entitlements.<sup>635</sup> These entitlements are what Honoré refers to as the “standard incidents of ownership.”<sup>636</sup> These are - the entitlement to use the thing (*ius utendi*); the entitlement to the fruits, including the income from the thing (*ius fruendi*); the entitlement to possess the thing (*ius possidendi*); the entitlement to dispose of the thing (*ius disponendi*); the entitlement to claim the thing from any unlawful possessor (*ius vindicandi*); the entitlement to resist any unlawful invasion (*ius negandi*) and the entitlement to consume and destroy the thing (*ius abutendi*).<sup>637</sup> If a legal system did not admit these “ingredients of ownership,” it would be difficult to talk of ownership.<sup>638</sup> If one or more of these entitlements are missing, then ownership would be deemed not to exist in its comprehensive sense.<sup>639</sup>

This however does not mean that ownership must comprise of a full bundle of entitlements.<sup>640</sup> Ownership may exist even in situations where the owner has assigned these or some of the entitlements to another person.<sup>641</sup> For example, a person may choose to hire

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<sup>633</sup> 1920 A.D. 530 at 537.

<sup>634</sup> While there exists fundamental similarities in the conception of ownership among the Romans, the Roman-Dutch and contemporary South Africa, this does not mean that the conception of ownership is identical amongst the three societies. There are differences. These will be highlighted below.

<sup>635</sup> *Johannesburg Municipal Council v Rand Townships Registrar* 1910 TPD 1314 at 1319; *Chetty v Naidoo* 1974 (3) SA 13 (A) 20B–C; *Pearly Beach Trust v Registrar of Deeds* 1990 (4) SA 614 (C) 617I; *MEC for Local Government and Finance, KwaZulu Natal v North Central & South Central Local Councils, Durban* [1999] All SA 5 (N) 16f-j; Badenhorst PJ, Pienaar J, and Mostert H (2006) *Silberberg and Schoeman's The Law of Property* 93; Mostert and Pope (2010) (eds) *The Principles of The Law of Property in South Africa*, (2010) 93; du Bois F (2007) (ed) *Wille's Principles of South African Law 9<sup>th</sup> Ed* Cape Town 470; AM Honoré, (1961) “Ownership” in AG Guest (ed) *Oxford Essays in Jurisprudence* 113.

<sup>636</sup> Honoré, AM (1961) “Ownership” in Guest (ed) *Oxford Essays in Jurisprudence* 107.

<sup>637</sup> *D 7.6.5*; Honoré, AM (1961) “Ownership” in Guest (ed) *Oxford Essays in Jurisprudence* 112 and 113; Badenhorst PJ, Pienaar J, and Mostert H *Silberberg and Schoeman's The Law of Property* (2006) 93; Mostert and Pope (eds) *The Principles of The Law of Property in South Africa*, (2010) 93; Hall CG (1976) *The Law of Property 10<sup>th</sup> ed*, 27; Van der Merwe, CG and de Waal MJ 1993 *The Law of Things and Servitudes* 98.

<sup>638</sup> Honoré, AM (1961) “Ownership” in Guest (ed) *Oxford Essays in Jurisprudence* 112 and 113; Roscoe Pound 1915 “Legal Rights” *International Journal of Ethics*, Vol. 26, No. 1, pp. 92-116 The University of Chicago Press.

<sup>639</sup> *Gien v Gien* 1979 (2) SA 1113 (T) 1120; Honoré, AM (1961) “Ownership” in Guest (ed) *Oxford Essays in Jurisprudence* 112 and 113; Baron JB “Rescuing the Bundle of Rights Metaphor in Property Law” *University of Cincinnati Law Review* Vol 82(1) .

<sup>640</sup> Compare Honoré, AM ‘Ownership’ (1961) in Guest, AG (ed) *Oxford Essays in Jurisprudence* (Oxford, Oxford University Publishers) 124ff and Van der Merwe *Sakereg* 174.

<sup>641</sup> Mostert H and Pope A (eds) *The Principles of The Law of Property in South Africa*, (2010) 93; Dias RWM *Jurisprudence* 4<sup>th</sup> edition (1976) 395; Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students’ Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 75.

out her car in exchange for a sum of money. In this instance, she temporarily ceases to use and enjoy her car but this does not extinguish her ownership of the car. The presence of these incidents of ownership simply signified the existence of ownership.<sup>642</sup> These entitlements are not regarded equally all the time. The degree of their importance at any given time is relative to the property in question at that particular time.<sup>643</sup>

In the analysis of the evolution of the concept “ownership” so far, it is interesting to note that there is no reference to neglecting property, particularly property from which a community derived benefit.

#### 4.2.1 The *ius abutendi* and the neglect of property

As discussed in the previous section, the *ius abutendi* is an incident of ownership.<sup>644</sup> It was a key corollary of ownership under Roman law.<sup>645</sup> An owner had the right to use the thing, to consume it or destroy it which could be summed up by the phrase *jus utendi fruendi abutendi*.<sup>646</sup> This phrase derives from a principle of property law called the principle of absoluteness.<sup>647</sup> This principle refers to the degree of certainty with which property holders control their property and with which they may be able to protect such control.<sup>648</sup> It allows an

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<sup>642</sup> Honoré, AM ‘Ownership’ (1961) in Guest, AG (ed) *Oxford Essays in Jurisprudence* 113; Lewis, C ‘The Modern Concept of Ownership of Land’ (1985) *Acta Juridica* 241 at 243ff.

<sup>643</sup> See Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students’ Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 71; see also Philbrick FS “Changing Conceptions in Property Law” *University of Pennsylvania Law Review* 1938, Vol 86.

<sup>644</sup> Some of the incidents of ownership include the power to vindicate the property (*ius vindicandi*); to possess the property (*ius possidendi*); to dispose of the property (*ius disponendi*); to use the property (*ius utendi*); to draw its fruits (*ius fruendi*); and the power to neglect or destroy the property (*ius abutendi*); see also Roscoe Pound (1939) “The Law of Property and Recent Juristic Thought” *A.B.A.J.* 993, 997. Rep.

<sup>645</sup> Lior Jacob Strahilevitz (2005) “The Right to Destroy” *The Yale Law Journal* 114(787). There is no consensus regarding where exactly the *ius abutendi* came from. To this effect, see generally Nicolas B (1962) *An Introduction to Roman Law* 154.

<sup>646</sup> Lior Jacob Strahilevitz (2005) 114(787); Radin Max, 1925 “Fundamental Concepts of the Roman Law,” *CAL. L. REV* (13) 207-209.

<sup>647</sup> Van der Merwe, CG (1987) *The Law of Things* 7; Badenhorst PJ, Pienaar JM, Mostert H (2006). *Silberberg and Schoeman's The Law of Property* 92-93. Mostert and Pope (2010) (eds), *The Principles of the Law of South Africa* 217; Van der Walt AJand GJ Pienaar (2009) *Introduction to the Law of Property* 6<sup>th</sup> edition Cape Town: 39-47. Other principles of property law include - the principle of abstraction, which assists in understanding how and when property may be transferred; the publicity principle, which supports legal certainty and strengthens the protection that may be afforded to property relations; the principle of specificity, which links a particular piece of property with the rights that may be held in respect of it; the transmissibility principle, which refers to the fact that rights to property are alienable and the *numerus clausus* principle, which confirms that property law relies on closed categories or systems and that ownership can be acquired only in a defined number of ways.

<sup>648</sup> Van der Merwe, CG (1987) *The Law of Things* 7; Badenhorst PJ, Pienaar JM, Mostert H (2006). *Silberberg and Schoeman's The Law of Property* 92-93. Mostert and Pope (2010) (eds), *The Principles of the Law of South Africa* 217; Van der Walt AJand GJ Pienaar (2009) *Introduction to the Law of Property* 6<sup>th</sup> edition 39-47 .

owner to enforce his right in respect of the thing he owns against the whole world.<sup>649</sup> The absoluteness principle also confers “the most extensive power” to an owner in respect of his property.<sup>650</sup> Through this principle, an owner can ward off any interference from anyone through an interdict and or the *rei vindicatio*.<sup>651</sup> At face value, this seems to imply that an owner could do as they please with their property unrestricted. However, as the discussion will show, this was not the case under Roman law.<sup>652</sup>

As previously highlighted, the *ius abutendi* entitles an owner to use, abuse, and even destroy his property as he pleases, within the confines of the law.<sup>653</sup> Claassen defines it as an entitlement to “alter and destroy property.”<sup>654</sup> In the case of *Drymiotis v Du Toit*<sup>655</sup> the *ius abutendi* was defined as “the right to destroy or use up the *res* altogether.” The *ius abutendi* suggests that an owner does not have constraints regarding the use and abuse of the things that he owns.<sup>656</sup> He can do as he pleases with his thing as long as he does not violate any law.<sup>657</sup> Pound explains the *ius abutendi* as “the right of destroying or injuring one’s property if one likes.”<sup>658</sup>

As referred to in chapter one, the *ius abutendi* probably forms the basis of the criticisms raised when minister Lulu Xingwana suggested the “use it or lose it” approach to farm landownership.<sup>659</sup> The idea of compelling an owner to use her property or lose it, seems to violate the right to do as she pleases with her land, even if this includes neglecting her land. This same understanding was also noted in *Trojan Exploration Co (Pty) Ltd and Another v Rustenburg Platinum Mines Ltd and Others* where the court held that the *ius abutendi* refers to the right to abuse one’s property.<sup>660</sup> In *Bozzone and Others v Secretary for Inland Revenue*,

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<sup>649</sup> Van der Merwe, CG and de Waal MJ (1993) *The Law of Things and Servitudes* 7.

<sup>650</sup> Van der Merwe, CG and de Waal MJ (1993) 7.

<sup>651</sup> Van der Merwe, CG (1987) *The Law of Things* 7; Badenhorst PJ, Pienaar JM, Mostert H (2006). *Silberberg and Schoeman's The Law of Property* 92-93. Mostert and Pope (2010) (eds), *The Principles of the Law of South Africa* 217; Van der Walt AJ and Pienaar GJ (2009) *Introduction to the Law of Property* 6<sup>th</sup> edition Cape Town: 39-47.

<sup>652</sup> See also Birks P “The Roman Law concept of *dominium* and the idea of absolute ownership” 1985 *Acta Juridica* 1.

<sup>653</sup> *Gien v Gien* 1979 (2) SA 1113 (T) at 1120; see also the Namibian case of *Rostock CC And Another v Van Biljon* 2011 (2) NR 751 (HC) at B[44].

<sup>654</sup> Claassen RD (1997) *Dictionary of Legal Words and Phrases* 2<sup>nd</sup> Edition Volume 3, J-P; see also *Uitenhage DC v Port Elizabeth Municipality* 1944 EDL 1; *Secretary for Inland Revenue v Bozzone* 1974 3 SA 826 (N) 831.

<sup>655</sup> 1969 (1) SA 631 (T).

<sup>656</sup> Birks P (1985) *The Roman Law Concept of Dominium and the Idea of Absolute Ownership*, 1.

<sup>657</sup> Birks P (1985) 1.

<sup>658</sup> Roscoe Pound (1939) “The Law of Property and Recent Juristic Thought” *A.B.A.J.* 993, 997.

<sup>659</sup> See discussion in chapter one on the Research Question and Motivation of the Research.

<sup>660</sup> 1996 (4) SA 499 (A), p 504.



the *ius abutendi* was defined as “the right to consume or use up” the thing altogether.<sup>661</sup> In an American case of *Kingsbury v Whitaker*, the court referred to the *ius abutendi* as allowing an owner the right to “destroy and annihilate that which belongs to him” provided he does not injure or “harm” another.<sup>662</sup>

Again, as in the definitions of “ownership,” what is notable about all the definitions of the *ius abutendi* is the absence of specific reference to *neglecting* property. The definitions focus on the way an owner can use and or abuse their property. Emphasis is placed on *using property anyhow* as long as the owner does not break the law. Nowhere in the definitions is found the power to *neglect* property.

In his 1961 essay, Tony Honore however did make a brief reference to “waste”.<sup>663</sup> He wrote – “[T]he right to capital consists in the power to alienate the thing and the liberty to consume, waste or destroy part of it...” He did not expound on waste or give any further detail. This leaves much room for speculation regarding whether or not Honore envisaged “waste” to be synonymous with “neglect”.

The idea that an owner can use their property anyhow, including neglecting it possibly comes from an 1898 English law principle that was expressed in *Allen v Flood*.<sup>664</sup> The court held that one’s motive in the exercise of their right to their property was irrelevant so long as that person did not commit any crime. Commenting on this, Allen wrote – “we have come to regard this principle as so indigenious to common law that it is almost impious to question it.”<sup>665</sup>

In the 18<sup>th</sup> century, an English law scholar, Blackstone, argued that the regard for private ownership of property was so much that an owner’s *ius abutendi* could not be violated.<sup>666</sup> He argued that if the State wanted to construct for example, a road that passed through a private person’s property, although this would benefit the public, consent had to be sought from the owner.<sup>667</sup> Such owner could refuse or grant permission because the power conferred to him by ownership allowed him to.<sup>668</sup> Blackstone went further to argue that it would be in vain to

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<sup>661</sup> 1975 (4) SA 579 (A), p 585.

<sup>662</sup> 32 La. Ann. 1055 (1880).

<sup>663</sup> Tony Honore 1961 ‘Ownership’ in AG Guest (ed) *Oxford Essays in Jurisprudence* 107.

<sup>664</sup> *Allen v Flood & another* 1898 AC 1.

<sup>665</sup> Allen, Carleton Kemp “Legal Morality and the *ius abutendi*” 40 L.Q.Rev. 164 (1924).

<sup>666</sup> Blackstone W (1765-70) *Commentaries on the Laws of England* Book 1 available online at <http://www.lonang.com/exlibris/blackstone/bla-101.htm> (accessed 15.08.2015).

<sup>667</sup> Blackstone W (1765-70) *Commentaries on the Laws of England* Book 1

<sup>668</sup> Blackstone W (1765-70) *Commentaries on the Laws of England* Book 1.

expect the interests of the public to be considered more than those of a private owner.<sup>669</sup> He wrote,

“So great is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men to do this without the consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good... In this, and similar cases, the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual treating with an individual for exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price.”<sup>670</sup>

Blackstone’s argument is evidently problematic. While the *ius abutendi* is a realized entitlement of ownership, based upon a solid principle of property law - absoluteness, it cannot be and has never been enjoyed without limitations. As Kemp argues, this would not “accord well with the ordinary morality of a community...all reasonable men would reprobate it.”<sup>671</sup>

#### 4.2.2 Limitations on the *ius abutendi*

As discussed above, the general conventional understanding is that private ownership of property “insulates individuals” absolutely from external interference in their handling of property.<sup>672</sup> However, it is not difficult to see that such an unrestricted idea of ownership or specifically the *ius abutendi*, is problematic to any society.<sup>673</sup> There are numerous public and private law limitations that are placed on private property owners.<sup>674</sup> As Van der Walt has argued,

“[T]raditional notions of property do not suffice in transformational contexts, where the foundations of the property regime itself are or should be in question because regulatory restrictions, even when imposed in terms of a broadly conceived notion of the public good, simply

<sup>669</sup> Blackstone W (1765-70) *Commentaries on the Laws of England* Book 1.

<sup>670</sup> Blackstone W (1765-70) *Commentaries on the Laws of England* Book 1.

<sup>671</sup> Allen Carleton Kemp “Legal Morality and the *ius abutendi*” 40 L.Q.Rev. 165 (1924).

<sup>672</sup> Gregory S Alexander “The social-obligation norm in American property law” *Cornell Law Review*, (94) 745, 747; Thomas W Merrill, 1998 *Property and the Right to Exclude*, 77 NEB L. REV 730.

<sup>673</sup> See a discussion of this in *Daniels v Scribante and Another* (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC) (11 May 2017).

<sup>674</sup> Silberberg & Schoeman *Property* 93–94; Wille’s *Principles* 406.

cannot do all the transformative work that is required. In this perspective it is not sufficient to demonstrate that property is subject to...public purpose restrictions; the point is to identify and explain instances where transformation justifies changes that question the very foundations upon which the current distribution of property rests.<sup>675</sup>

Since Roman law times, it has not been feasible to have a concept of ownership which does not confer responsibility on the owner.<sup>676</sup> The *ius abutendi* has never been unfettered.<sup>677</sup> The misconception of ownership as unlimited is traceable to Bartolus' definition of the term, as well as to the influence of Pandectists.<sup>678</sup> The latter's views were read as if they were part of our "institutional writers" and they passed on the idea of ownership as unrestricted.<sup>679</sup>

Visser argues that although Bartolus, whose definition heavily influenced Grotius, defined ownership as "the right to deal with a thing in a complete way (*perfecte disponere*)" he was not referring to an "absolutist idea of ownership."<sup>680</sup> He was merely trying to distinguish between ownership and possession.<sup>681</sup> Absolute power to do as one pleases with their property only existed in comparison to possession.<sup>682</sup> No society can afford an absolutist idea of ownership. This would lead, as it currently does, to irresponsible, dangerous and wasteful neglect of property which has wider negative consequences on the owner and the society as a whole.

In Roman law, there were restrictions "in the interests of the society relating to, for example, how land was used."<sup>683</sup> The *ius abutendi* was subject to restrictions.<sup>684</sup> A most notable restriction of the *ius abutendi* related to the power of an owner to *alienate* his property.<sup>685</sup> Huber also acknowledged that although the *ius abutendi* accorded an owner "complete power over a corporeal object" it was not without restrictions.<sup>686</sup>

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<sup>675</sup> Van der Walt *Property in the Margins* 16.

<sup>676</sup> Visser DP 1985 "The 'Absoluteness' of Ownership: The South African Common Law in Perspective" *Acta Juridica* 43.

<sup>677</sup> Lewis C (1985) "The Modern Concept of Ownership of Land" *Acta Juridica* 243.

<sup>678</sup> *D 41. 2. 17. 1.*

<sup>679</sup> Visser DP (1985) "The 'Absoluteness' of Ownership: The South African Common Law in Perspective" *Acta Juridica* 47. See for example the definition of ownership by Savigny is quoted by Wessels in *Johannesburg City Council v Rand Townships Registrar*, 1910 TPD 1314. In *Regal v African Superslate (Pty) Ltd*, 1963 (1) SA 102 (A), Steyn CJ makes reference to Dernburg.

<sup>680</sup> Visser DP (1985) 43.

<sup>681</sup> Visser DP (1985) 43.

<sup>682</sup> Visser DP (1985) 43.

<sup>683</sup> Lewis C (1985) "The Modern Concept of Ownership of Land" *Acta Juridica* 244.

<sup>684</sup> Visser DP (1985) 44.

<sup>685</sup> Visser DP (1985) 43.

<sup>686</sup> Quoted in Visser DP (1985) 44.

The law and public policy of the Roman era placed numerous positive obligations on ownership.<sup>687</sup> For example, a curator could be appointed to interdict a prodigal son from *wasting* and abusing his inherited property and rather, use the inheritance in a positive manner.<sup>688</sup> The Roman law expanded to provide that all those who neglected farm-land could lose it in favour of those that were willing to use it.<sup>689</sup> Everyone therefore was expected to use their property conscientiously.

In *Daniels v Scribante*,<sup>690</sup> the Court held that an owner has positive obligations regarding property ownership. In coming to this conclusion, the Court illustrated that ownership cannot be enjoyed without limitations. The brief facts of the case are as follows - the applicant occupied property in terms of the Extension of Security of Tenure Act (ESTA). The property required improvements and provision of basic amenities to make it suitable for human habitation. The applicant offered to carry the costs of making the improvements to the property. The respondent denied the applicant permission to make these improvements. In agreeing with the respondent, the Magistrates' Court as well as the Land Claims Court ruled that ESTA set out the rights of occupiers and subsequently, the right asserted by the applicant was not one of those rights. Aggrieved, the applicant unsuccessfully sought leave to appeal from the Supreme Court of Appeal (SCA).

The matter was escalated to the Constitutional Court where Ms Daniels argued that the improvements were meant to bring the dwelling to a level consonant with human dignity. She argued that, based on the right to human dignity provided for in terms of section 5 of ESTA, she was entitled to make the improvements. She also argued that this right is not a severe intrusion into the respondent's common law right of ownership. The respondent contended that, in terms of section 25(6) of the Constitution, ESTA afforded occupiers specific rights which however excluded those rights asserted by the applicant. For this reason, the applicant had no right that she claimed. The respondents' other argument was that, because in terms of section 13 of ESTA, an owner of property could be ordered to compensate an occupier for improvements that the occupier made, affording an occupier the asserted right would effectively mean a positive duty was being imposed on an owner or person in charge to

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<sup>687</sup> *Silberberg & Schoeman Property* 93–94; *Wille's Principles* 406; Van der Walt AJ discusses examples of these in Van der Walt AJ and Pienaar GJ (2009) *Introduction to the Law of Property* 6<sup>th</sup> edition Cape Town: 83-96.

<sup>688</sup> Scott SP (1973) "The Opinions of Paul in *The Civil Law* Cincinnati Publishers 3.4a.7. 235.

<sup>689</sup> Scott SP (1973) 221- C 11.59.8 (AD 388-92).

<sup>690</sup> *Daniels v Scribante and Another* (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC) (11 May 2017), paras 47-53.

finance the improvements. The respondents contended that in accordance with constitutional jurisprudence, a positive duty could not be imposed on a private owner of property.

The Court held that ESTA did afford an occupier the right to make improvements to her or his dwelling without the consent of the property owner. In asserting this right however, the applicant needed to engage with the respondent because the exercise of the occupier's right had the potential to intrude on an owner's property right under section 25 of the Constitution and the right to human dignity contained in section 5 of ESTA. The Court further explained that there was no constitutional restriction to the imposition of a positive duty on a private individual.<sup>691</sup> Whether or not such a duty may be imposed depended on numerous factors. In this case, the Court imposed a positive duty on the respondent to make improvements on the property for the benefit of the applicant. This case illustrates the important fact that owners cannot exercise their rights passively. Rather, they have positive obligations that require them to actively, positively and responsibly look after their property.

The criticisms leveled against minister Lulu Xingwana in the wake of her suggested "use it or lose it" approach referred to in chapter one therefore seem unwarranted. This is because, as discussed previously, ownership is not absolute.<sup>692</sup> The criticisms sound more like political rhetoric than views based on pragmatic socio-economic and legal prudence. Unlimited title to property has never been a Roman law attribute and it is not in our law. It is little surprise that all definitions of ownership always emphasize the power to enjoy a thing *within the confines of the law*. In *King v Dykes*<sup>693</sup> the court held that

"The idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that *an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds his land in trust for future generations.*"

The law has always been responsive to wasteful neglect and extravagant use of property even when this happened within the confines of the law. As an example given earlier in this section, a curator could be appointed to a prodigal son who was negligent and wasteful to his inheritance.<sup>694</sup> The prodigal was expected to behave responsibly with his inheritance. A

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<sup>691</sup> Para 47 - 48.

<sup>692</sup> *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 120G; *East London Western Districts Farmers' Association v Minister of Education and Development Aid* 1989 (2) SA 63 (A) at 67H-J; *Milton* 1969 *Acta Juridica* at 150 151 ff; *Colonial Development (Pty) Ltd v Outer West Local Council* 2002 (2) SA 589 (N) at 610I.

<sup>693</sup> 1971 (3) SA 540 (RA).

<sup>694</sup> See Scott SP (1973) "The Opinions of Paul in *The Civil Law* Cincinnati Publishers 3.4a.7. 235 on note 42.

person who “neglected husbandry could lose ownership in favour of those who could farm better.”<sup>695</sup>

In *PE Municipality v Various Occupiers*,<sup>696</sup> the Court held that there are new obligations imposed on ownership that suggest a departure from the classical liberalist conception of ownership. The Court further held that ownership in the constitutional sense is not a privileged right that reigns supreme without any limitations. There are instances when ordinary ownership entitlements such as possession, use and occupation can be limited and in such instances, the Court should not “establish a hierarchical arrangement between different interests involved” in a manner that privileges “ownership over the right not to be dispossessed of a home.”<sup>697</sup> In *Regal v African Superstore (Pty Ltd)*<sup>698</sup> Steyn CJ seems to suggest that while owners have the right to use their property as they please, they should not neglect it if such neglect would cause harm to their neighbours.<sup>699</sup> This would amount to nuisance.<sup>700</sup>

Most people would agree that the *ius abutendi* should be enjoyed relative to the type of property owned. It cannot be enjoyed against every type of property. No society can afford such an irresponsible approach to ownership. As Cowen put it,

“The right to consume, and to destroy looms large, . . . in regard to the ownership of a piece of firewood; or a leg of mutton; but land hunger or hunger and thirst for the loveliness of a nature area, cannot be adequately satisfied by dwelling upon a theoretical right to destroy land. Here, the power to enjoy and to use sensibly, and here the social obligations of ownership, are the essence.”<sup>701</sup>

Many things lie neglected around us and their neglect does not cause controversy. No one would stop to ask why an old bicycle is no longer being used by its owner or why an owner is neglecting their computer. Strahilevitz explains that normal people neglect many things such

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<sup>695</sup> Birks P (1985) “The Roman Law Concept of Dominion and the Idea of Absolute Ownership” *Acta Juridica* 119.

<sup>696</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC), para 23.

<sup>697</sup> *Port Elizabeth Municipality* para 23.

<sup>698</sup> 1963 (1) SA 102 (A).

<sup>699</sup> At 106H-107A; See also Van der Walt AJ (2010) *The Law of Neighbours*, 33; Lior Jacob Strahilevitz (2005) “The Right to Destroy” *The Yale Law Journal* 114 (783); Birks P (1985) “The Roman Law Concept of Dominion and the Idea of Absolute Ownership” *Acta Juridica* 1 19; Visser DP (1985) “The ‘Absoluteness’ of Ownership: The South African Common Law in Perspective” *Acta Juridica* 43.

<sup>700</sup> See Van der Walt AJ (2010) *The Law of Neighbours* 33.

<sup>701</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students’ Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 71.

as “clothes” and “furniture” and no one questions their conduct.<sup>702</sup> Sometimes, people even neglect and get rid of expensive and valuable things such as jewellery.<sup>703</sup> Such neglect is tolerable as it does not really affect anyone.

Alexander argues that “no system of private property can ignore that property involves responsibilities...”<sup>704</sup> He further posits that most people only understand ownership as comprising only of the entitlement to ward others off and no further duties on the owner.<sup>705</sup> Of course this is not correct. The right of an owner to exclude others is subject to limitations. For example, in *Monhunram v National Director of Public Prosecutions and Another*, the Constitutional Court dealt with a matter that concerned the forfeiture of property (gambling machines) which was allegedly used to commit an offence in terms of the Prevention of Organised Crime Act.<sup>706</sup> The Constitutional Court noted that an individual’s “right to property carries with it important duties to use, manage or look after it in a responsible manner.”<sup>707</sup>

In *Daniels v Scribante*<sup>708</sup> the Court explained that the absolutist conception of ownership has its origins in Europe during a time when there was a struggle “between modern civil law and feudal law as well as the socio-political struggle against feudal oppression.”<sup>709</sup> Because of the importance of attaining individual political and economic independence, it was necessary to establish a universally accepted right of ownership in an individual in order to avoid feudal burdens on it.<sup>710</sup> Such a view of ownership created a hierarchy of rights which resulted in ownership being viewed as supreme to other rights that may, in certain instances, be subtracted from it. This conception of ownership was necessary in establishing individual freedom in the development of Western capitalism.<sup>711</sup> However, the Court held, this view cannot be accepted in our Constitution.<sup>712</sup>

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<sup>702</sup> Lior Jacob Strahilevitz (2005) “The Right to Destroy” *The Yale Law Journal* 114(783).

<sup>703</sup> Lior Jacob Strahilevitz (2005) “The Right to Destroy” *The Yale Law Journal* 114(783).

<sup>704</sup> Alexander GS “Critical Land Law” in Bright and Dewar (eds) *Land Law – themes and perspectives* (1998) 77.

<sup>705</sup> Alexander GS “The Social-Obligation Norm in American Property Law” *Cornell L. Rev* Volume 94 (4) 747. 121 of 1998.

<sup>707</sup> *Monhunram v National Director of Public Prosecutions and Another* 2007 4 SA 222 (CC).

<sup>708</sup> *Daniels v Scribante and Another* (CCT50/16) [2017] ZACC 13; 2017 (4) SA 341 (CC) (11 May 2017), para 135-137.

<sup>709</sup> Para 134.

<sup>710</sup> Para 134.

<sup>711</sup> Para 134.

<sup>712</sup> See further Sachs J in *PE Municipality* para 23.

In summary, the understanding of ownership as unlimited and complete power over a thing is foreign to South Africa's property law context.<sup>713</sup> According to Cowen, the new patterns of landownership which include sectional title, time-sharing, nature conservation areas, group and cluster housing – can only work in an environment which is not absolute, less rigid and less individualistic.<sup>714</sup> Ownership should rather recognize the social obligation of property.<sup>715</sup>

### 4.3 The social-obligation norm of ownership

Modern political and legal consciousness is replete with classical liberalist conceptions of ownership which entail a strict adherence to the *ius abutendi*. Notwithstanding the ubiquity of such an approach, other ideas of ownership currently exist which offer a contrasting dimension to this absolutist understanding of ownership. Some of these ideas include, for example, egalitarian liberalism, communism as well as socialism. These latter ideas criticise the classical liberal understanding of ownership as inadequate and as “obscuring the obligations” that an owner has in respect of property.<sup>716</sup>

As alluded to in section 4.2 above, the classical liberal conception of ownership proposes that the success, well-being and social harmony of an individual can only be achieved by giving the owner as much liberty as is possible with their property with very minimal interference.<sup>717</sup> Friedman argues that a person's freedom and independence regarding how they handle their property underlies classical liberalism.<sup>718</sup> Owners are therefore at liberty to do as they please with their property as long as they respect the entitlements of others.<sup>719</sup> Each owner's freedom to do as she pleases is esteemed. People who coerce other people to behave in a certain way have no place in a libertarian society.

One of the views of ownership that contrasts with the classical liberal notion was popularised by the French jurist, Leon Duguit in Buenos Aires in 1911 in a series of lectures. This view is

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<sup>713</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* 71.

<sup>714</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* 70-80.

<sup>715</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* 70-80.

<sup>716</sup> Sheila F and Daniel B (2011) “The Social Function of Property: A Comparative Law Perspective” *Fordham Law Review* Vol. 80 p. 101.

<sup>717</sup> Vallentyne P (2012) “Libertarianism”, *The Stanford Encyclopaedia of Philosophy*.

<sup>718</sup> David F (1973) *The Machinery of Freedom Guide to A Radical Capitalism 2nd* Open Court Publishing Company, see “Introduction.”

<sup>719</sup> Walter Block (1994) “Libertarianism vs. Libertinism,” *Journal of Libertarian Studies* 11, no. 1 pp. 117 - 28; David F (1973) *The Machinery of Freedom Guide to A Radical Capitalism 2nd* Open Court Publishing Company, 86.



termed, the “social-obligation norm” of property.<sup>720</sup> Although this idea of a social-obligation norm was made popular by Duguit, it had already been mentioned by other scholars such as Henri Hayem, Raymond Saleilles, Aldolphe Landry, Maurice Hauriou and Joseph Charmont.<sup>721</sup> In fact, as early as 1850, Auguste Comte had argued that all citizens have a social responsibility and “property carried with it an indispensable social function.”<sup>722</sup> According to Mirow, characterising property as entailing a social-obligation represented a growing trend of the “globalisation of ‘The Social’ within law and legal thought noted by Duncan Kennedy.”<sup>723</sup>

The lectures mentioned above comprised six lectures,<sup>724</sup> the sixth of which, “The Social Function of Property” led to the popularisation of the social-obligation norm of property. The first five lectures arguably laid the foundation for the sixth lecture on “The Social Function of Property.”<sup>725</sup> In this lecture, Duguit argued that property, like the rest of the other areas of law, had also become socialised.<sup>726</sup> He asserted that “[P]roperty is not a right; it is a social function.”<sup>727</sup> This statement in particular gave birth to what is now commonly referred to as the “social-obligation norm” or the “social-function norm” of property.<sup>728</sup> The essence of the

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- i. Subjective Rights and the Social Function;
  - ii. The New Conception of Liberty;
  - iii. The Autonomy of the Will;
  - iv. The Juridical Act;
  - v. The Contract and Responsibility; and
  - vi. The Social Function of Property.

<sup>721</sup> See a discussion of these scholars’ contributions in Mirow M C (2010) “The Social-Obligation Norm of Property: Duguit, Hayem, and Others” *Florida Journal of International Law* Vol. 22 p 193.

<sup>722</sup> Quoted in Mais la propriété n’est pas un droit; elle est une fonction sociale. Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 21 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>723</sup> Mirow M C (2010) “The Social-Obligation Norm of Property: Duguit, Hayem, and Others” *Florida Journal of International Law* Vol. 22 p 193.

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- i. Subjective Rights and the Social Function;
  - ii. The New Conception of Liberty;
  - iii. The Autonomy of the Will;
  - iv. The Juridical Act;
  - v. The Contract and Responsibility; and
  - vi. The Social Function of Property.

<sup>725</sup> Mirow M C “The Social-Obligation Norm of Property: Duguit, Hayem, and Others” (2010) *Florida Journal of International Law* Vol. 22 p 207.

<sup>726</sup> Mais la propriété n’est pas un droit; elle est une fonction sociale. Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 21 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 148 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>727</sup> Mais la propriété n’est pas un droit; elle est une fonction sociale. Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 21 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>728</sup> Mirow M C (2010) “The Social-Obligation Norm of Property: Duguit, Hayem, and Others” *Florida Journal of International Law* Vol. 22 pp. 192; See also Hale CA (2000) “The Civil Law Tradition and Constitutionalism in Twentieth-Century Mexico: The Legacy of Emilio Rabasa,” 18 *LAW & HIST. REV.* 275; Ankersen TT &

“social-obligation norm” is that all property must have its “share of social responsibility.”<sup>729</sup> In the lecture, Duguit noted that the conception of ownership as absolute had negative results.<sup>730</sup> This is because arable land would, for example, then be left to lie vacant and unutilised, urban areas left without construction, houses would be neglected and left unattended.<sup>731</sup> This was unacceptable in an era of social interdependence.<sup>732</sup> For Duguit therefore, property was not supposed to be viewed as a “subjective right of the owner; it was rather a social function of the holder of wealth.”<sup>733</sup> Owners should have positive obligations placed on them. They have a duty to productively utilise property to the benefit of the community.

Duguit disapproved of liberalism’s emphasis on an owner’s autonomy to do as he pleases with his property, which approach should be criticised on three dimensions.<sup>734</sup> The first dimension is that liberalism’s idea of an “isolated individual” is incorrect.<sup>735</sup> All human beings live in an interconnected society where they need other human beings to meet their



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Ruppert R (2006) “Tierra Y Libertad: The Social Function Doctrine and Land Reform in Latin America,” 19 *TUL. ENVTL. L.J.* 95; Juergensmeyer, CJ (1996) “Florida’s Property Rights Protection Act: Does it Inordinately Burden the Public Interest?” 48 *FLA. L. REV.* 701; Coletta RR (1998) “The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis” 1 *U. PA. J. CONST. L.* 20 n.23.

<sup>729</sup> Mattei U (2000) *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* Greenwood 31. See also Julian Conrad Juergensmeyer (1996) *Florida’s Property Rights Protection Act: Does it Inordinately Burden the Public Interest?*, 48 *FLA. L. REV.* 701; Raymond R. Coletta (1998) *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 *U. PA. J. CONST. L.* 20 n.23; Thomas T. Ankerson & Thomas Ruppert (2006) *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 *TUL. ENVTL. L.J.* 95; Charles A. Hale (2000) *The Civil Law Tradition and Constitutionalism in Twentieth-Century Mexico: The Legacy of Emilio Rabasa*, 18 *LAW & HIST.REV.* 275; Schneiderman D (2000) “Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism” 63 *LAW & CONTEMP. PROBLEMS* 92.

<sup>730</sup> Mais la propriété n’est pas un droit; elle est une fonction sociale. | Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 21 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>731</sup> Mais la propriété n’est pas un droit; elle est une fonction sociale. | Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 21 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>732</sup> Mais la propriété n’est pas un droit; elle est une fonction sociale. | Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 21 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

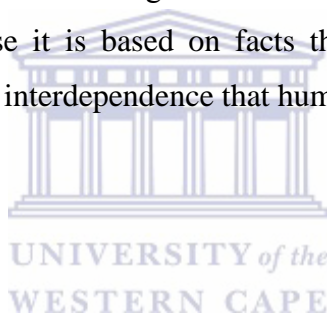
<sup>733</sup> Mais la propriété n’est pas un droit; elle est une fonction sociale. | Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 21 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>734</sup> Mais la propriété n’est pas un droit; elle est une fonction sociale. | Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 160 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>735</sup> Mais la propriété n’est pas un droit; elle est une fonction sociale. | Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 162 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 178 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

needs.<sup>736</sup> Duguit's second criticism is based in what he regards as the inconsistency between "an isolated individual and the right of property."<sup>737</sup> According to Duguit, it is not possible for people to live in isolation and yet be expected to have duties on third parties as in the law of nuisance.<sup>738</sup> Thirdly, Duguit did not agree with the classical liberal idea that property only serves individual owners. This cannot be so because, he argued, a community's economic interests derive from property found in that particular community.<sup>739</sup> Property therefore not only serves an individual but also the community's economic interests. Sheila and Bonilla refer to this as "Duguit's rule of productivity."<sup>740</sup> The wealth that is inherent in property should be utilised productively.<sup>741</sup> If this does not happen, then a community's socio-economic needs will not be met and its social cohesion will be disturbed.<sup>742</sup>

According to Sheila and Bonilla, "Duguit's idea of the social function of property is based on a description of social reality that recognises solidarity as one of its primary foundations."<sup>743</sup> The theoretical framework of a social-obligation norm of property is both "realist" and "socialist."<sup>744</sup> It is realist because it is based on facts that exist and can be proven; and socialist because it recognises the interdependence that human beings have on each other.<sup>745</sup>



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<sup>736</sup> Mais la propriété n'est pas un droit; elle est une fonction sociale. Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 181 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 178 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>737</sup> Mais la propriété n'est pas un droit; elle est une fonction sociale. Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 178 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 178 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>738</sup> Mais la propriété n'est pas un droit; elle est une fonction sociale. Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 178 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 178 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>739</sup> Mais la propriété n'est pas un droit; elle est une fonction sociale. Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 178 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 178 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>740</sup> Sheila F and Bonilla D "The Social Function of Property: A Comparative Law Perspective" *Fordham Law Review* Vol. 80, p. 101, 2011.

<sup>741</sup> Sheila F and Bonilla D "The Social Function of Property: A Comparative Law Perspective" *Fordham Law Review* Vol. 80, p. 101, 2011.

<sup>742</sup> Mais la propriété n'est pas un droit; elle est une fonction sociale. Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 162 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>743</sup> Sheila F and Bonilla D "The Social Function of Property: A Comparative Law Perspective" *Fordham Law Review* Vol. 80, p. 101, 2011.

<sup>744</sup> Mais la propriété n'est pas un droit; elle est une fonction sociale. Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 181 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>745</sup> Mais la propriété n'est pas un droit; elle est une fonction sociale. Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon* 181 (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 (Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

Duguit also criticised the dearth of laws that recognised the social function of property.<sup>746</sup> He noted that there was no legislation that created positive obligations on owners to cultivate arable land or to look after their houses except for the usual instances of obligations created by the law of neighbours regarding nuisance.<sup>747</sup>

Duguit's argument that property was a social function, transformed how the idea of property was understood in Europe and in America.<sup>748</sup> The argument, as mentioned above, contrasts with the classical liberalist and Blackstonian conception that ownership of property is an absolutely sacrosanct right which allows an owner to do as they please with their property.<sup>749</sup> The social-obligation norm of property also diverges from Anglo-American perceptions of property which afford owners inviolable dominion over their property so long as they do not commit a crime. This latter approach to private ownership of property was explained by Lawson and Rudden thus –

“In principle, owners can do anything they like with what they own: use it, use it up, neglect it, destroy it, give it away entirely or for a time, lend it, sell or lease it, pledge it, leave it by will, and so on. Furthermore the owner is perfectly free to do nothing at all with the thing: in principle, the law of property imposes no *positive* duties on an owner.”<sup>750</sup>

Professor Duguit's characterization of property as a social function suggests that there should be a “minimum level of social utility beyond which property should cease to exist.”<sup>751</sup> The State can mandate an owner to utilise their property productively to achieve property's socio-economic benefit to others.<sup>752</sup> Property owners have an affirmative duty and ownership of

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<sup>746</sup> Mais la propriété n'est pas un droit; elle est une fonction sociale. | Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon 162* (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>747</sup> Mais la propriété n'est pas un droit; elle est une fonction sociale. | Léon Duguit, *Les Transformations Générales Du Droit Privé Depuis Le Code Napoléon 162* (2d ed. 1920) – (translated in *The Progress Of Continental Law In The Nineteenth Century* 75 Joseph H. Drake et al. eds., Thomas S. Bell et al. trans, 1918).

<sup>748</sup> Mirow M C (2010) “The Social-Obligation Norm of Property: Duguit, Hayem, and Others” *Florida Journal of International Law* Vol. 22 pp. 191; Mirow M C “Origins of the Social Function of Property in Chile” *Fordham Law Review* Vol. 80 pp. 1183-1217.

<sup>749</sup> Blackstone W (1765-70) *Commentaries on the Laws of England* Book 1 available online at <http://www.lonang.com/exlibris/blackstone/bla-101.htm> (accessed 15.08.2015).

<sup>750</sup> Lawson FH and Rudden B (2002) *The Law of Property* 90.

<sup>751</sup> Mirow M C (2010) 192.

<sup>752</sup> Sheila R F and Daniel B (2011) “Introduction to The Social Function of Property: A Comparative Perspective,” 80 *Fordham L.Rev.* 1003; Mirow M C (2010) “The Social-Obligation Norm of Property: Duguit, Hayem, and Others” *Florida Journal of International Law* Vol. 22 pp. 192.

property entails obligations.<sup>753</sup> According to Davidson, the social-obligation norm demands that owners must put their property to productive use.<sup>754</sup>

Progressive property theorists such as Alexander and Singer argue that property should be understood in terms of its social-welfare values and obligations.<sup>755</sup> These values are important to social citizenship as well as also crucial in a community's social structure.<sup>756</sup> They assist a citizen to achieve a "fully human life" in a society.<sup>757</sup> The social-obligation norm rejects the overly simplified notions of ownership put forward by classical liberal theories.

#### 4.4 Versions of the social-obligation norm

As discussed in paragraph 4.3 above, the idea of a social-obligation norm is mainly credited to Leon Duguit. Duguit's body of work largely emphasized the role that the law should play as an instrument with which to promote social solidarity.<sup>758</sup> His argument was not necessarily novel during his time. It was already being reflected in the day-to-day discussions of the time and it formed part of a wider contemporary critique of a strict regard for private ownership of property.

##### 4.4.1 A classical liberalist social-obligation norm

Various versions of the social-obligation norm exist today.<sup>759</sup> One such conception of the norm is built around elements of classical liberalism. As discussed in paragraph 4.2 above, a classical liberalist idea of ownership gave the owner absolute power to do as she pleases with

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<sup>753</sup> Davidson NM (2011) "Sketches for a Hamiltonian Vernacular as a Social Function of Property" *Fordham L. Rev.* 1053 80.

<sup>754</sup> Davidson NM (2011) "Sketches for a Hamiltonian Vernacular as a Social Function of Property" *Fordham L. Rev.* 1053 80.

<sup>755</sup> See Singer JW (2000) *Entitlement: The Paradoxes of Property* and Alexander GS "The Social-Obligation Norm in American Property Law" *Cornell L. Rev* Volume 94 (4) 74.

<sup>756</sup> Van der Walt and Viljoen (2015) "The Constitutional mandate for Social Welfare-Systemic Differences and Links Between Property, Land Rights and Housing Rights" *PER* 1041.

<sup>757</sup> Van der Walt and Viljoen (2015) "The Constitutional mandate for Social Welfare-Systemic Differences and Links Between Property, Land Rights and Housing Rights" *PER* 1042.

<sup>758</sup> Ondetti G (2015) "The social function of property, land rights and social welfare in Brazil" *Land Use Policy* 50 30.

<sup>759</sup> Juergensmeyer JC (1996) "Florida's Property Rights Protection Act: Does it Inordinately Burden the Public Interest?" 48 *FLA. L. REV.* 701; Hale CA (2000) "*The Civil Law Tradition and Constitutionalism in Twentieth-Century Mexico: The Legacy of Emilio Rabasa,*" 18 *LAW & HIST. REV.* 275; Alexander GS "The Social-Obligation Norm in American Property Law" *Cornell L. Rev* Volume 94 (4) 74; Mirow M C (2010) "The Social-Obligation Norm of Property: Duguit, Hayem, and Others" *Florida Journal of International Law* Vol. 22 pp. 192. David Schneiderman (2000) *Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism*, 63 *LAW & CONTEMP. PROBLEMS* 92; Thomas T. Ankerson & Thomas Ruppert (2006) *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 *TUL. ENVTL. L.J.* 95; Raymond R. Coletta (1998) *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 *U. PA. J. CONST. L.* 20 n.23.

her property as long as she does not commit a crime. A classical liberalist social-obligation norm expands the conception of ownership and adds an owner's obligation to undertake to provide goods to the community that derive from such owner's endowment with property. The classical-liberalist conception of the social-obligation norm however has been criticised as too simplistic and narrowly conceptualised.<sup>760</sup> This is because it limits the social obligation norm of ownership to being simply about avoiding committing a nuisance while the owner is expected to commit to the contribution of providing public goods, as is discussed in this section below.<sup>761</sup> This understanding of the social-obligation norm is negatively constructed and its key attribute is *avoiding* committing nuisance. The Latin maxim *sic utere tuo ut alienum non laedas*, translated to mean "use (what is) yours so as not to harm (what is) of others" best captures the essence of the classical liberal understanding of the social-obligation norm.<sup>762</sup>

The list of activities which amount to socially-responsible conduct of ownership affirms the limitations of the classical liberal social-obligation norm. According to Alexander, such activities include "making contributions to the public fiscus."<sup>763</sup> This is problematic because the social-obligation norm should be construed more robustly to "include the redistribution of wealth for the sake of equality of welfare."<sup>764</sup> The classical liberalist conception of the social obligation norm is too superficial and it inevitably leads to owners simply making limited provision of public goods.<sup>765</sup> Evidently, this conception of the social-obligation norm does not paint the norm's true picture. It is incomplete and as Alexander notes, it is "descriptively inaccurate" and this makes it "normatively unappealing too."<sup>766</sup> Affirming this, Singer writes, "[I]t is well understood that owners cannot use their property to harm others, but it is not well understood how difficult it is to determine what that means."<sup>767</sup> It is therefore inaccurate, incomplete and potentially misleading to argue that the negative obligation of *not harming anyone* forms the basis of the social-obligation norm. This would legitimate Blackstone's

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<sup>760</sup> Alexander GS "The Social-Obligation Norm in American Property Law" *Cornell L. Rev* Volume 94 (4) 753.

<sup>761</sup> Nozick R (1974) *Anarchy, State, And Utopia* 26; Alexander GS "The Social-Obligation Norm in American Property Law" *Cornell L. Rev* Volume 94 (4) 743.

<sup>762</sup> Davidson NM (2011) "Sketches for a Hamiltonian Vernacular as a Social Function of Property" *Fordham L. Rev.* 1053 80.

<sup>763</sup> Alexander GS "The Social-Obligation Norm in American Property Law" *Cornell L. Rev* Volume 94 (4) 753.

<sup>764</sup> Richard A. Epstein (1985) *Takings: Private Property and The Power Of Eminent Domain* 295-303; Alexander GS "The Social-Obligation Norm in American Property Law" *Cornell L. Rev* Volume 94 (4) 753.

<sup>765</sup> Alexander GS "The Social-Obligation Norm in American Property Law" *Cornell L. Rev* Volume 94 (4) 754.

<sup>766</sup> Alexander GS "The Social-Obligation Norm in American Property Law" *Cornell L. Rev* Volume 94 (4) 754.

<sup>767</sup> Singer JW (2000) *Entitlement: The Paradoxes of Property*.

flawed conception of ownership as simply conferring an owner the “sole and despotic dominion” over their property as discussed earlier in paragraph 4.2.1.<sup>768</sup>

Michelman posits that the classical liberalist conception of the social-obligation norm erroneously amounts to merely a “possessive” conception of ownership.<sup>769</sup> In terms of this view, “[W]e primarily understand property in its constitutional sense as an anti-redistributive principle, opposed to interventions into the regime of holdings for the sake of redistributive ends.”<sup>770</sup> The judges in a 1992 American case of *Lucas v South Carolina Coastal Council*<sup>771</sup> came under some criticism when they seemingly aligned themselves towards the classical conception of the social-obligation norm in referring to limitations that can be placed on an owner.<sup>772</sup> Judge Anton Scalia upheld the argument that if the economic value of an owner’s land is reduced by land legislation, then that legislation was unconstitutional.<sup>773</sup> The only exception to this would be an instance where the legislation reduced the value of an owner’s land in the process of protecting other owners of land as this would be curbing nuisance. Further, Judge Scalia held that where a law that regulates land use results in an owner’s land becoming worthless, that law should be removed completely unless the owner’s use of the land constituted a gross nuisance.<sup>774</sup> This is a narrow conception of the social-obligation norm because, as stated earlier in this section, its focus is only on what an owner is prohibited from doing.



#### **4.4.2 A utilitarian based social-obligation norm**

A further version of the social-obligation norm has attributes which are closely identifiable with those of utilitarianism.<sup>775</sup> This utilitarian social-obligation norm aims to achieve the

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<sup>768</sup> Blackstone W (1765-70) *Commentaries on the Laws of England* Book 1 available online at <http://www.lonang.com/exlibris/blackstone/bla-101.htm> (accessed 15.08.2015).

<sup>769</sup> Michelman FI (1987) “Possession vs Distribution in the Constitutional Idea of Property” *IOWA L. Rev* 1319.

<sup>770</sup> Michelman FI (1987) “Possession vs Distribution in the Constitutional Idea of Property” *IOWA L. Rev* 1319, 754.

<sup>771</sup> 505 US 1003 (1992).

<sup>772</sup> Merrill TW and Dana AD (2002) *Property: Takings* 147-48; William T. Fisher 111, “The Trouble with Lucas” 45 *STAN. L. REV.* 1393, 1406-08; Lynn E. Blais (1996) *Takings, Statutes, and the Common Law: Considering Inherent Limitations on Title*, 70 *S. CAL. L. Rev.* 1 *passim*; Alexander GS “The Social-Obligation Norm in American Property Law” *Cornell L. Rev* Volume 94 (4) 755.

<sup>773</sup> 505 US 1003 (1992).

<sup>774</sup> *Lucas v South Carolina Coastal Council* 505 US 1027 (1992).

<sup>775</sup> Utilitarianism will not be discussed comprehensively here because this has been done by other scholars elsewhere such as John Stuart Mill 1863, *Utilitarianism* 14; see also Kelly JN (1992) *A Short History of Western Legal Theory* 317; Gregory S. Alexander & Eduardo M P (2012) *An Introduction to Property Theory*; Munzer A (1990) *A Theory of Property*; Van der Walt AJ (1995) “Unity and Pluralism in Property Theory – A Review of Property Theories and Debates in Recent Literature: Part I” *Tydskrif vir die Suid-Afrikaanse Reg*; Smart JJC and Williams Bernard (1973) *Utilitarianism: For and Against*, 12; Smart JJC and Williams Bernard (1973) *Utilitarianism: For and Against* 135.

happiness of the greatest number of people or the majority.<sup>776</sup> The worth of property in a utilitarian social-obligation norm is determined by whether it will bring maximum welfare or utility to people.<sup>777</sup> Sprankling argues that the principal function of utilitarianism is to optimize utmost happiness or utility of everyone.<sup>778</sup> In terms of this theory, the method that encourages the society's welfare determines the manner in which property rights are defined and allocated.<sup>779</sup> As will be discussed in detail later on in chapter six, applied to the South African context, this social-obligation norm would favour a land restitution process that promotes active, optimal and sustainable use of land over the current process which has led to farm failures. Utilitarianism is concerned with the maximum net utility of property to people.<sup>780</sup> The proper value of property should be ascertained by the way it brings and promotes happiness or utility aggregated across everyone in the society.<sup>781</sup>

A utilitarian based social-obligation norm is concerned with social and political implications rather than simply morality.<sup>782</sup> It also favours social justice.<sup>783</sup> Munzer proposes that the core of utilitarianism is the principle that “utility is the sole ultimate standard of right and wrong.”<sup>784</sup> Bentham elaborates that utilitarianism requires individuals to consider the rightness or wrongness of conduct by the way such conduct positively or negatively affects others.<sup>785</sup> John Stuart Mill wrote that “[T]he creed which accepts as the foundation of morals “utility” or the “greatest happiness principle” holds that actions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness.”<sup>786</sup> Henry Sidgwick also echoed a similar understanding of utilitarian theory by explaining it in terms of conduct which produces the most happiness for people.<sup>787</sup> Alexander notes that a key feature

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<sup>776</sup> Kelly JN (1992) *A Short History of Western Legal Theory* 315; Kroeze IJ (2004) “Legal Positivism” in Roederer C and Moellendorf D (eds) *Jurisprudence* 62-83.

<sup>777</sup> Smart JJC and Williams Bernard (1973) *Utilitarianism: For and Against*, 12; Smart JJC and Williams Bernard (1973) *Utilitarianism: For and Against* 135.

<sup>778</sup> John G. Sprankling (2012) *Understanding Property Law*, 3<sup>rd</sup> ed, 2.

<sup>779</sup> John G. Sprankling (2012) 2.

<sup>780</sup> Gregory S. Alexander & Eduardo M. Penalver (2012) *An Introduction to Property Theory* 17.

<sup>781</sup> Posner, Richard A, (1979) “Utilitarianism, Economics, and Legal Theory” 8 *J. Legal Stud* 104.

<sup>782</sup> Smart JJC and Williams B (1973) *Utilitarianism: For and Against*, 135.

<sup>783</sup> Posner, Richard A (1979) “Utilitarianism, Economics, and Legal Theory” 8 *J. Legal Stud* 107; Utilitarianism will therefore regard as socially acceptable conduct which benefits a majority of people rather than conduct which only benefits a few individuals at the expense of the majority.

<sup>784</sup> Stephen R. Munzer (1990) *A Theory of Property* 193.

<sup>785</sup> Jeremy Bentham (1962) *A Fragment on Government*, in *The Works of Jeremy Bentham*, Vol. 1 at 227.

<sup>786</sup> William H. Shaw (1999) *Contemporary Ethics: Taking Account of Utilitarianism* 7; John Stuart Mill (1962) *Utilitarianism and Other Writings*; John Stuart Mill (1993) *On Liberty and Utilitarianism* .

<sup>787</sup> Henry Sidgwick (1966) *The Methods of Ethics* 411.



of utilitarianism theory is the way property and property rights are important to basic good, utility or welfare.<sup>788</sup>

This means that property rights are valuable because of the good that they bring to people. By recognising that utility is the only way through which right and wrong are judged, utilitarianism theory removes all irrational decisions.<sup>789</sup>

#### **4.4.3 A law and economics based social-obligation norm**

Law and economics theory also provides another version of the social-obligation norm. This social-obligation norm is concerned with utility in the form of economic efficiency.<sup>790</sup> The concern with utility has subjected the law and economics social-obligation norm to attack as being simply another version of a utilitarian social-obligation norm.<sup>791</sup> Bernard and Nozick argue that economics is more or less equal to utilitarianism.<sup>792</sup> In a 1977 lecture, Hart also remarked that “utilitarianism is the inspiration of the economic analysis of law.”<sup>793</sup> Of course, the confusion over whether the two social-obligation norms are similar or not is understandable. As discussed above, utilitarian social-obligation norm emphasises that the rightness or wrongness of conduct rests on whether that conduct promotes happiness for the majority of people or not.

The law and economics social-obligation norm, as will be shown, emphasises that conduct is judged on whether or not it promotes “welfare”. It is the reference to the term “welfare” that leads to conclusions that it is synonymous with happiness, a utilitarian precept. The use of the term “utility” in economics theory as a “synonym for welfare” also adds to the confusion.<sup>794</sup> A closer scrutiny of the economics theory reveals some differences. As the following discussion shows, the economic efficiency social-obligation norm emphasises maximum production while a utilitarian based social-obligation norm stresses the importance of pleasure or utmost happiness for the majority of people.

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<sup>788</sup> Gregory S. Alexander & Eduardo M. Penalver (2012) *An Introduction to Property Theory* 17.

<sup>789</sup> James Rachels (2007) *The Legacy of Socrates: Essays in Moral Philosophy* Columbia University Press 115.

<sup>790</sup> Posner RA (2003) *Economic Analysis of Law* (6<sup>th</sup> ed) 27-28; Miceli TJ (2005) “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2<sup>nd</sup> ed) 246-260.

<sup>791</sup> See Bernard W (1967) “A Critique of Utilitarianism,” in Smart JJC & Bernard W *Utilitarianism For and Against* 77, 149-50; Robert N (1974) *Anarchy, State, and Utopia* 62, 201; Hart HLA (1977) “American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream,” *11 Ga. L. Rev.* 969, 987-88.

<sup>792</sup> See Bernard W (1967) “A Critique of Utilitarianism,” in J. J. C. *Smart & Bernard Williams, Utilitarianism For and Against* 77, 149-50; Robert Nozick, (1974) *Anarchy, State, and Utopia* 62, 201.

<sup>793</sup> Hart HLA (1977) “American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream,” *11 Ga. L. Rev.* 969, 987-88.

<sup>794</sup> Posner RA (1979) “Utilitarianism, Economics and Legal Theory” *8 Journal of Legal Studies*, 105.

In law and economics theory, human beings are viewed as “rational maximisers of their ends in life.”<sup>795</sup> The ends are referred to as one’s self interest or satisfaction.<sup>796</sup> Self-interest or satisfaction is distinguished from selfishness through the use of the word “utility.”<sup>797</sup> Law and economics theorists use rationality and reasoning as the way by which everyday life ought to be lived.<sup>798</sup> Its main aim is to achieve maximum economic efficiency in order to avoid wasting resources which would otherwise benefit many people.<sup>799</sup> It seeks to give resources to those who will not waste them, but rather, those who will utilise them productively and optimally and value them more than any other person.<sup>800</sup> In a law and economics theory environment, wasting resources is unacceptable.<sup>801</sup>

Law and economics theorists view the protection of private property rights as important to society as such protection enables the holders of these rights to utilise them optimally and efficiently.<sup>802</sup> The theory however recognises that absolute protection of property rights would result in inefficiency regarding achieving optimal use of resources.<sup>803</sup>

#### **4.4.4 A human flourishing perspective of the social-obligation norm**

The theory of human flourishing provides another version of the social-obligation norm. This version is superior to the other concepts of the norm and it is preferable. In terms of this conception, all property owners must recognise that they belong to a broader human community and as such, the focus of their title to property must enhance the community to

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<sup>795</sup> Posner RA (2003) *Economic Analysis of Law* (6<sup>th</sup> ed) 3.

<sup>796</sup> Posner RA (2003) 3.

<sup>797</sup> Posner RA (2003) 3.

<sup>798</sup> Posner RA (2003) 17.

<sup>799</sup> See the discussion in Miceli TJ (2005) “Property” in Backhaus JG (ed) *The Elgar Companion to Law and Economics* (2nd ed) 246-260 246; Baker M, Miceli T, Sirmans CF & Turnbull GK (2001) “Property Rights by Squatting: Landownership Risk and Adverse Possession Statutes” *77 Land Economics* 360-370 360; Miceli TJ & Sirmans CF (1995) “The Economics of Land Transfer and Title Insurance” *10 Journal of Real Estate Finance and Economics* 81-88 81; Alexander GS (2009) “The Social-Obligation Norm in American Property Law” *94 Cornell Law Review* 745-820 750; Posner RA (2003) *Economic Analysis of Law* (6th ed) 26-28.

<sup>800</sup> Posner RA (2003) 26-28; Sprankling JG (1994) “An Environmental Critique of Adverse Possession” *79 Cornell Law Review* 816-884 821, 874-875.

<sup>801</sup> Posner RA (2003) 26-28; Sprankling JG (1994) “An Environmental Critique of Adverse Possession” *79 Cornell Law Review* 816-884 821, 874-875; Baker M, Miceli T, Sirmans CF & Turnbull GK (2001) “Property Rights by Squatting: Landownership Risk and Adverse Possession Statutes” *77 Land Economics* 360-370 360; Alexander GS (2009) “The Social-Obligation Norm in American Property Law” *94 Cornell Law Review* 745-820 750.

<sup>802</sup> Posner RA (2003) 26-28; Sprankling JG (1994) “An Environmental Critique of Adverse Possession” *79 Cornell Law Review* 816-884 821, 874-875.

<sup>803</sup> Epstein RA (1986) “Past and Future: The Temporal Dimension in the Law of Property” *64 Washington University Law Quarterly* 667- 722; Posner RA (2003) *Economic Analysis of Law* (6th ed) 49-53.

which they belong.<sup>804</sup> This view has been also referred to as the “contractarian version of the community-based social-obligation norm.”<sup>805</sup> This version recognises justice as the basis for the social-obligation of ownership. While there are numerous views of justice, the justice that is envisaged in terms of this approach is that which appreciates that owners have more capacity for distributing wealth than non-owners.<sup>806</sup>

To understand better this conception of the community-based social-obligation norm, the concept of a community should be understood properly.<sup>807</sup> As discussed in chapter two, community takes an independent individual as the core component of social organisation.<sup>808</sup> According to Dagan, a community is therefore an agglomeration of independent individuals who live together and depend on each other for various purposes.<sup>809</sup> An individual and a community’s mutual relationship flourishes when they meet each other’s mutual needs. This dependency and interdependency has been referred to as a “contractual, welfarist and constitutive” relationship between an individual and the community.<sup>810</sup> An individual’s relationship with a community seeks to achieve mutually shared ends. Both should benefit from each other.<sup>811</sup> Individuals often seek to “maximize their own personal welfare.”<sup>812</sup> Dagan argues that if individuals often seek to “maximize their own personal welfare,” then communities can only give community members responsibilities that will benefit the individuals.<sup>813</sup>

Penalver and Alexander argue that Dagan’s conception of community has numerous limitations.<sup>814</sup> They instead advocate for an idea of ownership which is Aristotelian<sup>815</sup>

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<sup>804</sup> See Dagan H (1999) Takings and Distributive Justice, 85 VA. L. Rv. 741, 771; Singer JW (2000) *Entitlement: The Paradoxes of Property*; Dagan H (2007) “The Social Responsibility of Ownership” *Cornell L Rev*, 1255; Dagan H “Just Compensation, Incentives and Social Meanings” *MICH Law Review* 134 pp197-216.

<sup>805</sup> Alexander GS “The Social-Obligation Norm in American Property Law” *Cornell L. Rev* Volume 94 (4) 758; Dagan H (2007) “The Social Responsibility of Ownership” *Cornell L Rev*, 1255; Dagan H (1999) Takings and Distributive Justice, 85 VA. L. Rv. 741, 771; Dagan H “Just Compensation, Incentives and Social Meanings” *MICH Law Review* 134 pp197-216.

<sup>806</sup> Alexander GS “The Social-Obligation Norm in American Property Law” *Cornell L. Rev* Volume 94 (4) 758.

<sup>807</sup> The idea of a community was discussed in chapter two and therefore, it is not necessary to repeat that discussion here.

<sup>808</sup> Dagan H (1999) “Takings and Distributive Justice”, 85 VA. L. Rv. 741, 771.

<sup>809</sup> Dagan H (1999) “Takings and Distributive Justice”, 85 VA. L. Rv. 741, 791-792.

<sup>810</sup> Alexander GS “The Social-Obligation Norm in American Property Law” *Cornell L. Rev* Volume 94 (4) 759.

<sup>811</sup> Dagan H (1999) “Takings and Distributive Justice”, 85 VA. L. Rv. 741, 771.

<sup>812</sup> Alexander GS “The Social-Obligation Norm in American Property Law” *Cornell L. Rev* Volume 94 (4) 759.

<sup>813</sup> Dagan H (2007) “The Social Responsibility of Ownership” *Cornell L Rev*, 1266-67.

<sup>814</sup> Alexander GS and Penalver EM (2009) “Properties of Community” *Theoretical Enquiries in Law* 127.

<sup>815</sup> Aristotle supported the idea of a classical approach to private ownership of property. Explaining his theory of private ownership is outside the scope of this thesis. However, the following statement summarises his idea which was mainly based on the belief that private ownership enhanced the means of production:

because, they argue, human beings are socio-political entities whose sufficiency finds satisfaction in dependency and interdependency with other human beings.<sup>816</sup> It is not necessary to comprehensively engage their idea of community here because they do this in their articles.<sup>817</sup> However, it suffices to say that they believe that all human beings strive to be independent entities.<sup>818</sup> While they desire to be independent, a key aspect of all humans is that they ultimately seek to flourish from their membership of a community.<sup>819</sup> They express this aspect thus – “community is constitutive of human flourishing in a very deep sense; perhaps community even comprises humanity.”<sup>820</sup> Many scholars have written on human flourishing.<sup>821</sup> They all agree that “human beings develop the capacities necessary for a well-lived and distinctly human life only in a society dependent upon other human beings.”<sup>822</sup> Human flourishing should also include individuals’ abilities to make choices autonomously.<sup>823</sup> Alexander summarises the “human flourishing version of the social-obligation norm” as that which obligates an owner to provide for his or her community, benefits which will be required for human flourishing.<sup>824</sup> Says Alexander, “[T]hese are benefits which are necessary to the community members’ development of those human




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“It is evident then that it is best to have property private, but to make the use of it common; but how the citizens are to be brought to it is the particular business of the legislator. And also with respect to pleasure, it is unspeakable how advantageous it is, that a man should think he has something which he may call his own; for it is by no means to no purpose, that each person should have an affection for himself, for that is natural, and yet to be a self-lover is justly censured; for we mean by that, not one that simply loves himself, but one that loves himself more than he ought; in like manner we blame a money-lover, and yet both money and self is what all men love. Besides, it is very pleasing to us to oblige and assist our friends and companions, as well as those whom we are connected with by the rights of hospitality; and this cannot be done without the establishment of private property, which cannot take place with those who make a city too much one; besides, they prevent every opportunity of exercising two principal virtues, modesty and liberality. Modesty with respect to the female sex, for this virtue requires you to abstain from her who is another’s; liberality, which depends upon private property, for without that no one can appear liberal, or do any generous action; for liberality consists in imparting to others what is our own. (Aristotle, *The Politics*, II.v.)”

<sup>816</sup> Alexander GS and Penalver EM (2009) “Properties of Community” *Theoretical Enquiries in Law*.

<sup>817</sup> Alexander GS “The Social-Obligation Norm in American Property Law” *Cornell L. Rev* Volume 94 (4) 755-773; Alexander GS and Penalver EM (2009) “Properties of Community” *Theoretical Enquiries in Law* 127.

<sup>818</sup> Alexander GS and Penalver EM (2009).

<sup>819</sup> Alexander GS 760.

<sup>820</sup> Alexander GS 761.

<sup>821</sup> See for example Fredrickson B L and Losada M F “Positive Affect and the Complex Dynamics of Human Flourishing” *American Psychologist*, Vol 60(7), Oct 2005, 678-686; Brian R, Salmela-Aro, K, Phillips, S D and Mahwah NJ *Personal project pursuit: Goals, action, and human flourishing* Lawrence Erlbaum Associates Publishers Personal project pursuit: Goals, action, and human flourishing (2007); Barbara L. Fredrickson “Unpacking positive emotions: Investigating the seeds of human flourishing” *The Journal of Positive Psychology* Vol 1(2) 2006.

<sup>822</sup> Alexander GS and Penalver EM (2009) “Properties of Community” *Theoretical Enquiries in Law* 135-36.

<sup>823</sup> Alexander GS “The Social-Obligation Norm in American Property Law” *Cornell L. Rev* Volume 94 (4) 762.

<sup>824</sup> Alexander GS 774.

qualities essential to their capacity to flourish and have a relationship to an individual's ownership of their property.”<sup>825</sup>

#### 4.5 Shortcomings of the social-obligation norm

This thesis concedes that some may argue that the social-obligation norm is not necessarily a panacea to wasteful neglect of property. The first and obvious likely criticism is that the social obligation norm potentially undermines the private and personal interests of individuals in favour of aggregate utility.<sup>826</sup> It does not give due consideration to the interests of individuals but rather, favours the interests of a collective.<sup>827</sup> It infringes on individuals' interests in favour of the interests of a group. As Chaskalson held in *S v Makwanyane*, the law is there “to protect the rights of minorities and others who cannot protect their rights through the democratic process.”<sup>828</sup> Ignoring individuals' rights in favour of group rights is sometimes against the spirit and purport of the Constitution as the Constitution recognises individual rights such as, for example,<sup>829</sup> equality,<sup>830</sup> dignity,<sup>831</sup> freedom.<sup>832</sup>

In light of the criticism that the social-obligation norm undermines private individual interests in favour of group interests, it is imperative to remember that the debates on the importance of public against private proprietary interests have been going on for some time.<sup>833</sup> However, it is impractical to ignore the need to balance the variance between private and public proprietary interests. One school of thought holds that the privileges of private landowners should not be protected at the expense of an entire community. Karp advocates that the interests of a community for survival should be more privileged than those of an

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<sup>825</sup> Alexander GS 774.

<sup>826</sup> Gregory S. Alexander & Eduardo M. Penalver (2012) *An Introduction to Property Theory* 31.

<sup>827</sup> Ross D (2004) “Law and Economics” in Roederer C and Moellendorf D (eds) *Jurisprudence* 186 – 213, 190 – 191; See also criticisms of utilitarian based theories in Posner, Richard A (1979) “Utilitarianism, Economics, and Legal Theory” 8 *J. Legal Stud* 107; Henry Sidgwick (1907) *The Methods of Ethics* 7<sup>th</sup> ed 413; John Plamenatz (1958) *The English Utilitarians*; J. J. C. Smart, An Outline of a System of Utilitarian Ethics, in Smart & Williams (1967) *Utilitarianism For and Against* 77, 149-50 at 3; Rolf E. Sartorius (1975) *Individual Conduct and Social Norms: A Utilitarian Account of Social Union and the Rule of Law*, Jeremy Bentham (1789) *Introduction to the Principles of Morals and Legislation*; Henry Sidgwick, supra note 10; Leslie Stephen (1900) *The English Utilitarians*.

<sup>828</sup> *S v Makwanyane and Another* 1995 (3) SA 431 (CC). See also *West Virginia State Board of Education v Barnette* 319 US 624 (1943) at 638.

<sup>829</sup> For others, see the Bill of Rights in the South African Constitution.

<sup>830</sup> S 9.

<sup>831</sup> S 10.

<sup>832</sup> S 12.

<sup>833</sup> See for example Gregory S. Alexander & Eduardo M. Penalver, (2012) *An Introduction to Property Theory* 31.

individual.<sup>834</sup> He notes that, “[T]he natural systems upon which we as a community rely for survival must be protected, and if private property rights must be sacrificed to achieve that protection, so be it.”<sup>835</sup>

For example, as discussed in chapter five, Brazil utilises the social-obligation norm in its approach to land-ownership. Here, the position is that land should benefit the public more than it benefits the individual.<sup>836</sup> Although private property rights are recognised, title in land is guaranteed by the way it benefits the public as provided for in statute.<sup>837</sup> Title in land is only possessory and is not absolute.<sup>838</sup> A person can lose this title if they are not actively and productively utilising the land for the benefit of the society.<sup>839</sup> Title VII, article 170 (II) and (III) of the Brazilian Constitution contain principles of “private property” and the “social function” of property. These principles, together with the other seven principles<sup>840</sup> “are intended to ensure everyone a life with dignity”.<sup>841</sup> This, to a large extent, is an

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<sup>834</sup> Karp J.P (1993) “A Private Property Duty of Stewardship: Changing our Land Ethic” *Environmental Law* Volume (23) 737.

<sup>835</sup> Karp J.P (1993) “A Private Property Duty of Stewardship: Changing our Land Ethic” *Environmental Law* Volume (23) 737.

<sup>836</sup> See discussion on Brazil in chapter 5.

<sup>837</sup> Brazilian Land Statute of 1964.

<sup>838</sup> Haar C (ed) (1964) “Control of the Use of Land in English Law” in *Law and Land* 23 quoted in Caldwell K Lynton (1974) “Rights of Ownership or Rights of Use? The Need for a New Conceptual Basis for Land Use Policy” *William and Mary Law Review* 15(4)760.

<sup>839</sup> Marianne Schmink (1982) *Land Conflicts In Amazonia* online at <http://onlinelibrary.wiley.com/doi/10.1525/ae.1982.9.2.02a00080/pdf> (accessed 14.09.2011). See also Article 5 of the Brazilian Constitution which is also discussed in paragraph 5.3.2 below.

<sup>840</sup> See 1988 Constitution of the Federative Republic of Brazil online at (accessed 03.11.2011).

<sup>841</sup> See 1988 Constitution of the Federative Republic of Brazil online at <http://www.v-brazil.com/government/laws/titleVII.html> (accessed 03.11.2011). Chapter III which deals with Agricultural and Land Policy and Agrarian Reform creates the basis for understanding what the “social function” of property entails. Chapter III provides the following -

Article 184. It is within the power of the Union to expropriate on account of social interest, for purposes of agrarian reform, the rural property which is not performing its social function, against prior and fair compensation in agrarian debt bonds with a clause providing for maintenance of the real value, redeemable within a period of up to twenty years computed as from the second year of issue, and the use of which shall be defined in the law.

Paragraph 1 - Useful and necessary improvements shall be compensated in cash.

Paragraph 2 - The decree declaring the property as being of social interest for agrarian reform purposes empowers the Union to start expropriation action.

Paragraph 3 - It is incumbent upon a supplementary law to establish special summary adversary proceeding for expropriation action.

Paragraph 4 - The budget shall determine each year the total volume of agrarian debt bonds, as well as the total amount of funds to meet the agrarian reform programme in the fiscal year.

Paragraph 5 - The transactions of transfer of property expropriated for agrarian reform purposes are exempt from federal, state and municipal taxes.

Article 185. Expropriation of the following for agrarian reform purposes is not permitted:

I - small and medium-size rural property, as defined by law, provided its owner does not own other property;

II - productive property. Sole paragraph - The law shall guarantee special treatment for the productive property and shall establish rules for the fulfilment of the requirements regarding its social function.

acknowledgement of the social obligation norm of ownership. The Brazilian Constitution expects the State to ensure that land benefits the majority of people as compared to individuals alone. It is concerned about what happens to the land after reform. The Brazilian Constitution prioritises the maximum utility of land over any other land restitution method.

Another criticism of the social-obligation norm of ownership relates to the uncertainty of the domain of the norm. How does one know which policies will maximize a community's greatest happiness or utmost utility? It is not possible to come up with policies that bring maximum utility to everyone, so whose happiness is considered when designing policies? The norm lacks a standard by which the happiness of everyone is measured.<sup>842</sup> It is therefore possible to make a decision which should make everyone happy but actually makes people unhappy because happiness is subjective. Posner describes this uncertainty as a "moral monstrosity which arises from the utilitarian's readiness to sacrifice the innocent individual on the altar of social need."<sup>843</sup>

## 4.6 Conclusion

In 1984, Cowen correctly argued that the understanding of ownership as unlimited and complete power over a thing was unacceptable in South Africa's modern day era.<sup>844</sup> This understanding was strongly influenced by the reception of Pandectist philosophies as part of our law.<sup>845</sup> Cowen argued that the new patterns of landownership which include sectional title, time-sharing, nature conservation areas, group and cluster housing – can only work in an environment which is not absolute, less rigid and less individualistic.<sup>846</sup> Cowen therefore advocated for a South African ownership which was not rigidly autonomous and

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Article 186. The social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements:

I - rational and adequate use;

II - adequate use of available natural resources and preservation of the environment;

III - compliance with the provisions that regulate labour relations;

IV - exploitation that favours the well-being of the owners and labourers.

<sup>842</sup> Posner, Richard A, 1979 "Utilitarianism, Economics, and Legal Theory" 8 *J. Legal Stud* 113.

<sup>843</sup> Posner, Richard A, 1979 "Utilitarianism, Economics, and Legal Theory" 8 *J. Legal Stud* 113; see also Alan Donagan, "Is There a Credible Form of Utilitarianism?" in *Contemporary Utilitarianism* ed, Michael D. Bayles, 1968 at 187, 188.

<sup>844</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students' Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 71.

<sup>845</sup> Visser DP (1985) "The 'Absoluteness' of Ownership: The South African Common Law in Perspective" *Acta Juridica* 47.

<sup>846</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students' Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 70-80.

individualistic but rather, which recognizes the social-obligation norm of property ownership.<sup>847</sup> The South African land restitution paradigm does have notable attributes of the classical liberalist conception of ownership which gives more respect to an owner's autonomy with his land without any interference. Cases such as for example, *Johannesburg Municipal Council v Rand Townships Registrar and Others*<sup>848</sup> and *Dadoo Ltd v Krugersdorp Municipal Council*<sup>849</sup> demonstrate South Africa's embracement of a classical conception of ownership which accepts that owners have "all rights of use and abuse." This cannot be so in our era today. Ownership must embrace the social-obligation norm of property. A classical liberal understanding of ownership may be acceptable with regard to movables such as domestic utensils, domestic animals and others but not with regard to immovable property particularly land.<sup>850</sup> As discussed in chapter two, this respect for a conservative conception of ownership is harmful to the socio-economic wellbeing of the beneficiaries of land and the rural economy as a whole. A more acceptable conception of ownership rather recognizes the social function of property.<sup>851</sup>

As previously mentioned, even the development of the concept of ownership does not have specific reference to neglect, particularly neglect which is detrimental to the society. Even as legal scholars of the early years struggled with defining ownership, they did not include wasteful neglect as an attribute of ownership. According to Singer, "Owners have obligations. We can argue about what these obligations should be, but no one can seriously argue that they do not exist."<sup>852</sup>

Arable land benefits millions of South Africans. It provides employment, food and supplies raw materials for industries. It is an integral part of the economy. As chapter six illustrates,

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<sup>847</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students' Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 70-80.

<sup>848</sup> 1910 TPD 1314.

<sup>849</sup> 1920 A.D. 530 at 537.

<sup>850</sup> See in this regard, Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students' Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 70-80.

<sup>851</sup> Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* (Paper read at the University of the Witwatersrand, Johannesburg, 26 April 1984) under the auspices of the Law Students' Council of the University of and the Trust Bank of Africa Limited, in the Trust Bank Series of continuing legal education lectures) 70-80.

<sup>852</sup> Singer JW (2000) *Entitlement: The Paradoxes of Property* 18.



cases such as *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*<sup>853</sup> illustrate that property must be positively utilised in a manner that will also benefit others. For example, owners have to be engaged citizens who must take the risk for unpaid municipal charges.<sup>854</sup> This was implicit confirmation by the court that ownership also entails a social-obligation norm.



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<sup>853</sup> *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, Local Government And Housing, Gauteng, And Others (Kwazulu-Natal Law Society And Msunduzi Municipality As Amici Curiae)* 2005 (1) SA 530 (CC)

<sup>854</sup> Para 51.

## **CHAPTER FIVE: THE SOCIAL-OBLIGATION NORM IN GERMANY AND BRAZIL**

### **5.1 Introduction**

The previous chapter defined what is meant by the social-obligation norm of ownership. The chapter explained that in terms of the social obligation norm, ownership is not absolute. Rather, owners are expected to utilize their property responsibly and more specifically, they are required to use their property in a manner that also benefits others and allows them to flourish. A conception of ownership that upholds the sanctity of ownership without limits is an unsustainable classical liberal view of ownership which is unacceptable in our world today. South Africa's adherence to the classical liberal conception of ownership in the restitution process contributes, to a great extent, to the wasteful neglect of cultivable land.

As the present chapter shows, other countries such as Germany and Brazil have long adopted a conception of ownership which gives more respect to the social-obligation norm of ownership with positive results. Because of adopting the principles of the social-obligation norm in these countries, their land restitution processes encourage active, optimal and sustainable utilization of land. South Africa can draw important lessons from these legal systems in order to achieve a land restitution programme which will also promote active, optimal and sustainable utilization of land. Of course, the underlying socio-economic structures of South Africa, Germany and Brazil are different and as such this research thesis does not seek to impose a German- or Brazilian-style land restitution program but rather, suggest that the underlying principles of the social-obligation norm in Brazil and Germany should be applied to South Africa to ensure that the country's land restitution program also encourages active, sustainable and optimal utilisation of land.

This chapter therefore discusses the social-obligation norm of property ownership in Germany and Brazil. The chapter demonstrates that the application of the social-obligation norm has led to productive utilization of property in the two countries and that South Africa needs to embrace this norm as a more effective concept of carrying out land restitution. As discussed in the previous chapter, the social-obligation norm of ownership provides a good basis upon which ownership of property can promote social transformation and improve the rural economy. The norm can be harnessed to correct the failures of the land restitution programme and lead to an active rural economy which is based on agriculture as envisaged by chapter six of the NDP.

As illustrated in the previous chapters, the social-obligation norm is the idea that a person's right of private ownership carries with it the obligation or responsibility to use that property in ways that contribute to the collective or common good. Any use of property which does not contribute to the collective or common good is, in terms of the social-obligation norm, unacceptable. For this reason, private owners are obliged to utilize their property in ways that promote the collective good of others. This may, for example, include imposing positive obligations on owners such as the requirement that all owners of arable land must cultivate it or that owners of buildings that are vacant or abandoned must allow such buildings to be used for housing.<sup>855</sup> As discussed in the previous chapter, the social-obligation norm does not reject private ownership of property – rather, the norm is underpinned by the fact that human beings are interdependent and to curb irresponsible neglect of property which would also have negative consequences, limits must be placed on private ownership.<sup>856</sup>

While the social-obligation norm has mostly European roots, it also has had an impact in numerous Latin American countries.<sup>857</sup> Legal systems of some European countries such as Germany make reference to the social-obligation norm. A number of Latin American countries such as Brazil emphasize that the social-obligation norm carries with it the positive responsibility to utilise property productively, sustainably and optimally.<sup>858</sup>

## 5.2 The social-obligation norm in Germany

### 5.2.1 Brief historical context

Between 1933 and 1990, former East Germany experienced prolonged State sanctioned land grabs.<sup>859</sup> The first phase of the land grabs was condoned and championed by the national socialist government of the Third Reich and thereafter, the second phase followed under the communist government of East Germany.<sup>860</sup> Huge areas of land were confiscated by the State

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<sup>855</sup> Ondetti G (2015) “The social function of property, land rights and social welfare in Brazil” *Land Use Policy* 50 30.

<sup>856</sup> Cunha ADS (2011) “The social function of property in Brazilian Law” *Ford Law Rev* 80 (3), 1171–1181; Mirow, MC (2011) “Origins of the social function of property in Chile” *Ford Law Rev* 80 (3), 1183–1217; Ondetti G (2015) “The social function of property, land rights and social welfare in Brazil” *Land Use Policy* 50 30.

<sup>857</sup> Ondetti G (2015) “The social function of property, land rights and social welfare in Brazil” *Land Use Policy* 50 30.

<sup>858</sup> Ankersen TT, Ruppert T (2006) “The social function doctrine and land reform in Latin America” *Tulane Environ. Law J.* 19, 69–120; Ondetti G (2015) “The social function of property, land rights and social welfare in Brazil” *Land Use Policy* 50 30.

<sup>859</sup> Blacksell M, Born KM and Bohlander M (1996) “Settlement of Property Claims in Former East Germany” *Geographical Review*, Vol. 86, No. 2 pp. 198-215.

<sup>860</sup> Blacksell M, Born KM and Bohlander M (1996) 198-215.

and were either nationalized or allocated to new owners.<sup>861</sup> Undoubtedly, these social wrongs committed by the erstwhile regimes needed redress at the unification of East and West Germany.

Because the erstwhile regimes' land grabs involved large tracts of land often with the use of violent and repressive methods, redressing the issue became an urgent and yet difficult and potentially explosive problem much like in South Africa.<sup>862</sup> It was characterized by tension and emotion.<sup>863</sup> Millions of acres of property were subject to claims of restitution. All people who had been dispossessed of their property between 1933-1945 as well as after 1949, had the right to restitution in terms of the Unification Treaty, also known as the *Einigungsvertrag*.<sup>864</sup>

Restitution in East Germany was a balancing act – while it sought to remedy the historical expropriations that had occurred, the process also sought to avert the undesirable negative economic consequences of restitution.<sup>865</sup> The government had to come up with a policy framework which ensured that while past injustices were remedied, the country's economy was not harmed. The government subsequently responded with two laws, one in 1991 and another in 1992, creating an expedited procedure for land sales that had the potential to contribute to economic growth in the country.<sup>866</sup> Under this legislation, known as the “Investment Exception,” the government was allowed (but not required) to sell land, regardless of a pending restitution claim, if there was an enumerated public benefit such as the provision of jobs.<sup>867</sup>

According to Harper,<sup>868</sup> the Unification Treaty between East and West Germany included specific programs that were aimed at property confiscated by the Communists.<sup>869</sup> One of the programs relating to the handling of expropriated property saw the introduction of a “Law

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<sup>861</sup> Blacksell M, Born KM and Bohlander M (1996) 198-215. This is analogous to the land grabs that occurred in South Africa during the colonial settler and apartheid regimes as discussed briefly in chapter one and two.

<sup>862</sup> Quint PE (1997) *The Imperfect Union – Constitutional Structures of German Unification*.

<sup>863</sup> Quint PE (1997) *The Imperfect Union – Constitutional Structures of German Unification*.

<sup>864</sup> Issa G (1995) *German Unification Case study: Restitution Laws – Restitution or Compensation for Expropriated Property?* Excerpt from Treuhandanstalt German Privatization Program Submitted to Professor Ali M. S. Fatemi, Chairman, Department of Economics at The American University of Paris Submitted in Partial Fulfilment of Requirements for BA in International Economics, Spring.

<sup>865</sup> Stack, MH “The ‘Colonization’ of East Germany?: A Comparative analysis of German privatization” *Duke Law Journal* Vol 46:1298.

<sup>866</sup> Tucker-Mohl J (2005) *Property Rights and Transitional Justice: Restitution in Hungary and East Germany* Italy :1-21.

<sup>867</sup> Tucker-Mohl J (2005) *Property Rights and Transitional Justice: Restitution in Hungary and East Germany* Italy :1-21.

<sup>868</sup> Harper GD (1999) “Restitution of Property in Cuba: Lessons Learned from East Europe” ASCE 409 – 424.

<sup>869</sup> Harper GD (1999) 409 – 424.

Relating to Special Investments in the German Democratic Republic” – the “Special Investments Law.”<sup>870</sup> It applied only to expropriated property. Harper<sup>871</sup> writes that;

“The Special Investments Law provided for the right of a present owner to sell property, even if the former owner had filed a claim, provided the present owner could obtain a certificate stating that the property had a ‘special investment purpose.’ A ‘special investment purpose’ existed for:

- The maintenance or creation of employment in particular, through the setting up of an industry or commercial establishment, or a service enterprise,
- The provision of housing for local people, or
- The installation of infrastructure necessary for one of the above.”

An original owner of property could therefore be denied a return of expropriated property if the property was being used for investment that yielded general economic benefits to the community.<sup>872</sup> Accordingly, the holder of expropriated property could sell the property to an investor – notwithstanding the claims of a previous owner – if the property was needed for a project that would create or protect jobs, satisfy significant housing needs or create the necessary infrastructure for such projects.<sup>873</sup> In March 1991, Germany passed a law which provided amendments to the “Special Investments Law – the ‘Law for the Removal of Obstacles to Privatization of Enterprises and for the Promotion of Investments.’” This new law allowed for the *Treuhandanstalt* or a Government Entity to sell and lease any of its real property or buildings, even if the former owner had filed a claim, if the sale was to promote “investment purposes.”<sup>874</sup>

According to Sinn,<sup>875</sup> East Germany’s economic life was being paralyzed and its restitution rule was under heavy attack. The “Obstacle Removal Law” was a response to this attack and it speeded up the investment process. The law isolated the investor’s decisions from the debates about ownership rights by replacing the restitution of real property with monetary compensation payments.<sup>876</sup> Sinn notes the following relevant provisions of the law as noteworthy - until the end of 1992; a potential investor could not buy property that fell under the restitution rule only if the previous owner guaranteed to carry out the same amount of

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<sup>870</sup> Harper GD (1999) 409 – 424.

<sup>871</sup> Harper GD (1999) 409 – 424.

<sup>872</sup> Quint PE (1997) *The Imperfect Union – Constitutional Structures of German Unification*.

<sup>873</sup> Quint PE (1997) .

<sup>874</sup> Quint PE (1997).

<sup>875</sup> Hans-Werner Sinn (1992) “Privatization in East Germany,” NBER Working Papers 3998, National Bureau of Economic Research, Inc.

<sup>876</sup> Hans-Werner Sinn, (1992).

investment until the end of 1992.<sup>877</sup> Further, a person who previously owned property was no longer able to halt the privatization process unless the particular person could furnish investment plans.<sup>878</sup> The government was able to rule out restitution by investing in the property.<sup>879</sup> Potential investors and restituted owners who did not keep their promises could be forced to return the property to the government.<sup>880</sup>

Regarding this, Issa asserts that this was the German government's way of reacting to the severe critiques of economists, local politicians and academics.<sup>881</sup> This was done in terms of the - *Hemmnisbeseitigungsgesetz* (Law to remove impediments) which was introduced in March 1991.<sup>882</sup> This law did not question the principle of restitution per se but rather imposed limitations to it to the extent that it did not promote active utilisation of property.<sup>883</sup> The original owner could only take physical possession of his property if he could guarantee the continuation of the enterprise and if he could assure enough investment to restructure the enterprise. If the original owner was not able to do so, an investor with a credible investment concept would have priority.<sup>884</sup> The original owner would then receive financial compensation which depended on the market value of the enterprise.<sup>885</sup>

Evidently, the law favoured investor interests over original owners who did not have either the desire or the ability to invest or carry on with the existing enterprise on the piece of land. Germany's approach to handling restitution claims reveals a commitment to the principles of the social-obligation norm. Property must serve a public purpose. This principle is clearly spelt out in Article 14 of the German Constitution.

### **5.2.2 The social-obligation norm in the German Constitution**

The German Constitution, which is known as The Basic Law of the Federal Republic of Germany was put into force in 1949. This Constitution was meant to "give Germany a new order to political life for a transitional period" that would end with the reunification of

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<sup>877</sup> Hans-Werner Sinn, (1992).

<sup>878</sup> Hans-Werner Sinn, (1992).

<sup>879</sup> Hans-Werner Sinn, (1992).

<sup>880</sup> Hans-Werner Sinn, (1992).

<sup>881</sup> Issa G (1995) *German Unification Case study: Restitution Laws – Restitution or Compensation for Expropriated Property?* Excerpt from Treuhandanstalt German Privatization Program Submitted to Professor Ali M. S. Fatemi, Chairman, Department of Economics at The American University of Paris Submitted in Partial Fulfillment of Requirements for BA in International Economics, Spring.

<sup>882</sup> Issa G (1995).

<sup>883</sup> Issa G (1995).

<sup>884</sup> Issa G (1995).

<sup>885</sup> Issa G (1995).

Germany.<sup>886</sup> The Constitution was not expected to continue in perpetuity beyond the unification of East and West Germany. The unification happened on the 3<sup>rd</sup> of October 1990 within the framework of The Basic Law itself under the now superseded Article 146.<sup>887</sup> Because The Basic Law had been amended numerous times since its inception, over time, it developed to reflect the ideal legal order that the Germans were happy with and therefore, it was subsequently retained as the final German Constitution.<sup>888</sup> For many years, The Basic Law had been the basis of numerous German Federal Constitutional Court decisions and coupled with the numerous progressive amendments that happened to it, it assumed the character of a legal document that was crafted to exist in perpetuity.<sup>889</sup>

Articles 20 and 28 of The Basic Law lay the basic and permanent principles of the Unified Germany. They go further than describing the polity of the German Republic as a “Democratic and Social Federal State,” and advance principles of Germany that are recognized in the Constitutional Law of Germany. These views include that Germany is a Constitutional State; a Social State; a Federal State and that it is also a Democratic State.<sup>890</sup> Of relevance to this thesis is the fact that Germany is a Social State. This is provided for in Article 20 of the German Constitution which obliges the government to provide all Germans with basic needs. There is no consensus amongst legal scholars whether all social benefits in Germany are mandated by this law or not.<sup>891</sup> What is however clear is that the concept of a social State is a key feature in German constitutional thought. The cases of *Lisbon Treaty* and *Hartz IV* dispel any probable doubts about Germany being a social State.<sup>892</sup> The Court in those cases described the social State as an indispensable part “of what is described as Germany’s constitutional identity, a distinctiveness that cannot be sacrificed to any other value of the Basic Law.”<sup>893</sup>

According to Donald, the concept of a social State in the German Constitution is influenced by the Lutheran notion that “while the people owe allegiance to the prince, the prince in turn is bound to see to the welfare of his subjects.”<sup>894</sup> In constitutional property law, the principle

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<sup>886</sup> See the pre-ambule to The Basic Law.

<sup>887</sup> Donald P (et al) (2012) *The Constitutional Jurisprudence of the Federal Republic of Germany: Third edition, Revised and Expanded* 48.

<sup>888</sup> Donald P (et al) (2012) 42.

<sup>889</sup> Donald P (et al) (2012) 43.

<sup>890</sup> See also Donald P (et al) (2012) 48.

<sup>891</sup> See this discussion also in Donald P (et al) (2012) 49-50.

<sup>892</sup> See *Lisbon* (2009; no. 6.6).

<sup>893</sup> Quoted in Donald P (et al) (2012) 50.

<sup>894</sup> also Donald P (et al) (2012) 50.

of Germany as a social State finds its strongest expression in the property clause in Article 14 of The Basic Law which provides that property must serve a social-obligation. The social-obligation norm aspect of Article 14 reflects Germany's established socialist thought that has its influence from Catholicism.<sup>895</sup> The Article also reflects an appreciation of the destructive effects of World War 2 which had left people with no housing and food.<sup>896</sup>

Article 14 of the German Constitution<sup>897</sup> provides as follows:

**“Article 14 [Property, inheritance, expropriation]**

- (1) Property and the right of inheritance shall be (are) guaranteed. Their substance [content] and limits shall be [are] determined by law.
- (2) Property entails social obligations [imposes duties]. Its use should also serve the public interest.
- (3) Expropriation shall only be permissible in the public interest [for a public necessity]. It may only be ordered by or pursuant to a law which determines the nature and extent of compensation. Compensation shall reflect a fair balance between the public interest and the interests of those affected. In case of dispute regarding the amount of compensation recourse may be had to the ordinary courts.<sup>898</sup>

This clause does not provide much guidance regarding its substantive content. A superficial reading of the Article may present to some with what seems like a conflicted constitutional property provision.<sup>899</sup> This is because it first guarantees liberty with ownership and yet also grants Parliament the power to define the content and extent of this guarantee.<sup>900</sup> Put differently, the Article codifies the social-obligation norm of ownership by giving owners an affirmative social-obligation while also guaranteeing ownership rights.<sup>901</sup>

In the *Hamburg Flood Control* case,<sup>902</sup> the Federal Constitutional Court articulated the apparent tension and conflicting provisions of Article 14. The court emphasized that while property is a classically liberal right, it is however subject to the authority of Parliament.<sup>903</sup>

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<sup>895</sup> Donald P (et al) (2012) 637.

<sup>896</sup> Donald P (et al) (2012) 637.

<sup>897</sup> Grundgesetz [Gg] [Constitution] Art. 14(2) (F.R.G), *Translated In* A.J. Van Der Walt, *Constitutional Property Clauses: A Comparative Analysis* 121 (1999).

<sup>898</sup> *Basic Law for the Federal Republic of Germany* (1995), translated in Van Der Walt *Constitutional Property Clauses: A Comparative Analysis* 121 (1999).

<sup>899</sup> Kleyn (1996) “The Constitutional Protection of Property: A Comparison between the German and the South African Approach” 11 *SAPL* 402 at 409; Donald P (et al) (2012) *The Constitutional Jurisprudence of the Federal Republic of Germany: Third edition, Revised and Expanded* Duke University Press 630.

<sup>900</sup> Donald P (et al) (2012) 630.

<sup>901</sup> See also Alexander G S (2003) "Property as a Fundamental Constitutional Right? The German Example" Cornell Law Faculty Working Papers. Paper 4.

<sup>902</sup> 24 BVerfGE 367 (1968).

<sup>903</sup> 24 BVerfGE 367 (1968).



While it is personal, it is also social. According to van der Walt, such a formulation of a property clause given in Art 14[1] is unusual.<sup>904</sup> The [A]rticle shows the distinction between a classical liberal conception of property which emphasizes individualized ownership, versus the social function of property ownership, which recognizes rights in property which are influenced by the social context.<sup>905</sup> The [A]rticle recognizes individual owners' right to exclude third parties and the State, from interfering with ownership. This provision influences the *ratio decidendi* of the courts in instances that involve various aspects of property.<sup>906</sup> In the *Hamburg* case, the Federal Constitutional Court explained that while an individual's right to property is classically liberal, regard must be given to the property's social function.<sup>907</sup>

According to Lubens, "[T]his broad social-obligation is only limited by ownership interests that implicate the fundamental values of human dignity and self-realisation."<sup>908</sup> Donald argues that the apparent tension in the Article should not be interpreted as a "desire to subvert the protection of property."<sup>909</sup> The government's powers that enable it to define the content as well as the limits of property are limited by Article 19(2) of the Basic Law. The latter provides that "in no case may the essence of a basic right be affected." Put differently, in limiting an owner's right to property in terms of the social-obligation norm, regard must be had to the essence of the right being limited.<sup>910</sup> The limitation should be done under the guidelines provided for in Article 19(2) which provides that the limitation must be done "pursuant to a law", "must apply generally and not merely to a single case" and "must specify the basic right affected." Quite clearly, Parliament's powers to limit an owner's right in terms of the social-obligation norm do not mean that it can interfere unreasonably with an owner's right as spelt out in the *Hamburg* case. While the case will be discussed in more detail in this chapter, the *Hamburg* case illustrated that generally, the tension posed by the social-obligation norm in Article 14 should be resolved to the benefit of an individual owner's right to property as provided for in Article 14[1].

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<sup>904</sup> Van der Walt AJ *Constitutional Property Clauses – A comparative analysis* (1999) 124.

<sup>905</sup> Lubens R (2007) "The Social Obligation of Property Ownership: A Comparison of German and US. Law," 24 *ARIZ. J. INT'L & COMP. L.* 406.

<sup>906</sup> Alexander G *The Global Debate over Constitutional Property* University of Chicago Press 2006, 131.

<sup>907</sup> 24 BVerfGE 367 (1968).

<sup>908</sup> Lubens R (2007) 389.

<sup>909</sup> Donald P (et al) (2012) *The Constitutional Jurisprudence of the Federal Republic of Germany: Third edition, Revised and Expanded* 631.

<sup>910</sup> Donald P (et al) (2012) 631.

It is helpful to note that the social-obligation norm in the German Constitution was not created “out of whole cloth.”<sup>911</sup> It had existed already for many years as part of “Germany’s background legal tradition.”<sup>912</sup> The clause clearly directs the German courts to exercise extensive land use regulation. Individual freedom with property is balanced against the interests of the general welfare of the public. This provision differentiates between property interests that are mainly economic and those that solely serve non-economic interests. Property is therefore not given a blanket protection as a fundamental right across the board.

The German Constitution gives property ownership the highest form of protection “only to the extent that the affected interest immediately at stake implicates the owner’s ability to act as an autonomous moral and political agent.”<sup>913</sup> This means that property is treated as a “derivative, or instrumental value in the general constitutional scheme.”<sup>914</sup> It is protected to the degree that it serves other fundamental values in the Constitution such as dignity. Property in the German Constitution does not give more respect to subjective preferences. The Constitution also does not recognize property “as a basic right for the purpose of blocking legislative or regulatory redistributive measures that frustrate the full satisfaction of individual preferences.”<sup>915</sup> Rather, the Constitution conceives property in terms of its benefit to the community or general public or in terms of its social-obligation to people.

What is also evident from Article 14 (1) is that property should be viewed as an institution that assists a person to achieve self-realisation or self-development in an “objective, distinctly moral and civic sense.”<sup>916</sup> This means that property is only important in so far as it assists people to develop both as moral agents and members who participate in the broader community. The German situation is different however in terms of Article 14. The Article does not only guarantee monetary compensation of property, it also guarantees the extent of ownership.<sup>917</sup> Recognising this, the German Constitutional Court stated, “The function of Article 14 is not primarily to prevent the taking of property without compensation – although

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<sup>911</sup> Alexander G (2006) *The Global Debate over Constitutional Property* 98.

<sup>912</sup> Alexander G (2006) 98. For more on the background of Germany’s legal tradition, please see Alexander G S (2003) “Property as a Fundamental Constitutional Right? The German Example” Cornell Law Faculty Working Papers. Paper 4 pp 11-17.

<sup>913</sup> Alexander G S (2003) 9.

<sup>914</sup> Alexander G S (2003) 9.

<sup>915</sup> Alexander G S (2003) 9.

<sup>916</sup> Alexander G S (2003) 9.

<sup>917</sup> See also Hans-Jürgen Papier, *Die Eigentumsgarantie des Art. 14 I 1 GG*, in Theodor Maunz and Günter Dürig, *Grundgesetz Kommentar*, 4 vols. (München, 1993), vol. 2, Randnummern 18-23 – translated by Kerstin Leussing.

in this respect it offers greater protection than Article 153 of the Weimar Constitution<sup>918</sup> – but rather, to secure existing property in the hands of the owner.”<sup>919</sup> This is clearly the primary meaning of Article 14 (1) which provides that “Property and the right of inheritance shall be (are) guaranteed.” Given this fact that Article 14 protects more than just the monetary equivalent of property, it is easy to conclude that property is regarded more highly under the German Constitution than it is under the South African Constitution.<sup>920</sup>

According to Alexander, in German constitutional jurisprudence, property is treated more as a civic right than a market-commodity.<sup>921</sup> This was illustrated more succinctly in the landmark case of *Hamburg Flood Control* where the court reiterated that constitutional property rights are more than simply economic interests, but also about personal and moral interests.<sup>922</sup> The court held as follows –

“To hold that property is an elementary constitutional right must be seen in the close context of protection of personal liberty. Within the general system of constitutional rights, its function is to secure its holders a sphere of liberty in the economic field and thereby enable him to lead a self-governing life.”<sup>923</sup>

The court further highlighted the relationship between property and personhood in terms of Article 14 when it held that “[T]he property guarantee under Article 14 must be seen in a relationship to the personhood of the owner, that is, to the realm of freedom within which persons engage in self-defining, responsible activity.”<sup>924</sup> According to Radin, this understanding of property means that in order “to achieve proper self-development, to be a person, an individual needs some control over resources in the external environment.”<sup>925</sup> Property therefore should assist one to achieve self-development. This conception of property lends itself to a Hegelian approach to property because Hegel is popular for justifying property in terms of how it helps a person to develop himself.<sup>926</sup> According to Alexander, the German Constitution’s opinion which highlights the relationship of property to personhood blends negative as well as positive obligations. An owner of property is protected from

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<sup>918</sup> See Alexander G S (2003) footnote 51.

<sup>919</sup> 24 BVerfGE at 389.

<sup>920</sup> See the discussion in chapter six.

<sup>921</sup> Alexander G S (2003) p19.

<sup>922</sup> 24 BVerfGE at 389.

<sup>923</sup> 24 BVerfGE at 389.

<sup>924</sup> 24 BVerfGE at 389.

<sup>925</sup> Margaret Jane Radin (1982) “Property and Personhood” 34 *Stan. L. Rev.* 957.

<sup>926</sup> See Margaret Jane Radin (1982) “Property and Personhood” 34 *Stan. L. Rev.* 957; see Alexander G S (2003) p20.

external interference with his property as a precondition that such owner will behave in a manner that will assist him to achieve self-realisation.

As mentioned above, while South Africa's Constitution is obviously different from the German Constitution, the two of them share striking similarities regarding constitutional property. For example, both have roots in Roman law and also, German Pandectists strongly influenced South African property law.<sup>927</sup> Besides, the drafters of the South African Constitution's property provision strongly relied on German Constitutional property law.<sup>928</sup> Both countries also have a similar approach to property law in that they both respect owners' right to privately own property, and they also both censure uncompensated expropriation of property. Germany's property provision provides for the right to exclude others and it also recognizes owners' individual freedom to do as they please with their property – very much like South Africa. As the discussion will show, both countries' property clauses allow limitation of ownership in instances where the limitation will serve a public interest. Lastly, both countries' constitutional property provisions allow owners to receive compensation in instances where they are forced to lose ownership.

Of course, as mentioned earlier in this chapter, there are differences between the two Constitutions. One such difference relates to the role of property. In the German Constitution, Article 14(2) expressly provides that property must serve a social function.<sup>929</sup> As will be argued later in paragraph 6.2, this express provision does not exist in South Africa's property clause.

### **5.2.3 The social-obligation norm in the German courts**

Article 14 (2) of the German Constitution clearly introduces a new trajectory in contemporary constitutional property regarding the social function of property.<sup>930</sup> Through this provision, Germany is able to fulfill its commitment to respect individual owners' freedom of ownership as well as the social obligation norm of property. As discussed above, ownership is not without limits. It rather entails a particular constitutional duty towards the community and it must be exercised responsibly. There are numerous cases which illustrate the importance of

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<sup>927</sup> See also Andre van der Walt (1992) "The South African law of ownership: A historical and philosophical perspective" 2 *De Jure* 454; Andre van der Walt (2006) "Transformative Constitutionalism and the development of South African Property Law (part 2)" *J. S. Afr. L.* 1.

<sup>928</sup> Jorg Fedtke (2000) *Die Rezeption von Verfassungsrecht* 329-33.

<sup>929</sup> Grundgesetz [GG] art. 14(2) (F.R.G.), translated in Van Der Walt (1999) *Constitutional Property Clauses: A Comparative Analysis* 121.

<sup>930</sup> Mostert H "Engaged Citizenship and the Enabling State as Factors Determining the Interference of Property: A Comparison of German and South African Law" (2010) *South African Law Journal* Volume 127 (2) 255.

the social-obligation norm to realize the interests of the public. According to Mostert, “[B]enefit to the individual and the community is determined by the relevance of the property in achieving the goals of personal self-realisation and/or the well-being of the community.”<sup>931</sup>

A landmark case that illustrates the significance of the social-obligation norm in the German courts is the *Hamburg Flood Control Case*.<sup>932</sup> The *Hamburg* case was about challenging the *Dikes and Embankments Act* of 1964 that had been enacted by the city of Hamburg. The statute provided for the conversion of grassland that was classified as “dikeland” by the State, into public property. All private ownership of such land was terminated by the Act. However, owners were allowed to claim for compensation for their property. Many owners of the “dikeland” challenged this arrangement and claimed that their rights to property in terms of Article 14 had been violated by the statute. The Hamburg State’s reason for such a Statute was to construct a system of dikes that would prevent destruction of lives and infrastructure. This was in light of the floods that had occurred in 1962 which caused severe destruction of property and livelihoods.

Despite the broad constitutional principles in Articles [14] and [19] which protect property rights, the German Federal Court allowed the State to expropriate the dikeland properties. The expropriation was done in terms of Article 14[3] and it did not violate the right to property guaranteed by Article 14[1]. The Court held that the expropriation was very well within the confines of Article 14[3] because the land was going to be utilized for a public purpose namely, constructing an effective system of dikes and embankments which would prevent another disastrous flood from occurring. The properties were therefore expropriated in terms of the social-obligation norm provided for in Article 14 [2] and [3].

It is helpful to highlight at this juncture that the case illustrates a major difference between the German and South African Constitutions. If it were in South Africa, assuming that the owners had been adequately compensated for their property in terms of section 25 (2) (a) and (b) of the South African Constitution, the claimants would not have adequate constitutional grounds for making a claim. In South Africa, such a statute therefore would have been constitutionally compliant – and subsequently, the claimants would have no constitutional basis for making a claim. In other words, if, according to section 25 (2), sufficient proof that

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<sup>931</sup> Mostert H (2010) (2) *South African Law Journal* 255.

<sup>932</sup> (1968) 24 BVerfGE 367.

a public purpose or public interest had been met, and adequate compensation had been given, then the taking would be deemed constitutional.

Another important case that relates to the social-obligation norm in Germany is the *Wet Gravel Extraction* (Nassauskiesung) case.<sup>933</sup> In this case, the complainant had a pit of gravel and he filed a complaint against action that had been taken in terms of the *Federal Water Resources Act* of 1957. Using this Act, the government stopped the owner from continuing with extracting gravel from the pit because, it was alleged, the extraction presented a risk to municipal water wells. Here, the court weighed the private (financial) interests of the individual owner against the interests of the community of having clean drinking water which was suitable for human use. The court agreed that the owner had to sacrifice his financial interests and so he was stopped from continuing digging for gravel as this would affect the water meant for the community. As discussed in the previous chapter, any conduct with property which does not enhance the livelihood of the community is not acceptable in terms of the social obligation norm. The court's decision here shows clear regard for the social-obligation norm. The landowner in this case "was expected to sacrifice the profitable use of his land, because of the public interest in maintaining water supplies fit for human consumption."<sup>934</sup> Such a regard for the social-obligation norm is lacking in the South African land restitution programme. It would address the problems of wasteful neglect of cultivable land.

It is also important to note that when it comes to the social-obligation norm in Germany, the courts do not prioritise regulatory intensity over individual sacrifice or vice versa. Put differently, individuals are not expected to put up with ownership interference to an intolerable and senseless degree. This addresses the concerns of anyone who may think the social-obligation norm has no regard for private ownership of land. Regulatory intensity and individual sacrifice are considered in tandem.<sup>935</sup> This came out clearly in the *Vineyard* case.<sup>936</sup> In this case, there was a restriction placed on the cultivation of new vineyards. This restriction was put in place because it would positively contribute to German's economy generally and even more so to grape farmers. The burden or restriction therefore which was placed on new farmers by the regulation was regarded as uncompensable. The farmers there

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<sup>933</sup> BVerfGE 58, 300 – translated by Kerstin Leussing.

<sup>934</sup> Mostert H (2010) (2) *South African Law Journal* 255.

<sup>935</sup> Donald P (et al) (2012) *The Constitutional Jurisprudence of the Federal Republic of Germany: Third edition, Revised and Expanded* Duke University Press 639.

<sup>936</sup> 21 BVerfGE 150 (1967).

could not have any legal recourse against this limitation. In the context of the social-obligation norm, this limitation was deemed tolerable and necessary because it benefitted a community's interests while it simultaneously infringed on an individual person.

Another case which considers the conflict between an owner's interests versus the social-obligation norm is the *Small Garden Plot* case.<sup>937</sup> In this case, the federal government had passed a law which limited the right of landowners to terminate garden plot leases. These plots, which were rented from owners on the periphery of towns and cities played a big role in food production. The Government felt that restricting the landowners' right to terminate the lease would actually enhance the social-obligation norm of the property. However, because of the changed socio-economic conditions in the country as well as the blossoming agriculture, the Court deemed that the burden placed on the property was unnecessarily too heavy compared to the value of the protected interest. The court held that the social-obligation norm expected lawmakers to seriously consider the merits of the norm versus the infringement of an owner's rights. In upholding the principles of the norm, an owner should not be expected to put up with a burden which an ordinary person cannot put up with.

The social obligation norm in Germany permits State intervention with an owner's entitlements for the common good. While the right of property is a fundamental right in the Basic Law which is protected vigorously by the Federal Constitutional Court, this right can be limited to an extent sufficient, reasonable and necessary to fulfil a social-obligation. In the context of South Africa's land restitution, the social-obligation norm would compel all owners of cultivable land to actively, productively and sustainably utilise such land. As discussed in this chapter, such an approach to land restitution would be a reflection of the social-obligation norm. It would subsequently address the problem of wasteful neglect of cultivable land. Consequently, the rural economy would be spurred into life as envisaged by the NDP.<sup>938</sup>

## **5.3 The social-obligation norm in Brazil**

### **5.3.1 Brief historical context**

Before discussing the social-obligation norm in Brazil, it is helpful to outline a very summative overview of the land situation in Brazil. A detailed historical account of the whole land issue in Brazil would not add value to the research because numerous authors have

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<sup>937</sup> 10 BVerfGE 221 (1959).

<sup>938</sup> See the discussion in chapter 1 above.

already done this elsewhere.<sup>939</sup> The brief history given here simply serves to help understand the context of the social-obligation norm in Brazil and how it has assisted the country by discouraging wasteful neglect of land.

Brazil has arguably the world's most inequitable landownership patterns in the entire world.<sup>940</sup> Many poor people are landless or do not have adequate land from which to sustain their livelihoods. The majority of Brazilians are either squatters or do not have secure title to land.<sup>941</sup> According to Mitchell, the landlessness in Brazil has nothing to do with the shortage of land but rather, has everything to do with the socio-political circumstances that resulted in the minority rich people owning most of the land.<sup>942</sup>

When Brazil was colonized by Portugal through Pedro Alvarez Cabral in 1500, the country experienced large scale settler expropriation of land without compensation.<sup>943</sup> According to Dalton, the colonial settlers distributed to each other large tracts of land, called *sesmarias*, without any encumbrances besides the requirement that it should be used beneficially.<sup>944</sup> The settlers were given large tracts of land in the hope that they would contribute to the lucrative coffee and sugar cane industries.<sup>945</sup> This system of distributing land continued for many years until 1822 when Brazil attained its independence.<sup>946</sup> On independence, the new government replaced the *sesmarian* method of acquiring landownership with what is known as the right of *posse*.<sup>947</sup> Dalton explains that *posse* was a process that was similar to instances of original acquisition of property.<sup>948</sup> The *posse* process entailed that people could take occupation, and

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<sup>939</sup> See for example Fernandes, E (2011) "Implementing the urban reform agenda in Brazil: possibilities, challenges and lessons" *Urban For.* 22 (3), 299–314; Wolford W, Wright A (2003) *To Inherit the Earth: The Landless Movement and the Struggle for a New Brazil* Food First, Oakland;

Ondetti, G (2008) *Land, Protest, and Politics: The Landless Movement and the Struggle for Agrarian Reform in Brazil*. Penn State, University Park; Ondetti, G (2008) "Up and down with the agrarian question: issue attention and land reform in contemporary Brazil" *Pol. Policy* 36 (4), 510–541; Pacheco, P (2009) "Agrarian reform in the Brazilian Amazon: its implication for land distribution and deforestation" *World Dev.* 37 (8), 1337–1347.

<sup>940</sup> Anthony L H (1990) *Land Tenure and Land Reform in Brazil*, in *Agrarian Reform and Grassroots Development: Ten Case Studies* 205, 207 (Roy L. Prosterman et al. eds).

<sup>941</sup> Anthony L H (1990) 205, 207.

<sup>942</sup> Mitchell K (2003) "Market-Assisted Land Reform in Brazil: A New Approach to Address an Old Problem" *22 N.Y.L. Sch. J. Int'l & Comp. L.* 557; Anthony L H (1990) 205, 207.

<sup>943</sup> Dalton T R "Rights for the Landless: Comparing Approaches to Historical Injustice in Brazil and South Africa" *Columbia Human Rights Law Review* (44) 171.

<sup>944</sup> Dalton T R (44) 171.

<sup>945</sup> Paolo Groppo (1996) *Agrarian Reform and Land Settlement Policy in Brazil: Historical Background, 1996* United Nations Food and Agriculture Organization Land Reform Bulletin.

<sup>946</sup> Dalton T R (44) 171.

<sup>947</sup> Lee J Alston (et al) (1999) *Titles, Conflict, and Land Use: The Development of Property Rights and Land Reform in the Brazilian Amazon Frontier* 33. See also Robert M. Levine (1999) *The History of Brazil* 31.

<sup>948</sup> Dalton T R (44) 171.



subsequently ownership, of vacant land through squatting.<sup>949</sup> In other words, people could go and squat on vacant and unoccupied land until they attained ownership of the land in question.

This system of occupying land continued until the mid-nineteenth century when Brazil experienced a boom in coffee production.<sup>950</sup> This increase in coffee production meant that the value of land increased significantly and subsequently, because of the demand for land, there was need to introduce new regulations on acquisition of landownership which was made even more necessary by the existence of large tracts of unutilized and unoccupied land next to and, “alongside large populations of landless peasants.”<sup>951</sup> This led to the passage of the 1850 Land Law.<sup>952</sup> This law legalized *posses* and revitalized all *sesmarias* that had been obtained until that point. It however forbade all forms of acquiring land through squatting that had been legal before, and provided that all land could only be acquired by purchasing it.<sup>953</sup> This subsequently locked out a large majority of the Brazilian population from acquiring land.<sup>954</sup> Policy debates on addressing the land issue continued until the passage of the Land Statute in 1964.<sup>955</sup> Provisions of this 1964 Land Statute will be analysed shortly, however, for now, it suffices to note that the Statute authorized the government to expropriate land subject to the following three requirements – a) the land must be unproductive; b) expropriation must be in the public interest and c) expropriation must be for compensation. As will be seen later, while values of the social-obligation norm had already been in existence in Brazil as has been described briefly above, this Statute further made the formal entrenchment of the social-obligation norm in the Brazilian Constitution even easier.

Most of the agricultural land in Brazil is referred to as the *latifundia*.<sup>956</sup> The *latifundia* is a property in the rural area which is bigger than the regionally defined module, also known as

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<sup>949</sup> DeWitt J (2002) *Early Globalization and the Economic Development of the United States and Brazil* 33.

<sup>950</sup> DeWitt J (2002) 33.

<sup>951</sup> Dalton T R (44) 171; Lee J. Alston (et al) (1999) *Titles, Conflict, and Land Use: The Development of Property Rights and Land Reform in the Brazilian Amazon Frontier* 33; See also Robert M. Levine (1999) *The History of Brazil* 31.

<sup>952</sup> See Lee J. Alston et al (1999) *Titles, Conflict, and Land Use: The Development of Property Rights and Land Reform in the Brazilian Amazon Frontier* 33. See also Robert M. Levine (1999) *The History of Brazil* 31.

<sup>953</sup> Dalton T R (44) 179.

<sup>954</sup> Meszaros G “Taking the Land into their hands – the Landless Workers’ Movement and the Brazilian State” *Journal of Law and Society* Vol 27(4) 527.

<sup>955</sup> John C. Martin (2008) “Bringing Dead Capital to Life: International Mandates for Land Titling in Brazil” 31 *B.C. Int’l & Comp. L. Rev.* 121, 125.

<sup>956</sup> Mitchell K (2003) “Market-Assisted Land Reform in Brazil: A New Approach to Address an Old Problem” 22 *N.Y.L. Sch. J. Int’l & Comp. L.* 557.

*modulos*.<sup>957</sup> The Land Statute of 1964 defined a *modulos* as the total land that could constitute a “family farm” for each respective region subject to land productivity and regional use. The size of a *modulos* varies from 2 ha to 12 ha.<sup>958</sup> According to Mitchell, “a *latifundia* is defined as a rural property that is: 1. larger than the regionally defined *modulos* and is unused or inadequately used; or 2. greater than 600 times the regionally defined *modulos* regardless of use.”<sup>959</sup> Today many families however have much smaller land which is known as a *minifundia* and these are smaller than the *modulos*.<sup>960</sup> A number of *latifundia* are owned by absentee owners who do not necessarily reside on them. They are thus neglected and unproductive. According to Mitchell, In the northern region of Brazil for example, which includes the Amazon Basin where there are a lot of *latifundia*, only 12.6% of land is occupied.<sup>961</sup> Even in the more settled regions of Brazil, occupancy ranges from 59 to 83%.<sup>962</sup> Without a doubt, the existence of large unoccupied and unproductive tracts of land alongside large landless populations is a cause for conflict in Brazil.

### **5.3.2 The social-obligation norm in the Brazilian Constitution**

As noted before, while the social-obligation norm of property, albeit undefined, had existed in Brazil for a long time, it only initially appeared in the Brazilian Constitution in 1934. With this 1934 Constitution, Brazil followed the other Latin American countries’ trend of adopting the social-obligation norm by asserting that the right to property “cannot be exercised against the social or collective interest.”<sup>963</sup> This position found further entrenchment in the 1946 Constitution. Article 141 thereof provided that “[T]he use of property will be conditional on social welfare. The law can, in observation of the provisions in Article 141, section 16, promote the just distribution of property with equal opportunity for all.” While this provision does not specifically refer to the social-obligation norm, reference to “social welfare” is a clear statement that property must be utilized to promote the collective good.

According to Bernardes, while the 1946 Constitution did not expressly use the expression, “social-obligation norm,” the drafters of the Constitution were quite clearly influenced by the

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<sup>957</sup> Mitchell K 557 (2003).

<sup>958</sup> Mitchell K 557 (2003).

<sup>959</sup> Mitchell K (2003) 557 see footnote 69.

<sup>960</sup> Mitchell K (2003) 557.

<sup>961</sup> Mitchell K (2003) 557.

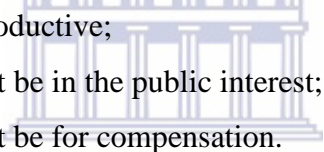
<sup>962</sup> Mitchell K (2003) 557.

<sup>963</sup> Ondetti G (2015) “The social function of property, land rights and social welfare in Brazil” *Land Use Policy* 50 30.

norm.<sup>964</sup> As years progressed, extensive underutilization of land raised food prices and led to a reduced size of the consumer market.<sup>965</sup> This raised concerns and according to Ondetti, the inclusion of the social function norm in the Constitution was a clear reflection of these concerns.<sup>966</sup> These concerns led to several changes to the law and in the 1960s brought numerous adjustments which saw the specific incorporation of the social function principle into Brazilian law.<sup>967</sup> Commenting on this, Ondetti writes,

“A constitutional amendment approved in 1964 facilitated agrarian reform by allowing the State to compensate expropriated landowners in bonds, rather than cash, making reform more financially viable. The amendment also transferred an existing tax on rural land from the municipal to the federal level, with the goal of using it to stimulate farm production by taxing unproductive land at a higher rate.”

Later on the Brazilian government enacted a new land statute. This new land law explicitly provided for the social function of all land in rural areas.<sup>968</sup> In terms of this law, the government was empowered to expropriate all land subject to three requirements: –

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- i. The land must be unproductive;
  - ii. The expropriation must be in the public interest; and
  - iii. The expropriation must be for compensation.

Amendments were made to the law and Article 184 of the 1988 Constitution provided that “It is within the power of the Union to expropriate land on account of social interest...which is not performing its social function.”<sup>969</sup> Although the term “social function” initially appeared in Brazilian legal landscape in the 1946 Constitution, not much reference was made to it though until it was adopted into the 1988 Constitution. The 1988 Constitution makes reference to the social-obligation norm numerous times. For example, Article 5 of the Constitution provides as follows –

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<sup>964</sup> Bernardes JT quoted by Ondetti G (2015) “The social function of property, land rights and social welfare in Brazil” *Land Use Policy* 50 30.

<sup>965</sup> Linhares MY and Silva FTD (1999) quoted in Ondetti G (2015) “The social function of property, land rights and social welfare in Brazil” *Land Use Policy* 50 30.

<sup>966</sup> Ondetti G (2015) 50 30.

<sup>967</sup> Cehelsky M (1979) *Land Reform in Brazil: The Management of Social Change* 261.

<sup>968</sup> See John C. Martin (2008) “Bringing Dead Capital to Life: International Mandates for Land Titling in Brazil” 31 *B.C. Int’l & Comp. L. Rev.* 121, 125.

<sup>969</sup> Kristen Mitchell (2003) “Market-Assisted Land Reform in Brazil: A New Approach to Address an Old Problem” 22 *N.Y.L. Sch. J. Int’l & Comp. L.* 557, 568.

“All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms:

XXII - the right of property is guaranteed;

XXIII - property shall observe its social function;

XXIV - the law shall establish the procedure for expropriation for public necessity or use, or for social interest, with fair and previous pecuniary compensation, except for the cases provided in this Constitution;

XXV - in case of imminent public danger, the competent authority may make use of private property, provided that, in case of damage, subsequent compensation is ensured to the owner;”

In addition, Article 170 provides that “The economic order, founded on the appreciation of the value of human work and on free enterprise, is intended to ensure everyone a life with dignity, in accordance with the dictates of social justice, with due regard for the following principles (II) private property and (III) the social function of property.” The Constitution further places restrictions on property which include for example, Article 5(II) which provides that in all cases where there is imminent danger to the public, “a competent authority may make use of private property, provided that, in case of damage, subsequent compensation is given to the owner.” Another restriction is found in Article 170 (VI) which provides that there is an obligation to reconcile the environment with how property is used. Article 227 paragraph 2 provides that “The law shall regulate construction standards for public sites and buildings and for the manufacturing of public transportation vehicles, in order to ensure adequate access to the handicapped.” These are all restrictions which are placed on ownership which however are justified by the need to fulfil the social-obligation norm of ownership in order to benefit the society.

However, the social-obligation norm in the Brazilian Constitution goes beyond the limits given in the examples above. Chapter III, which addresses Agricultural and Land Policy and Agrarian Reform, creates the basic premises that illustrate the social function of property.<sup>970</sup> As discussed before, Article 184 provides that property which is not performing its social-obligation norm may be expropriated on the grounds of a social interest or agrarian reform. Article 185 reiterates that property which is being utilised productively may not be expropriated. Of course, challenges exist with regard to the exact meaning of productive or useful utilization of land. No definitions or explanations are given in the Brazilian

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<sup>970</sup> Santinoni Vera, Flavia (2006) “The Social Function of Property Rights in Brazil” *Berkeley Program in Law & Economics*. UC Berkeley: Berkeley Program in Law and Economics, 5.

Constitution, but the broad definition and general understanding is that at least “eighty per cent of the property must be put to productive use.”<sup>971</sup>

According to Vera, the main underlying premise of the concept of social function provided by the 1988 Constitution states that,

“The social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements:

- I - rational and adequate use;
- II - adequate use of available natural resources and preservation of the environment;
- III - compliance with the provisions that regulate labor relations;
- IV - exploitation that favors the well-being of the owners and employees.”<sup>972</sup>

In terms of Article 186, property will have fulfilled its social-function when the following three elements are met and complied with –

- a. “The land should be exploited in an economic, rational and adequate manner;
- b. The natural resources on the land must not be exploited in a manner that destroys the environment. The environment must be preserved as the land is utilised; and
- c. The activities on the land must comply with the labour code (compliance with the provisions that regulate labour relations and guarantee the well-being of the owners and employees).”<sup>973</sup>

The 1988 Constitution introduced the notion of “productive property” and, as discussed, also made this a defence against expropriation. This means that only property which is *not* productive can be expropriated. “Productive” is however not defined in the Constitution and the onerous task of defining it was left to laws that were passed with “productive” in mind.<sup>974</sup> The difficulty of defining “productive” was highlighted by Judge Urbano Ruiz in an interview conducted by Meszaros.<sup>975</sup> In the interview, Judge Ruiz remarked,

“imagine someone out there who has a vast holding of land. He puts a few cows there, is this productive or not? What are the criteria for defining this? From there, you can string out a discussion for a long time. Technically, is there a means of lancing the boil or not? There is an

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<sup>971</sup> See Kristen Mitchell (2003) “Market-Assisted Land Reform in Brazil: A New Approach to Address an Old Problem” 22 *N.Y.L. Sch. J. Int'l & Comp. L.* 557, 568.

<sup>972</sup> Santinoni Vera, Flavia. (2006) “The Social Function of Property Rights in Brazil” *Berkeley Program in Law & Economics*. UC Berkeley: Berkeley Program in Law and Economics, 5.

<sup>973</sup> Santinoni Vera, Flavia. (2006) 6.

<sup>974</sup> Meszaros G “Taking the Land into their hands – the Landless Workers’ Movement and the Brazilian State” *Journal of Law and Society* Vol 27(4) 527.

<sup>975</sup> See Meszaros G footnote 23.

infinite of appeal mechanisms...if you have an able lawyer, you can almost eternalise the discussion.”<sup>976</sup>

In February 1993, Law 8629 was enacted. This law is known as the Agrarian Reform Law and it gives more detail regarding the social function of property. It provides that “productive property” refers to a “predetermined level of productivity.”<sup>977</sup> Vera argues that the term “productivity” is problematic in law because it has its roots in engineering and not necessarily law.<sup>978</sup> It is essentially a concept that is mainly used in “economic analysis.”<sup>979</sup> It is not necessary to enter into a discussion of the technical meaning of “productivity” as used by economists and engineers. However, a very brief reference of the explanation of the term using an economic lens in order to fully understand its application and implications to the context of the social-obligation norm will suffice.

An economic analysis of the term “productivity” refers to the “value of output (goods and services) produced per unit of input (productive resources) used.”<sup>980</sup> For this reason, when there is increased productivity, it means that more goods and services would have been produced using the same quantity of resources. Alternatively, the same goods and services would have been produced using fewer resources. According to Vera, the law uses the concept of productivity based on hectares of land as the factor of production.<sup>981</sup> This is the context within which “productive utilization of land”, as a principle of the social-obligation norm is understood within the Brazilian land context.

### **5.3.3 Brazil’s social obligation norm in the courts**

According to Article 184 of the Brazilian Constitution,

“It is within the power of the Union to expropriate on account of social interest, for purposes of agrarian reform, the rural property which is not performing its social function, against prior and fair compensation in agrarian debt bonds with a clause providing for maintenance of the real value, redeemable within a period of up to twenty years computed as from the second year of issue, and the use of which shall be defined in the law.”

Article 186 further provides that

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<sup>976</sup> Meszaros G 525.

<sup>977</sup> Santinoni Vera, Flavia (2006) 6.

<sup>978</sup> Santinoni Vera, Flavia (2006) 6.

<sup>979</sup> Santinoni Vera, Flavia (2006) 6.

<sup>980</sup> Santinoni Vera, Flavia (2006) 6.

<sup>981</sup> Santinoni Vera, Flavia (2006) 6.

“The social function is met when the rural property complies simultaneously with, according to the criteria and standards prescribed by law, the following requirements:

- (I) rational and adequate use;
- (II) adequate use of available natural resources and preservation of the environment;
- (III) compliance with the provisions that regulate labour relations;
- (IV) exploitation that favours the well-being of the owners and labourers.”

Numerous decisions of the Brazilian Federal Supreme Court, which is known as the *Supremo Tribunal Federal* reveals the importance of the social-obligation norm. For example, in *Estácio de Souza Leão Filho v. Presidente da República (Estácio de Souza Leão Filho v. President of the Republic)*,<sup>982</sup> *Rafaeli e outro v. Presidente da República (Rafaeli et al. v. President of the Republic)*,<sup>983</sup> as well as *Siqueira e outro v. Presidente da República (Siqueira et al. v. President of the Republic)*,<sup>984</sup> arguments were mainly with regard to whether the social function of property was a core part of property rights or simply the land to which the right in question related. The three cases dealt with mostly identical issues. The plaintiffs in the three cases owned land in rural areas. They wanted a presidential Act that allowed for the expropriation of land for reform, to be declared unlawful. As referred to above, Article 184 of the Constitution allows “the Union” to expropriate land on account of social interest, for purposes of agrarian reform, the rural property which is not performing its social function.” On the other hand Article 185 does not allow for the expropriation of “small and medium-sized rural property, as defined by the law” in instances where the owner does not own any other property. The Article also does not allow the expropriation of productive property.

In the three cases cited above, the land was in the rural areas and was supposed to be expropriated because it was not being used rationally and adequately as required by the Constitution in Article 186. The owners of the land did not exploit the land efficiently as required by the Land Statute. The use of the land did not therefore conform to the social-obligation norm of owning arable land. What however complicated the cases was that all three of them were large sized pieces of land which could lawfully be expropriated.

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<sup>982</sup> *S.T.F., Mandado de Segurança No. 24.573, Relator: Min. Eros Grau, 12.06.2006, 2260, Supremo Tribunal Federal Jurisprudência Eletrônico [S.T.F.J.e.], 15.12.2006, 160 (Braz.) – translated in Cunha ADS (2011) “The social function of property in Brazilian Law” *Ford Law Rev.*80 (3), 1171–1181.*

<sup>983</sup> *S.T.F., Mandado de Segurança No. 25.299, Relator: Min. Sepúlveda Pertence, 14.06.2006, 2246, Supremo Tribunal Federal Jurisprudência Eletrônico [S.T.F.J.e.], 08.09.2006, 178 (Braz.) – translated in Cunha ADS (2011) “The social function of property in Brazilian Law” *Ford Law Rev.*80 (3), 1171–1181.*

<sup>984</sup> *S.T.F. Mandado de Segurança No. 26.129, Relator: Min. Eros Grau, 14.06.2007, 2286, Supremo Tribunal Federal Jurisprudência Eletrônico [S.T.F.J.e.], 24.08.2007, 563 (Braz.) - translated in Cunha ADS (2011) “The social function of property in Brazilian Law” *Ford Law Rev.*80 (3), 1171–1181.*

However, they were owned in a condominium set-up which meant that there were a number of individuals who each owned a small portion of the land. The complication therefore was that the three plaintiff's individual pieces of land, outside the condominium, were small or medium-sized portions of land and according to Article 185 of the Constitution, they could not be expropriated for land reform even if they were not being exploited productively. The owners therefore asked the Brazilian Supreme Court to declare the presidential Act unlawful.

In terms of the principles of Civil law Private Law, this scenario does not appear too difficult to resolve. This is because Brazilian statutes, like other civil law legal systems, prohibit the holding of multiple rights of property on one piece of land.<sup>985</sup> As explained above, if land is held in a condominium, it has “only one property right that is exercised simultaneously” by a number of people.<sup>986</sup> Since they all share this right to the property, they all must exercise such right “in conformity with its social function.”<sup>987</sup> If this is not the case, then the land can be expropriated in terms of Article 185. While there were dissenting Judges who agreed with the plaintiffs, the majority argued that the social-obligation attribute was essentially tied to the land itself and not the owners. The question therefore that had to be answered was whether or not the land itself, and not the owners, conformed to the social-obligation norm and in this case, it did not and therefore it had to be expropriated.

Another case which illustrates Brazil's regard for the social obligation norm is the case of *Koerich Participações Administração e Construção LTDA v. Município de Florianópolis* (*Koerich Inc. v. County of Florianópolis*).<sup>988</sup> In this case, a Statute had been passed which established guidelines regarding urban policies and law which must be observed by the local councils. The Statute also provided for the “onerous concession of the right to build” (*outorga onerosa do direito de construir*), a process which enabled the local council to oblige an owner to pay for any form of construction work which exceeded the surface area of his or her own property. The Brazilian Constitutional Court (*Supremo Tribunal Federal*) held that the Statute was perfectly constitutional because it was “an instrument directed at the correction of distortions brought about by unruly urban growth, at the promotion of the full development of the functions of the city, and at the application of the principle of the

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<sup>985</sup> Cunha ADS (2011) “The social function of property in Brazilian Law” *Ford Law Rev* 80 (3), 1171–1187.

<sup>986</sup> Cunha ADS (2011) 1171–1187.

<sup>987</sup> Cunha ADS (2011) 1171–1187.

<sup>988</sup> Translated in Cunha ADS (2011) 1171–1181.



social function of property.”<sup>989</sup> The Brazilian Constitution of 1988 Constitution allowed local councils to tax urban real estate. The court therefore held that the Statute was an external limit imposed by a local municipality’s Urban Development Plan and this limit was authorised by the social-obligation principle.

## 5.4 Conclusion

In South America, much of the legal development of the region particularly on the use of land is linked to Duguit’s idea of the social function of property. For example, the law makers who were responsible for drafting many Constitutions of the Latin American countries’ Constitutions changed how they defined property in the early years of the twentieth century.<sup>990</sup> Before Duguit’s famous lectures, the majority of the Constitutions defined property using the classical liberal approach which is based on the French Civil Code.<sup>991</sup> In addition, prior to Duguit, the popular understanding of property was that it was absolute and only the owner had the power to do as he pleased within the confines of the law.<sup>992</sup> Many contemporary writers obviously reject this classical liberal approach to property and consider that property has a social function or should be defined in terms of how it serves a social purpose.<sup>993</sup> The Chilean Constitution of 1925 is a good example of a Constitution whose regard of property was influenced by Duguit. Article 10(10) of the Chilean Constitution of 1925 provides that “the exercise of the right of property is subject to the limitations or rules

<sup>989</sup> See translation of this in Cunha ADS (2011) “The social function of property in Brazilian Law” *Ford Law Rev* 80 (3), 1171–1181.

<sup>990</sup> Azeula A “Property in the Post-post-revolution: Notes on the Crisis of the Constitutional Idea of Property in Contemporary Mexico” *Texas Law Review* Vol 89:1915.

<sup>991</sup> Mirow M C (2010) “The Social-Obligation Norm of Property: Duguit, Hayem, and Others” *Florida Journal of International Law* Vol. 22 p 193; Juergensmeyer, CJ (1996) “Florida’s Property Rights Protection Act: Does it Inordinately Burden the Public Interest?” 48 *FLA. L. REV.* 701; Hale CA (2000) “The Civil Law Tradition and Constitutionalism in Twentieth-Century Mexico: The Legacy of Emilio Rabasa,” 18 *LAW & HIST. REV.* 275; Ankerson TT & Ruppert R (2006) “Tierra Y Libertad: The Social Function Doctrine and Land Reform in Latin America,” 19 *TUL. ENVTL. L.J.* 95.

<sup>992</sup> See for example other writers who make this point such as Milton JRL (1996) “Ownership” in (eds) Reinhard Zimmermann and Daniel Visser *Southern Cross: Civil Law and Common Law in South Africa*, and Co, Ltd 657-758; “Ownership” in Guest (ed) *Oxford Essays in Jurisprudence* (1961) 112 and 113; Badenhorst PJ, Pienaar J, and Mostert H (2006) *Silberberg and Schoeman’s The Law of Property*; Mostert and Pope (2010) (eds) *The Principles of The Law of Property in South Africa*; Hall CG (1976) *The Law of Property 10<sup>th</sup> ed*; Van der Merwe, CG and de Waal MJ (1993) *The Law of Things and Servitudes* .

<sup>993</sup> See Visser DP (1985) “The ‘Absoluteness’ of Ownership: The South African Common Law in Perspective” *Acta Juridica* 47; Cowen DV *New Patterns of Landownership. The transformation of the Concept of Ownership as plena in re potestas* 70-80; Mostert H “Engaged Citizenship and the Enabling State as Factors Determining the Interference of Property: A Comparison of German and South African Law” (2010) *South African Law Journal* Volume 127 (2) 248; See also for example the definition of ownership by Savigny is quoted by Wessels in *Johannesburg City Council v Rand Townships Registrar*, 1910 TPD 1314. In *Regal v African Superplate (Pty) Ltd*, 1963 (1) SA 102 (A), Steyn CJ makes reference to Dernburg; *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, Local Government And Housing, Gauteng, And Others (Kwazulu-Natal Law Society And Msunduzi Municipality As Amici Curiae)* 2005 (1) Sa 530 (CC).

that the maintenance of the progress of the social order require.” The Bolivian Constitution of 1993 also provides a good example of Duguit’s influence on contemporary perceptions of property. Article 7(1) provides that everyone may enjoy their right to “private property individually or collectively, as long as *this right*<sup>994</sup> fulfils a social function.” In similar fashion, the 1983 Constitution of El Salvador provides that “the right to private property in its social function is recognised and guaranteed.”<sup>995</sup>

In analysing the social-obligation norm in the German Constitution, one must also bear in mind that Germany is a social welfare State.<sup>996</sup> Germany’s economic system is most commonly referred to as a “social market economy.”<sup>997</sup> This reference is based on the belief that Germany has in the compatibility “of a free market with a socially conscious State.”<sup>998</sup> This system encourages a political economy that is based on the ideals of individual freedom and social responsibility. Benefits that are included under this system include freedom to choose and exercise a trade or profession in Article 12; the right of property in Article 14 as well as the social state principle. The social State principle is of particular relevance to this thesis because it provides the context for the social obligation norm. Article 20 of the German Constitution explains that Germany is a social federal State. According to Donald, Article 20 provides the context for a progressive social-obligation norm agenda which is effected by various pieces of legislation.<sup>999</sup>

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The effects of the world war also played a role in influencing the social-obligation norm aspect of the German Constitution. Because of this, the property clause in the German Constitution places considerable importance on community obligation. Lubens argues that even the broad positive right to “development of the personality” in Article 2(1) of the German Constitution is limited by its social context.<sup>1000</sup> Germany’s Federal Constitutional Court reiterated this when it held that “[W]hile freedom and individual dignity are fundamentally guaranteed, it cannot be overlooked that the image of man in the Grundgesetz

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<sup>994</sup> Own insertion.

<sup>995</sup> El Salvador Constitution (1983), article 103.

<sup>996</sup> See Article 20(1) of the Basic Law which states as follows - “The Federal Republic of Germany is a democratic and social federal state.” Grundgesetz [GG] art. 20(1) (F.R.G.), translated in David P. Currie, *The Constitution of the Federal Republic of Germany* app., at 351 (1994).

<sup>997</sup> Donald P (et al) (2012) *The Constitutional Jurisprudence of the Federal Republic of Germany: Third edition, Revised and Expanded* 622.

<sup>998</sup> Donald P (et al) (2012) 622.

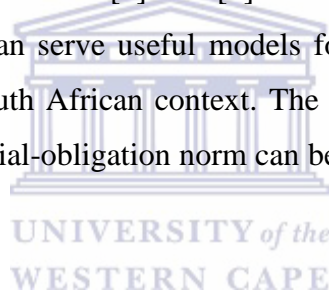
<sup>999</sup> Donald P (et al) (2012) 623.

<sup>1000</sup> Lubens R (2007) “The Social Obligation of Property Ownership: A Comparison of German and US. Law,” 24 *ARIZ. J. INT’L & COMP. L.* 389.

is not that of an individual in arbitrary isolation but of a person in the community, to which the person is obligated in many ways.”<sup>1001</sup>

“Property rights must be exercised responsibly, not to benefit only the individual owner but also the community at large.”<sup>1002</sup> While the German system does not explicitly censure neglect, it does however provide for “socially responsible conduct with property.”<sup>1003</sup> The German model supports “*socially responsible conduct with property.*”<sup>1004</sup> Property that has more social relevance to the community is regulated more than that which does not have much social relevance.<sup>1005</sup> Holders therefore have to be responsible with it. This is quite helpful for the South African context where many farm land farms are lying idle and neglected.

As illustrated in the chapter, Germany and Brazil have made the social-obligation norm an underlying constitutional property law principle which promotes active, optimal and sustainable utilization of land. Article 14[1] and [2] of the German Constitution as well as Article XXIII of the Brazilian can serve useful models for the positive formulation of the social-obligation norm in the South African context. The next chapter discusses and makes recommendations on how the social-obligation norm can be positively expressed in the South Africa’s land restitution process.



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<sup>1001</sup> Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 20, 1954, 4 Entscheidungen des Bundesverfassungsgerichts [BVerfGE] 7 (F.R.G.) interpreted in Lubens R (2007) “The Social Obligation of Property Ownership: A Comparison of German and US. Law,” 24 *ARIZ. J. INT’L & COMP. L.* 389.

<sup>1002</sup> Mostert H “Engaged Citizenship and the Enabling State as Factors Determining the Interference of Property: A Comparison of German and South African Law” (2010) *South African Law Journal* Volume 127 (2) 248.

<sup>1003</sup> BVerfGE 25, 112 at 118; BVerfGE 52, 1 at 32-33; See also Mostert H *SALJ* Volume 127 (2) 248.

<sup>1004</sup> Mostert H *SALJ* Volume 127 (2) 248.

<sup>1005</sup> Mostert H *SALJ* Volume 127 (2) 248.

## CHAPTER SIX: A SOCIAL OBLIGATION NORM IN SOUTH AFRICA'S LAND RESTITUTION PROGRAMME

### 6.1 Introduction

As highlighted in the previous chapters, the idea of a social-obligation norm has permeated many Constitutions in the world, including the 1996 Constitution of the Republic of South Africa. There are Constitutional Court cases in South Africa that indirectly acknowledge this concept, some of which will be discussed later in this chapter. There are also academics who appreciate the subtle and veiled existence of a social-obligation norm in the conception of ownership. For example, Milton posits that the traditional conception of ownership which accepted that “ownership of land conferred the right on the owner to use his land as he pleased is rapidly giving way in constitutional South Africa, to the more responsible conception that *an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds his land in trust for future generations.*”<sup>1006</sup> Further, Milton argues that the more acceptable post-apartheid conception of ownership in South Africa expects that owners must be responsible in the use of their property and must use it in ways that enhance the livelihood of their communities and future generations.<sup>1007</sup> Milton’s position is clear testament to the fact that the general principles of the social obligation norm in broad and imprecise terms have essentially become part of South Africa’s legal thinking. There also exists numerous laws such as town and country planning legislation, preservation of natural resources laws, as well as prevention of pollution regulations, all which are aimed at recognizing the more “civilized and enlightened attitude towards the rights conferred by ownership.”<sup>1008</sup>

This chapter discusses the social-obligation norm within the context of South Africa. The chapter argues that there is a very subtle and *indirect* appreciation of the social-obligation norm of ownership in South Africa. South African constitutional property law has a social-obligation norm on both the private and public sides but this norm is neither explicitly recognized nor systematically developed. As discussed in chapter four and also illustrated in 6.2.1 below, South African property law still gives more respect to a classical liberal

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<sup>1006</sup> JRL Milton (1996) “Ownership” in (eds) Reinhard Zimmermann and Daniel Visser *Southern Cross: Civil Law and Common Law in South Africa*, 657-758. My own emphasis.

<sup>1007</sup> JRL Milton (1996) “Ownership” 680.

<sup>1008</sup> JRL Milton (1996) “Ownership” 680; see also *Silberberg & Schoeman Property* 93–94; *Wille’s Principles* 406; Van der Walt AJ discusses examples of these in Van der Walt AJ and GJ Pienaar (2009) *Introduction to the Law of Property* 6<sup>th</sup> edition 83-96.

conception of ownership which gives respect to the *ius abutendi*.<sup>1009</sup> However, this is not sustainable for the rural economy. It is adverse to the developmental aspirations of the NDP as discussed in chapter one.<sup>1010</sup> The social-obligation norm should be extended and applied *directly* to the land restitution process in order to enhance the agronomic potential of cultivable land.<sup>1011</sup>

## 6.2 The social-obligation norm in South Africa

In progressive property law theory as explained by Alexander and Singer, the social obligation norm of property finds its expression in constitutional property law.<sup>1012</sup> Stated differently, they argue that the social-obligation norm should be used to regulate property ownership to the extent that it is necessary to regulate some of the entitlements conferred by ownership, particularly the *ius abutendi*.<sup>1013</sup> This application of the social-obligation norm principle to property regulation betrays the perceived tensions that exist between private ownership and the social-obligation norm to the extent that it reveals the “tensions that exist between property protection to encourage human flourishing, and the entrenchment of the social-obligations of property owners as a matter of social citizenship.”<sup>1014</sup>

### 6.2.1 The social-obligation norm in South African Constitutional property law

As highlighted in chapter four, the rules and practices of pre-democratic South Africa have, for a long time, reflected the liberalist common law view of ownership that “entrenched and protected ownership against any intrusions without first asserting or proving an owner’s socio-political legitimacy.”<sup>1015</sup> The general conventional understanding has been that private ownership of property “insulates individuals” absolutely from external interference in their handling of property.<sup>1016</sup> Pienaar also acknowledges that the classical liberalist idea of individualised and unlimited ownership of land features significantly in South African

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<sup>1009</sup> See chapter 4.2.

<sup>1010</sup> See 1.4.

<sup>1011</sup> It is also worth noting that the social obligation norm in South Africa applies differently to land rights, housing rights as well as property. This is because there are notable systemic as well as theoretical differences between these three sets of rights. Further, the Constitution recognizes, protects and shapes these three rights separately.

<sup>1012</sup> Singer JW (2000) *Entitlement: The Paradoxes of Property* and Alexander GS “The Social-Obligation Norm in American Property Law” *Cornell L. Rev* Volume 94 (4) 74.

<sup>1013</sup> Singer JW (2000) 74.

<sup>1014</sup> Van der Walt and Viljoen (2015) *PER* 1042.

<sup>1015</sup> Van der Walt AJ (2002) “Exclusivity of Ownership, Security of Tenure and Eviction Orders: A Critical Evaluation of Recent Case Law” *SAJHR* (18)373.

<sup>1016</sup> Gregory S Alexander “The social-obligation norm in American property law” *Cornell Law Review*, (94) 745, 747; Thomas W Merrill (1998) “Property and the Right to Exclude” *77 NEB L. REV* 730.

property law.<sup>1017</sup> This idea was nurtured by the apartheid government's understanding that individualised ownership of land led to a functioning economy and sound political powers.<sup>1018</sup> This was more so in pre-democratic times where most, if not all of the "good" land was reserved for white owners in order to give them economic and political supremacy.<sup>1019</sup> To add to this, some South African case law and literature also often refer to landownership as absolute and individualistic.<sup>1020</sup> "By absolute is meant that ownership is in principle unrestricted and although it may be limited by public and private law measures, such limitations are generally temporary and do not permanently restrict a landowner's absolute entitlements to do with her property as she likes."<sup>1021</sup>

However, this position has changed because, as discussed in chapter four, it is not possible to have a conception of ownership which has no limits. The South African Constitution indirectly incorporates a social-obligation norm in its Bill of Rights and particularly its property clause. Alexander argues that "[T]he property clause of the 1996 South African Constitution incorporates a thick social-obligation norm through its explicit commitment to land reform and racial justice."<sup>1022</sup> In addition, the Constitution also has numerous positive socio-economic rights such as housing and health care all of which cumulatively reinforce the socio-obligation norm aspect of the Constitution.

An obvious point of reference in a discussion of the social obligation norm in constitutional property law in South Africa is section 25 of the South African Constitution, the so called "Property Clause." Section 25 has subsections which protect extant property rights from unlawful State interference. Sub-sections 25(1), (2) and (3) protect owners against arbitrary deprivations and uncompensated expropriation. Sections 25(5) to 25(9) give legitimacy to and promote land as well as other related reforms. According to Van Der Walt and Viljoen, the provisions of sections 25(5)-(9) are a clear reflection that the Constitutional Assembly

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<sup>1017</sup> See also Pienaar GJ (2010) *Sectional Titles and Other Fragmented Property Schemes* 3.

<sup>1018</sup> Pienaar GJ (2010) 3.

<sup>1019</sup> Pienaar GJ (2010) 3.

<sup>1020</sup> See for example *Lucas' Trustee v Ismail and Ahmod* 1905 TS 239 at 247; *Johannesburg Municipal Council v Rand Townships Registrar* 1920 TPD 1314 at 1319; *Dadoo Ltd v Krugersdorp Municipal Council* 1920 AD at 537; *Gien v Gien* 1979 (2) SA 113 (T) at 1120; CG van der Merwe *Sakereg* 2ed (1989) 170.

<sup>1021</sup> Pienaar GJ (1984) *Sectional Titles and Other Fragmented Property Schemes* 3-4; DV Cowen *New Patterns of Landownership* 67.

<sup>1022</sup> Gregory S Alexander "The social-obligation norm in American property law" *Cornell Law Review*, (94) 782.

intended to make land reform an integral part of the Constitution instead of making it an external limit that is placed upon it.<sup>1023</sup>

As discussed in chapter two, land reform as provided for in the property clause is a three-pronged process which includes the restitution of land rights, redistribution of land to promote equitable access to land as well as tenure reform for everyone whose land rights are insecure as a result of past racially motivated and discriminatory laws. In all the three legs of land reform, the Constitution requires there to be legislation which will give effect to the Constitution's land reform goals.<sup>1024</sup> Van der Walt and Viljoen argue that if the property clause is not read as a whole, one may get the impression that its provisions conflict and contradict each other.<sup>1025</sup> This is because the provisions of section 25(1)-(3) which provide regulatory limitations on existing property holdings also affect the security of the said existing property rights. Sub-sections 25(1)-(3) may also seem to contradict sub-sections 25(5)-(9) for the same reason.

The property clause must however be understood as a transformative and coherent whole which embodies the broader intention to address the injustices of the past. In *Port Elizabeth Municipality v Various Occupiers*, the Constitutional Court held that section 25 should be interpreted as a coherent whole within its constitutional and historical context.<sup>1026</sup> Read holistically therefore, the property clause protects extant property rights and also promotes land and related reforms. According to Van der Walt and Viljoen, these two key elements of the property clause “embody a creative tension rather than a fundamental conflict.”<sup>1027</sup> The protection of extant property rights as well as the intent to give land to those that do not have it indirectly shows that the property clause embraces the social obligation norm in so far as it promotes social welfare in the form of providing for land reform. Van der Walt argues that this subtle inclusion of the social-obligation norm in the property clause echoes the progressive views of Alexander and Singer, prominent social obligation norm scholars of the modern era.<sup>1028</sup> Further, the property clause's welfare oriented transformation imperative

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<sup>1023</sup> Van der Walt and Viljoen (2015) *PER* 1045.

<sup>1024</sup> Numerous pieces of legislation have been enacted. These give effect to the constitutional land reform provisions; see for example the Restitution of Land Rights Act 22 of 1994 (restitution); Land Reform (Labour Tenants) Act 3 of 1996; Communal Property Associations Act 28 of 1996 (redistribution); Extension of Security of Tenure Act 62 of 1997; Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998 (PIE); Interim Protection of Informal Land Rights Act 31 of 1996 (tenure security).

<sup>1025</sup> Van der Walt and Viljoen (2015) *PER* 1046.

<sup>1026</sup> *Port Elizabeth Municipality v Various Occupiers* 2005 1 SA 217 (CC).

<sup>1027</sup> Van der Walt and Viljoen (2015) *PER* 1046.

<sup>1028</sup> Van der Walt and Viljoen (2015) *PER* 1047.

which obliges the State to give citizens, particularly previously disadvantaged persons, equitable access to land is a notable aspect of the social obligation norm. In fact, the social obligation objective of the property clause was already clear even before 1994 as evidenced by numerous laws such as the *Distribution and Transfer of Certain State Land Act* 119 of 1993 as well as the *Less Formal Township Establishment Act* 113 of 1991.

As discussed in chapter two, land reform mainly targets the poor.<sup>1029</sup> It generally seeks to improve access to land to mainly, but not limited to, rural dwellers. According to Van der Walt and Viljoen, this constitutional mandate of giving increased land access to the poor serves an indirect social obligation objective because it is aimed at improving the livelihoods of marginalised groups and poor people.<sup>1030</sup> Improving the welfare of people is a key corollary of the social obligation norm.<sup>1031</sup> As discussed in chapter four and five, in property theory, property is defined and understood in terms of its social obligation as well as social-welfare values which enhance people's social citizenship. The land redistribution process serves the social obligation objective of enabling poor, landless and previously disadvantaged people to have space to flourish and live as active participants in society.

### **6.2.2 The social-obligation norm in the courts**

There are a number of cases in South African courts that show an appreciation of the social obligation-norm of ownership in the courts. A variety of these cases discuss instances in which an owner keeps his or her property but is prohibited from using it in some way that the community regards as against its collective interest. Without a doubt, these prohibitions also occasionally include various land-use regulations and different other forms of restrictions placed on ownership pertaining to how owners can use or enjoy property. Cases such as *FNB, Modderklip, Kranspoort, Mkontwana and Baphiring*<sup>1032</sup> all show the fact that South African courts acknowledge and apply the social-obligation norm in decision making and these cases each in turn deserve some attention.

#### ***i. FNB case***

The Constitutional Court case of *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*

<sup>1029</sup> See Carey Miller and Pope (2000) JAL 181.

<sup>1030</sup> Van der Walt and Viljoen (2015) *PER* 1048.

<sup>1031</sup> See chapters four and five for a comprehensive discussion of the social-obligation norm.

<sup>1032</sup> Discussed in this section under i, ii, iii and iv.



*Finance*<sup>1033</sup> provides a good point of departure for discussing the application by the courts of some tenets of the social obligation norm of ownership in the South African Constitution. The case provided the first major comprehensive engagement with, and consideration of section 25 in democratic South Africa. Mostert asserts that this case “represents the most comprehensive consideration to date of the structure and application of section 25 to particular disputes.”<sup>1034</sup> This case is therefore an inevitable starting point with regard to analysing the roots of the social-obligation norm in South Africa as it provides an important “account of the framework for constitutional property and regulation in South Africa.”<sup>1035</sup>

The matter in issue was whether or not Section 114 of the *Customs and Excise Act*<sup>1036</sup> was constitutional. This Act permitted the confiscation of movable property (motor vehicles - which belonged to First National Bank (FNB)), by the South African Revenue Services (SARS) in order to settle a tax debt owed to SARS by a number of debtors who were purchasing the cars on instalments.<sup>1037</sup>

In dealing with the application of section 25 to the case, the court considered that the Constitution of South Africa foresees a number of limitations when it comes to property rights. These limitations are specifically found in section 25(1) of the Constitution and are generally also known as “deprivations.” Section 25(1) provides that “[N]o one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.” Section 25(2) then provides for deprivations which give rise to compensation. These are referred to as expropriations. The section provides as follows – “[P]roperty may be expropriated only in terms of a 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.”

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<sup>1033</sup> *First National Bank of SA Ltd t/a Wesbank v Commissioner for the South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC).

<sup>1034</sup> Mostert H “Engaged Citizenship and the Enabling State as Factors Determining the Interference of Property: A Comparison of German and South African Law” (2010) *South African Law Journal* Volume 127 (2) 255.

<sup>1035</sup> Mostert H (2010) “Engaged Citizenship” *South African Law Journal* Volume 127 (2) 255.

<sup>1036</sup> 91 of 1964.

<sup>1037</sup> For more detail, see Andre van der Walt 'Negating Grotius - The constitutional validity of statutory security rights in favour of the state: *First National Bank t/a Wesbank v Commissioner of the South African Revenue Service* 2001 (7) BCLR 715 (C).

Section 25(2) should be read with the general limitations clause in section 36(1) of the Constitution which provides for a limitation of all rights in appropriate circumstances. The section provides as follows –

“(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.”

From a reading of both section 25(2) and section 36, one can see that all deprivations, which may also be expropriations, must be done in terms of a law of general application. They may not be arbitrary but rather, must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. What is more interesting especially for the social obligation norm is the provision in section 25(2) which requires that all expropriations must be done *for a public purpose or in the public interest*. Further, section 25(3) requires there to be payment of compensation for constitutional expropriations. In addition to these provisions, the court also elaborated that sufficient reason must be given for an infringement of property rights.<sup>1038</sup> The court held that “sufficient reason” includes the consideration of other relationships such as for example, the purpose of the infringement in relation to the affected property or its owner as well as the nature of the property in question in relation to the reasons and purpose of the deprivation.<sup>1039</sup> The court went further in explaining the “sufficient reason” test by outlining the purposes that would be acceptable to warrant an infringement of property rights.

The court provided that -

“sufficient reason is to be established as follows:

- 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.

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<sup>1038</sup> FNB para 100ff.

<sup>1039</sup> FNB para 100ff.

- 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.
- 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 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.”<sup>1040</sup>

In instances where the ownership of property is affected by a restriction, the reason of the restriction should be more compelling than in the case of less extensive property rights. The same also goes for restrictions that affect all incidents of ownership. Here too, there should be more compelling reasons than in situations where only one or a few of the incidents of ownership are affected. The court emphasized that “sufficient reason” can at times be established by “no more than a mere rational relationship between means and ends” while in certain instances a complete inquiry would be needed.

While the FNB case certainly is not the last case that deals with permissible interference with property, it does provide a very useful point of departure. The way the court identified the various considerations that determine whether or not there has been a “sufficient reason” for an infringement is important. Guidelines were also provided which assist in determining whether an infringement is permissible or not. According to Mostert, “[T]he test of sufficient reason to assess the arbitrariness of particular infringements already endorsed the idea that property protection can be layered according to the social relevance of a particular interest.”<sup>1041</sup> In FNB, the court distinguished between interests that relate to land, other types of property as well as between a collection of ownership entitlements and singular aspects of

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<sup>1040</sup> FNB case para 100.

<sup>1041</sup> Mostert H (2010) “Engaged Citizenship” *South African Law Journal* Volume 127 (2) 256.

ownership.<sup>1042</sup> According to Mostert, this distinction was done in order to show that there are instances where the reasons for “infringement are more compelling than others.”<sup>1043</sup> Further, Mostert argues that this distinction “anticipates the ranking of interests according to their social relevance in determining the validity of infringements upon property.”<sup>1044</sup>

**ii. *Kranspoort Community v Farm Kranspoort***

The case of *Kranspoort Community v Farm Kranspoort*<sup>1045</sup> illustrates the application of the social-obligation norm of ownership by our courts particularly with regard to landownership. The facts of the case are briefly as follows:

The Kranspoort community sought restoration of Farm Kranspoort No. 1849 in terms of section 25(7) of the Constitution,<sup>1046</sup> read together with section 2 of the RLA. The community claimed that it had been dispossessed of the farm by the Dutch Reformed Church of Transvaal in 1857.<sup>1047</sup> After a thorough consideration of all the relevant facts, the court held on the 10<sup>th</sup> of December 1999 that the community had indeed been unfairly dispossessed of its land as a result of racially motivated practices.<sup>1048</sup> The community was therefore entitled to restitution of its dispossessed farm-land in terms of the RLA.<sup>1049</sup>

However, the restitution was subject to the following conditions -

1. “The claimant community must form and register a communal property association in terms of the Communal Property Associations Act No 28 of 1996 on the basis of a draft Constitution and list of initial members which complies with this order and which has received the prior approval of the Court in chambers;
2. The communal property association referred to in paragraph 1 must ratify the decision to seek restoration of the farms as the appropriate form of relief, at a properly convened general meeting of the initial members of the communal property association;
3. The claimant community must formulate a plan to the satisfaction of the Court for the development and use of the farms and provide sufficient proof of -
  - a. community participation in the planning process; and
  - b. its commitment to the proper implementation of the plan.”

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<sup>1042</sup> Mostert H (2010) “Engaged Citizenship” 256.

<sup>1043</sup> Mostert H (2010) “Engaged Citizenship” 256.

<sup>1044</sup> Mostert H (2010) “Engaged Citizenship” 256.

<sup>1045</sup> 48 LS (LCC26/98) [1999] ZALCC 67.

<sup>1046</sup> The Section provides that “A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.”

<sup>1047</sup> Para [2].

<sup>1048</sup> Para [70] – [76].

<sup>1049</sup> Para [123].

Pursuant to this order, the community later applied to the court for an order confirming compliance with the above conditions.<sup>1050</sup> In the application for an order confirming compliance with the three conditions, the community annexed a “Sustainable Development Plan” and a “Settlement Establishment Project Proposal” showing evidence for the participation of the community as well as its commitment to the proper implementation of the plan.<sup>1051</sup> The community contended that it had complied with the court’s three requirements.<sup>1052</sup> The court held that condition 1 and 2 of the initial order had been complied with.<sup>1053</sup> However, the court was not satisfied that the third condition had been met.<sup>1054</sup>

The court therefore refused to grant the restitution order as it was concerned that without the satisfactory fulfillment of the third condition, the community would only be plunged into more poverty.<sup>1055</sup> The court wanted the restitution conditions to be as favourable and as beneficial as possible to the community.<sup>1056</sup> It thus insisted on a community participation in the planning process that would provide for -

- i. “the development of a plan which would enable the claimant community to resettle on the farm as a coherent, rural, village settlement. This would include plans investigating the feasibility of different options for housing, water and power supply and sewerage disposal;
- ii. the delivery and supply of, or access to existing, education, health, recreational and sports facilities;
- iii. an investigation of income generation possibilities on the farm in terms of available resources, including available finances, existing skills in the claimant community and training that would be required, existing resources on the farm that could be put to use immediately, for example fruit bearing trees;
- iv. available markets for the use of products developed and produced on the farm and by the claimant community - this would include eco-tourism initiatives; and
- v. a considered analysis of the appropriate form of tenure which occupants of the restored land would enjoy.”<sup>1057</sup>

In addition to the above, the Sustainable Development Plan was supposed to include

- i. “the timing and order in which the people will return to the farm and how further people will be settled as infrastructure develops to be able to sustain a larger number of people. The intention of the individual members of the claimant community to return should be surveyed in order to assess this;

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<sup>1050</sup> Kranspoort Community Re:Farm Kranspoort 48 LS (LCC26/98) [2000] ZALCC 41.

<sup>1051</sup> Kranspoort Community, para [2].

<sup>1052</sup> Kranspoort Community para [2].

<sup>1053</sup> Kranspoort Community para [3].

<sup>1054</sup> Kranspoort Community para [3].

<sup>1055</sup> Kranspoort Community Re:Farm Kranspoort 48 LS (LCC26/98) [2000] ZALCC 41, para [6].

<sup>1056</sup> Kranspoort Community Re:Farm Kranspoort 48 LS (LCC26/98) [2000] ZALCC 41, para [6].

<sup>1057</sup> Para [7].

- ii. a thorough assessment of the various agricultural possibilities should be undertaken, particularly in the light of the environmental sensitivity of the area. Grazing, crop growing, orchards, harvesting of existing natural resources, game farming, eco-tourism and all the suggestions made by the members of the claimant community themselves should be assessed and compared. The idea would not be to develop a mono-culture, but to develop a range of different possibilities and options on which the claimant community could base decisions.<sup>1058</sup>

This case is an example of how the court indirectly considered the social-obligation norm of ownership. The *ius abutendi* of a community which had benefited from the restitution process was restricted through the restitution order itself. Despite the claimant community being entitled to portions of a farm through restitution, the court refused to grant the community ownership until they proved that they had a clear and viable project outline for the farm.<sup>1059</sup> This resonates seamlessly with the suggested idea of a social-obligation norm of ownership. Restitution of land cannot be only about restoring property rights without taking into account how this restoration of property rights will affect the beneficiaries in terms of food security, poverty alleviation and economic consolidation.

**iii. *Baphiring Community v Uys and Others.***<sup>1060</sup>

The Baphiring case also illustrates the value placed on the social-obligation norm of ownership by the courts. In this case, the court preferred to compensate claimants for their lost land rather than actually giving them the land because of the socio-economic harm that the actual land restoration would cause.<sup>1061</sup> In this case, the *Baphiring Community* had been dispossessed of its land in 1971 as a result of racially discriminatory apartheid practices.<sup>1062</sup> The *Baphiring Community* sought restoration of its land and intended to form a community property association on the restituted land.<sup>1063</sup>

The court heard that at the time when the community was dispossessed of its land, there was very little farming activity on the land and that it was mostly subsistence farming.<sup>1064</sup> The land was not developed commercially. At the time of the proceedings however, the situation on the land was in stark contrast to what it had been when the community was forced off its land. The land was now in the hands of eight landowners who were intensively carrying out cattle farming and had also cultivated large tracts of the land in question. It was estimated

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<sup>1058</sup> Para [9].

<sup>1059</sup> Section 19(2)(c), Mineral and Petroleum Resources Development Act 28 of 2002.

<sup>1060</sup> 2010 (3) SA 130 (LCC).

<sup>1061</sup> 2010 (3) SA 130 (LCC).

<sup>1062</sup> Para [1].

<sup>1063</sup> Para [2].

<sup>1064</sup> Para [6].

that some 7515,1629 hectares of agricultural land that the claimants sought restoration of was cultivated agricultural land.<sup>1065</sup> The combined agricultural produce was: 1 800 calves per year, 5 900 tons of maize, 400 tons of beans, 470 tons of sunflower seeds and 1 080 000 litres of milk.<sup>1066</sup>

The Baphiring community sought restitution in the form of actual physical restoration<sup>1067</sup> of the land they occupied prior to dispossession as well as financial resettlement assistance. The court held that physical restoration of the land to the community was not feasible because the productive activities on the farms would be disrupted and the agronomic performance of the land would be compromised. The court cited examples of land that had been developmentally transformed from that which was originally lost. Examples that were cited include ecotourism lodges, intensive agricultural businesses as well as intensive urbanisation.<sup>1068</sup> The court held that restoration of such land would be disruptive and too expensive for the *fiscus*.<sup>1069</sup> Restoration of the land would disrupt food production and economic activities.<sup>1070</sup> Therefore, while the community was entitled to restitution of its land, the community would only receive equitable redress of its lost land.<sup>1071</sup>

The court's reasoning in refusing to restore the *Baphiring Community* of its land is instructive in the context of social-obligation norm of ownership. The court emphasized the significant agronomical contribution that the land was making. It opted that the beneficiaries should rather receive equitable redress for their land because literal restoration of this land would impact negatively on food production and employment. Where land is now being used productively and its use benefits the country through the creation of employment, food production and so forth, and where the claimants are not able or willing to ensure that it continues to be used as such, equitable redress should rather be offered in place of restoration. In a way, this is an application of the social-obligation norm principles. As

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<sup>1065</sup> Para [7]; see also EP Zietsman, Valuation Report production and market valuation of the farm Rosmincol No 442JP at p 217, Bundle 2.

<sup>1066</sup> Para [8].

<sup>1067</sup> In *Makuleke Community Re: Pafuri area of Kruger National Park and Environs, Soutpansberg District Northern Province* (LCC90/98) [1998] ZALCC 26 (15 December 1998) para [2], the court held that "Restoration of a right in land" is defined as "the return of a right in land dispossessed after 19 June 1913 as a result of past racially discriminatory laws or practices."

<sup>1068</sup> Para [16].

<sup>1069</sup> Para [16] – [17].

<sup>1070</sup> Paras [19] – [20] at 135 C – G.

<sup>1071</sup> Para [31] (3).

explained in chapter four, ownership not only entails rights but also responsibility.<sup>1072</sup> As discussed in the *FNB* case, there are numerous instances where an owner's private interests may be infringed in order to benefit the general public. These are social-obligation norm attributes which were upheld in *Baphiring*. The social-obligation norm also entails responsibility and shuns any conduct which may lead to wasteful neglect of resources.<sup>1073</sup>

**iv. *Mkontwana***

The case of *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*<sup>1074</sup> also illustrates that the social-obligation norm is indirectly upheld in our law. In this case, the Constitutional Court dealt with the constitutionality of section 118(1) of the Local Government: Municipal Systems Act 32 of 2000 and section 50(1) (a) of the Gauteng Local Government Ordinance No 17 of 1939. Both these sections, precluded the transfer of immovable property unless all electricity and water consumption charges due to a municipality in connection with the property by all occupiers of the property including non-owner occupiers for a specified period are paid. Section 118(1) of the Act requires payment of amounts due for two years before the certificate is issued but section 50(1)(a) of the Ordinance applied to amounts due for three years before the certificate is issued.

The main argument of those who objected to these laws is that they allowed for arbitrary deprivation of property and infringed section 25(1) of the Constitution. The South Eastern Cape High Court had held that this deprivation was permissible. Yacoob J, delivering the judgment of the majority in the Constitutional Court held that the legislation deprived people of property. He also held however that the deprivation was not arbitrary. He held further that the deprivation was significant and that the purpose of the provision was to place the risk on the owner of property if occupiers did not pay for electricity and water they used. This was an important and laudable purpose that encouraged payment as well as a sense of civic responsibility. The Court emphasised that municipalities were obliged to provide services in a sustainable way. The judgment concluded that the consumption charge was connected both to the property and to the owner even if the owner was not the occupier. There was sufficient reason for the deprivation because the purpose was compelling and because it was not unreasonable, in all the circumstances to expect the owner to take the risk if the occupier did

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<sup>1072</sup> Van der Walt (2006) *Property in the Margins* 213.

<sup>1073</sup> See discussion of Duguit's social-obligation norm in chapter 4.3.

<sup>1074</sup> *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, Local Government And Housing, Gauteng, And Others (Kwazulu-Natal Law Society And Msunduzi Municipality As Amici Curiae)* 2005 (1) SA 530 (CC)



not pay. The judgment also held that all municipalities had to provide owners with copies of electricity and water accounts sent to occupiers if the owners requested these in writing.

The reasoning of the court in objecting to the transfer of ownership until all electricity and water charges were paid shows a clear regard for the principles of the social-obligation norm. The court reiterated that it would be irresponsible and unsustainable to transfer property when municipal bills are still owed on the property.<sup>1075</sup> O'Regan J held that ownership of property envisaged in the Constitution must “protect private property on the one hand, and on the other, must ensure that *property serves the public interest.*”<sup>1076</sup> Further, O'Regan held that in dealing with property rights in South Africa, we must realise that such a right is never absolute in a constitutional democracy.<sup>1077</sup> While the right to property must be vigorously defended, a balance must be struck between protecting it and also making sure that property also serves “social purposes.”<sup>1078</sup> This is what this thesis is suggesting in the context of land awarded in terms of the land restitution programme. It must serve a social-function.

### **6.2.3 The social-obligation norm in mineral law**

Obliging owners of land to actively utilise their land is not a new principle in South African law. This principle also exists in mineral law as will be discussed in detail below. Of course, in the context of mineral law, the State is the custodian of mineral resources but it is the principles of the social-obligation norm that are utilised in ensuring that everyone benefits from the country's mineral resources that are of interest to this thesis.

In terms of the Mineral Petroleum Resources Development Act (MPRDA),<sup>1079</sup> section 3 provides that the mineral and petroleum resources in South Africa belong to all South Africans but the State retains custodianship for the benefit of all South Africans.<sup>1080</sup> Section 3(2)(a) provides further that the State, as the custodian of the mineral and petroleum resources, may grant or refuse anyone the mining rights. The MPRDA recommends that a prospecting and mining right should only be given to a person who has the capacity to

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<sup>1075</sup> See *Mkontwana v Nelson Mandela Metropolitan* paras [38] and [52].

<sup>1076</sup> *Mkontwana v Nelson Mandela Metropolitan* para [81].

<sup>1077</sup> *Mkontwana v Nelson Mandela Metropolitan* para [82].

<sup>1078</sup> *Mkontwana v Nelson Mandela Metropolitan* para [82].

<sup>1079</sup> 28 of 2002.

<sup>1080</sup> S 3(2) (a).

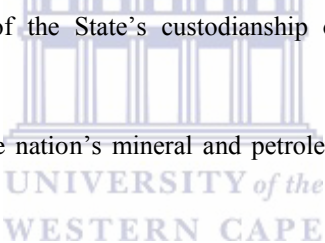
conduct mining activities.<sup>1081</sup> Such capacity includes technical ability to conduct intended operations, financial resources, and the ability to comply with other relevant laws.<sup>1082</sup>

The section 3 provision has yielded positive results. All holders of mining licences are mandated to exploit minerals so that all South Africans can benefit. Those that do not do so run the risk of losing their rights to others who are willing and able to do so.<sup>1083</sup>

The same principles should be adopted in the country's restitution project. All beneficiaries of land should recognise that the land belongs to all South Africans. Therefore, those that have it must have the capacity to use it productively, optimally and sustainably for the ultimate albeit indirect, benefit of those that do not have it.

The MPRDA was assented to on the 3<sup>rd</sup> of October 2002 and it commenced on the 1<sup>st</sup> of May 2004. In section 2, the Act outlines its objectives which are to –

“Recognise the internationally accepted right of the State to exercise sovereignty over all the mineral and petroleum resources within the Republic;

- 
- (a) Give effect to the principle of the State's custodianship of the nation's mineral and petroleum resources;
  - (b) Promote equitable access to the nation's mineral and petroleum resources to all the people of South Africa;
  - (c) Substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources;
  - (d) Promote economic growth and mineral and petroleum resources development in the Republic;
  - (e) Promote employment and advance the social and economic welfare of all South Africans;
  - (f) .....
  - (g) Give effect to section 24 of the Constitution by ensuring that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development; and
  - (h) Ensure that holders of mining and production rights contribute towards the socio-economic development of the areas in which they are operating.”

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<sup>1081</sup> S 17 and s 51.

<sup>1082</sup> *Mine Health and Safety Act*, 29 of 1996.

<sup>1083</sup> See s 17 and 51.

These section 2 provisions mirror closely what this thesis intends to achieve through the suggestion of a *practical* approach of the social-obligation norm in land restitution. The social-obligation norm should be adopted and incorporated more pragmatically into land restitution legislation. In terms of section 2(a) and (b) of the MPRDA, the State has the right to exercise sovereignty over all mineral and petroleum resources. This right should extend to restitution farm-land so that the State is able to exercise sovereignty to it as well. As was held in *Baphiring*,<sup>1084</sup> while South Africa has vast tracks of land, not all of it is suitable for farming and this makes agricultural land a scarce resource which must be handled with utmost care and consideration. The State therefore, as the custodian of South Africa's scarce natural resources, must be mandated with ensuring that agricultural land is used optimally, sustainably and productively.

In terms of section 2(c), the MPRDA intends to give equitable access of these minerals to all South Africans. Even people who live in areas where there are no mineral and petroleum resources should also benefit from these minerals in one way or another. This links closely with the suggested theory of social-obligation in land restitution. The argument being made is that if the social-obligation norm of ownership is adopted as the parameter for land restitution in South Africa, those that receive restitution farm-land will be compelled to use it productively, optimally and sustainably. Inevitably, those that do not actually have the land will also benefit from it because optimal, sustainable and productive use of the land will create and promote employment, food security as well as contribute to the economy, particularly the rural economy. This is happening in mineral law.

Sections 2 (e), (f), (h) and (i) emphasize the MPRDA's objectives to achieve economic growth, employment and socio-economic development in the country through the country's mineral and petroleum resources. This ties in closely with the objectives of the social-obligation norm of ownership as suggested by this thesis.

The State, as the custodian of the country's mineral and petroleum resources, may, in terms of section 3(2)(a), (3) and 17 (2), refuse to grant anyone a prospecting right if such a grant would not promote the Act's objectives. Section 17 (1), which has been referred to briefly above, provides that prospecting rights should be granted to those that have the capacity to prospect. The same should be applied to cultivable land awarded in terms of the land restitution process. It should be given to those that have the capacity to utilise it productively

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<sup>1084</sup> 2010 (3) SA 130 (LCC) Para [20].

otherwise there should be alternative relief considered for them. Section 51 allows for the cancellation of a mining right if the holder does not conduct mining activities optimally. If the person does not have the capacity to mine, then in terms of section 17 (2) and 51, they should not have the prospecting and mining right respectively. The rationale behind this is simple really - if all mineral and petroleum resources belong to all South Africans, and the State is the custodian for the benefit of all South Africans, then it would be irresponsible for the State to grant the rights to persons who cannot or will not exploit them. This would frustrate employment creation as well as socio-economic growth.

In section 19 (2), the Act mandates the holder of a prospecting right to commence with prospecting activities within 120 days from the date the right became effective. The prospecting must be effected “continuously and actively in accordance with the prospecting work programme.”<sup>1085</sup> In section 25 (2) (b), the holder of a mining right must commence with mining activities within a year of the right becoming effective. If these requirements are introduced in restitution land which has agricultural potential, they could hypothetically lead to successful restitution projects. Beneficiaries of agricultural land must begin utilising the land actively, continuously and optimally, as soon as is reasonably possible.

In section 52, the Act provides that the holder of a mining right must exploit the minerals optimally. If this is not happening, the holder of such right can lose it to another player who is willing and able to exploit it optimally.<sup>1086</sup> As already discussed, one of the greatest challenges to South Africa’s land restitution projects is that agricultural activities are not being conducted optimally. In most of the cases, beneficiaries conduct subsistence farming. They only feed and employ themselves. In as much as they would be willing to feed and employ others, for reasons discussed above, they fail to do so. This hinders the optimum benefit that could otherwise be derived from the land if it were being utilised optimally. Just like in mineral law, if a beneficiary of agricultural land is not utilizing it optimally, the law should frown upon this and allow the State to give the land to beneficiaries who will utilize it productively, sustainably and optimally.

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<sup>1085</sup> S 19 (2)(c).  
<sup>1086</sup> S 51 (4).

#### 6.2.4 *Ubuntu* as expressing attributes of the social-obligation norm

*Ubuntu* accords with the social-obligation norm. Numerous writers have addressed the challenges with defining *ubuntu*.<sup>1087</sup> For this reason, it is not necessary to repeat what has already been written to this effect. However, while there does not exist a universal definition of *ubuntu*, it is generally agreed that the concept refers to humaneness and it influences people's morality and social conduct.<sup>1088</sup> According to Swartz, *ubuntu* is an inherently African concept<sup>1089</sup> which offers a "unifying vision of community - built upon compassionate, respectful, interdependent relationships" and it serves as "a rule of conduct, a social ethic, the moral and spiritual foundation for African societies."<sup>1090</sup>

The post-amble to the Constitution provided that there is "need for understanding, but not for vengeance, a need for reparation but not retaliation, a need for *ubuntu* but not for victimization." In *S v Makwanyane*, Madala J argued that *ubuntu* is "a concept that permeates the Constitution generally and more particularly chapter three which embodies the entrenched fundamental human rights."<sup>1091</sup> This statement implies that *ubuntu* occupies an important place when it comes to matters of constitutional reasoning.<sup>1092</sup> In agreeing with Madala, Mokgoro stated that *ubuntu* should be placed at the forefront of constitutional interpretation.<sup>1093</sup>

The concept of *ubuntu* accords with, and has special relevance to the values of the social-obligation norm. *Ubuntu* calls for a balancing of the interests of the society against those of the individual.<sup>1094</sup> The same call is also made by the social-obligation norm. An individual's interests cannot be prioritised to the detriment of society.<sup>1095</sup> As discussed in chapter four, one of the main attributes of the social-obligation norm is that it envisages a "full life" for

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<sup>1087</sup> Mokgoro (1998) "Ubuntu and the Law in South Africa" *PELJ* 2-3; Bennett (2011) "Ubuntu: an African Equity" *PELJ* 30-2; and Himonga (2013) "The Right to Health in an African Cultural Context: the Role of Ubuntu in the Realization of the Right to Health with Special Reference to South Africa" *Journal of African Law*; Himonga C, Taylor M and Pope A (2013) "Reflections on Judicial views of *Ubuntu*" *PER / PELJ* (16)5, 376 / 616.

<sup>1088</sup> Mokgoro (1998) *PELJ* 2; Madala in *S v Makwanyane* 1995 3 SA 391 (CC) para 237; Mokgoro in *S v Makwanyane* 1995 3 SA 391 (CC) para 308.

<sup>1089</sup> Mokgoro (1998) *PELJ* 2 went as far as to argue that "The concept of *ubuntu*, like many African concepts, is not easily definable...in a foreign language...Because the African world-view cannot be neatly categorised and defined, any definition would only be a simplification of a more expansive, flexible and philosophically accommodative idea."

<sup>1090</sup> Swartz (2006) "A Long Walk to Citizenship: Morality, Justice and Faith in the Aftermath of Apartheid" *Journal of Moral Education* 560.

<sup>1091</sup> *S v Makwanyane* para 237.

<sup>1092</sup> Himonga C, Taylor M and Pope A (2013) *PER / PELJ* (16)5, 379 / 616.

<sup>1093</sup> *S v Makwanyane* para 306.

<sup>1094</sup> *S v Makwanyane* para 250.

<sup>1095</sup> See the discussion in chapter four and five.

everyone. Owners of property owe it to everyone else who does not own property, to utilise property actively, sustainably and productively. This will invariably contribute to job creation, food security as well as a functional and robust rural economy as envisaged by the NDP. Any self-centred behaviour which results in wasteful neglect of cultivable land, particularly to the detriment of others, is unacceptable in terms of the social-obligation norm. In describing the concept of *ubuntu*, Langa J held that it shuns individualism and rather places emphasis on communality and interdependence amongst people.<sup>1096</sup> *Ubuntu* places value on the humanity of every individual.<sup>1097</sup> It “regulates the exercise of rights by the emphasis it lays on sharing and co-responsibility and the mutual enjoyment of rights by all.”<sup>1098</sup> This is part of what the suggested social-obligation norm of ownership seeks to achieve.

As discussed in chapter two, the current classical liberalist conception of ownership which is recognised in South Africa allows owners to do as they please with their property even if it means neglecting and abusing it. This is permissible as long as the owner does not commit any crime. As argued in chapter two, such an understanding and acceptance of ownership is one of the reasons why many cultivable land restitution projects have failed. The concept of *ubuntu* shuns this classically liberalist conception of ownership in as far as it promotes the neglect of potentially productive land. This is because this has negative consequences on the economy as discussed in chapter two. It leads to job losses from the agricultural sector and, as chapter six of the NDP expresses, it frustrates the rural economy. *Ubuntu* on the other hand, just as the social-obligation norm, expects that all individuals are entitled to a dignified life where every individual behaves in a manner that enhances the livelihood of others.<sup>1099</sup> According to Langa, one of the main attributes of *ubuntu* is that it regards “the life of another person as valuable as one's own.”<sup>1100</sup> Inhumane behaviour therefore which negatively affects the livelihood of another person contravenes the values of *ubuntu*.<sup>1101</sup> This is one of the main arguments of the social-obligation norm of ownership as discussed in chapter four.

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<sup>1096</sup> *S v Makwanyane* para 224.

<sup>1097</sup> *S v Makwanyane* para 224.

<sup>1098</sup> *S v Makwanyane* para 224.

<sup>1099</sup> Langa J in *S v Makwanyane* para 224 – 225.

<sup>1100</sup> *S v Makwanyane* para 225.

<sup>1101</sup> *S v Makwanyane* para 245.

### 6.3 Conclusion

This chapter has argued that South Africa has a subtle social-obligation norm which is not clearly expressed or developed. As discussed in paragraph 6.2, this social-obligation norm can be identified in various court decisions such as those discussed in 6.2.2 above and also in mining legislation such as the MPRDA. The notion of *Ubuntu* also expresses the social-obligation norm through its emphasis on the need to balance collective community interests over individual entitlements. As discussed in paragraph 6.2.1, while an owner's *ius abutendi* should be respected to the same degree as the other entitlements of ownership, it is not possible to have an unlimited content of ownership. Ownership envisages responsibility. For this reason, the social-obligation norm provides important "checks and balances" on owners who do not exercise their ownership responsibly.

There are some who regard the idea of a social-obligation norm<sup>1102</sup> as one that is grounded on the fact that owners have social and economic rights and these rights in turn generally assist in shaping socio-economic policy.<sup>1103</sup> Such an understanding of the social-obligation norm obviously creates a lot of tension between property ownership and the social-obligation norm of ownership.<sup>1104</sup> This is because on one hand, a system of equitably accessible and distributed property will be viewed as necessary for social welfare; on the other hand, proposed State intervention that will be aimed at promoting the social-obligation norm of property will be regarded as an infringement on private ownership of property and therefore, "indirectly and insofar as security of property holdings from State interference is seen as a substantive liberal value, a threat to social welfare."<sup>1105</sup> If such an analysis is accepted at face value, one could end up falsely concluding that property is either the guardian or the enemy of social welfare. One may ultimately therefore conclude that property and social-welfare relate to each other in a manner that can simply be explained as "property ownership vs social welfare."<sup>1106</sup> This is obviously a pessimistic approach to the social-obligation norm which should not be.

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<sup>1102</sup> Sometimes the social obligation norm is referred to as the social-welfare norm. See for example Van der Walt and Viljoen (2015) *PER* 1035.

<sup>1103</sup> Van der Walt and Viljoen (2015) *PER* 1037.

<sup>1104</sup> See also Davy, Davy and Leisering (2013) *Int J Soc We If*, with reference to Marshall "Citizenship and Social Class."

<sup>1105</sup> Van der Walt and Viljoen (2015) *PER* 1037.

<sup>1106</sup> Epstein Takings 319 argues that "The fundamental problem in a system of welfare is that it conflicts with the theory of private rights that lies behind any system of representative government."

Van der Walt and Viljoen argue that such a pessimistic explanation indicates the tension that is created by this “property ownership v social welfare” approach which seeks to protect extant property rights and promoting social welfare.<sup>1107</sup> This will present a choice that will favour one side while it will also harm the other side. However, a correct interpretation of the social-obligation norm does not lead to such a negative conclusion. There should not be tension between property ownership and the social-obligation norm. As argued in chapter two, private ownership of property enhances people’s livelihoods so much so that it should be encouraged. According to Van der Walt and Viljoen, “private property is so important for human welfare that it should be encouraged as much as possible, with the consequence that the equitable distribution of property is just as important as the protection of extant holdings.”<sup>1108</sup> Such a view still does not remove the perceived tension between private ownership of property and the social-obligation norm, to the extent that the social-obligation norm requires equitable distribution of resources from those that have them but are not utilising them, to those that do not have them and are also willing to utilise them productively.

Property law theories such as libertarianism portray this tension in terms which imply that “the promotion of social welfare, as far as it finds expression in redistributive State action, poses a threat to the security and stability of extant private property holdings, which could disrupt economic, social and legal stability.”<sup>1109</sup> Each person’s freedom to do as they please should be esteemed. For this reason, a social obligation norm of ownership will therefore have no place in a libertarian society. This is because, as discussed, the social obligation norm concerns itself with optimal utilisation of property while it condemns the libertarian approach to ownership which allows owners to do as they please with property.

As discussed in chapter four, while the libertarian idea of being able to do as one pleases without any restrictions may be attractive to some, it is not sustainable. An obvious weakness of libertarianism is that it can easily result in irresponsible and wasteful behaviour. South Africa’s current land restitution law and land restitution process are mostly libertarian in so far as they allow owners to do as they please with their land as long as they do not commit

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<sup>1107</sup> Van der Walt and Viljoen (2015) *PER* 1037.

<sup>1108</sup> Van der Walt and Viljoen (2015) *PER* 1037.

<sup>1109</sup> Van der Walt and Viljoen (2015) *PER* 1037; See also for example Alexander and Peñalver’s “Introduction to Property Theory” 56 where they point out that Nozick and Epstein, the most important current Lockean theorists, “have taken us very far from the circumstances that motivated Locke to write the *Two Treatises* . Instead of a theory of limited private property rights in the service of an argument for majoritarian government, twentieth-century Lockeans have offered us a theory of limited majoritarian government in the service of private property rights”



any crime. This undermines the developmental aspirations envisaged by the NDP for the rural economy. In terms of the social obligation norm of ownership advocated by this thesis, owners of land must make optimal and active use of it. As discussed in chapter two, the duty to prevent wasteful neglect of property actually derives from the common law. According to Karp, “[A] life tenant has the obligation to husband the land so as not to do harm to the corpus of it because it must be passed on to future owners in the approximate condition as it was received.”<sup>1110</sup> Singer argues that while individual liberty is important in property ownership, regulation of that property owner’s liberty is important because “there is no room in the progressive-property theory for the notion that liberty is best secured in a system that is as free as possible of State intervention.”<sup>1111</sup> Private ownership of property is not an exclusionary occurrence that happens “in a private enclave.”<sup>1112</sup> It is part of an expansive social process that takes place in existing social structures that enhance the livelihoods of people.<sup>1113</sup>

Adding voice to criticisms of libertarianism in landownership, Hart notes that because of the social function of cultivable land, it is actually inappropriate to refer to it as a commodity that can be owned by an individual absolutely.<sup>1114</sup> Those that have cultivable land owe it to those that do not have it to work it so that it produces food and other commodities. Landowners have a role to play in provisioning the rest of the society that does not have land. This approach is not a novel principle. There have always existed limitations particularly with regard to public interest in farmable land. Crocombe bluntly expresses his disdain for individualised ownership by arguing that it is misleading to view a person’s real relationship with land as ownership.<sup>1115</sup> A person does not really own land. He owns rights in land.<sup>1116</sup> A person’s “uses and disposition of land have always been residual in society, whether represented by the community, the monarch, or the State.”<sup>1117</sup> In Anglo-Saxon England for example, apart from instances where land was allocated to specific people, for specific

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<sup>1110</sup> Karp J.P (1993) “A Private Property Duty of Stewardship: Changing our Land Ethic” *Environmental Law* Volume (23) 749.

<sup>1111</sup> Singer (2006) *Harvard Environmental LR* 311.

<sup>1112</sup> Van der Walt and Viljoen (2015) *PER* 1040.

<sup>1113</sup> Van der Walt and Viljoen (2015) *PER* 1040.

<sup>1114</sup> Hart C (ed) (1964) “Control of the Use of Land in English Law” in *Law and Land* 23 quoted in Caldwell K Lynton (1974) “Rights of Ownership or Rights of Use? The Need for a New Conceptual Basis for Land Use Policy” *William and Mary Law Review* 15(4)760.

<sup>1115</sup> Crocombe RG (1968) “Improving Land Tenure: A Survey of the Problems of Adapting Customary Land Tenure Systems to Modern Economic Conditions in the Region Served by the South Pacific Commission”, South Pacific Commission.

<sup>1116</sup> Crocombe RG (1968) .

<sup>1117</sup> Caldwell K Lynton (1974) “Rights of Ownership or Rights of Use? The Need for a New Conceptual Basis for Land Use Policy” *William and Mary Law Review* 15(4)760.

purposes, land belonged to the people, hence the emergence of the concept, folkland.<sup>1118</sup> It is therefore problematic to have a content of ownership which allows a person to do as they please with cultivable land even if they do not commit a crime because farmland should bring maximum utility to everyone. Many landowners celebrate their right to use and abuse their land anyhow within the limits of the law but as the statistics have shown,<sup>1119</sup> few actually behave responsibly and dutifully by actively utilising their land. A libertarian attitude towards farm landownership is counter-productive and unsustainable.<sup>1120</sup>

Be that as it may, this thesis is not advocating for a complete disregard of an owner's *ius abutendi* in calling for a positive expression of the social obligation norm of ownership in South Africa's land restitution legislation. It is rather calling for a limitation of the *ius abutendi* in so far as it encourages wasteful neglect of cultivable restituted land. In fact, as already mentioned, tempering the *ius abutendi* through promoting the social obligation norm is a theme that already permeates the Constitution of South Africa. This however has to be positively expressed. According to Van der Walt and Viljoen, the South African Constitution already fundamentally and inherently limits rights in property through specific provisions as well as through various pieces of legislation that are promulgated to give effect to the constitutional provisions.<sup>1121</sup> These limitations create space for a more positive formulation and promotion of the social obligation norm.<sup>1122</sup>

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<sup>1118</sup> Caldwell K Lynton (1974) "Rights of Ownership or Rights of Use? The Need for a New Conceptual Basis for Land Use Policy" *William and Mary Law Review* 15(4)760.

<sup>1119</sup> See chapter 4.

<sup>1120</sup> See discussion in chapter 4.

<sup>1121</sup> Van der Walt and Viljoen (2015) *PER* 1036.

<sup>1122</sup> Van der Walt and Viljoen (2015) *PER* 1036.

# CHAPTER SEVEN: RECOMMENDATIONS FOR A PRACTICAL SOCIAL-OBLIGATION NORM IN SOUTH AFRICA'S LAND RESTITUTION LEGISLATION

## 7.1 Introduction

In chapter two, this thesis identified the main shortcomings of South Africa's land restitution programme. These shortcomings mainly relate to, but are not limited to - poor post-settlement support for the beneficiaries, neglect and unproductive utilisation of cultivable land which in turn compromises the rural economy which is predominantly based on agriculture. In addition, the land restitution programme does not promote the NDP's envisaged developmental aspirations.<sup>1123</sup> As discussed in chapter three, while the government has not been blind to these challenges, the institutional changes envisaged in the 2011 *Green Paper on land reform* will not solve the shortcomings of the current land restitution programme. What is required, which is also suggested by this thesis, is a process which simultaneously returns land, where possible,<sup>1124</sup> to its original owners and also promotes active, sustainable and productive utilisation of such land. This is not only a responsible approach to ownership, but also one that will benefit the new owners of such returned land. Such an approach will also promote a vibrant rural economy. As the thesis argued in chapter four, this can be achieved by adopting the social-obligation norm as the basis upon which land restitution is carried out. Chapter five illustrated how the social-obligation norm of ownership is a part of German and Brazilian Constitutional property law. It is entrenched in the two countries' Constitutions. South Africa also needs to inculcate a pragmatic and overt social obligation norm as argued in chapter six in order to address the challenges of wasteful neglect of cultivable restitution land. This concluding chapter provides recommendations for how a social-obligation norm can be overtly introduced in South Africa's constitutional property law as well as in the RLA.

As discussed in chapter 4.3 and 4.4, the social-obligation norm of ownership is premised on the understanding that property must serve a social function.<sup>1125</sup> Owners of property must

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<sup>1123</sup> See discussion of the NDP in 1.4.

<sup>1124</sup> In terms of section 34 of the RLA, where it is not possible to return land, compensation is accepted as an alternative relief. See also a discussion of this in chapter 7.2.2.iv.

<sup>1125</sup> See also Mattei U (2000) *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* Greenwood 31. See also Julian Conrad Juergensmeyer (1996) *Florida's Property Rights Protection Act: Does it Inordinately Burden the Public Interest?* 48 FLA. L. REV. 701; Schneiderman D (2000) "Constitutional Approaches to Privatization: An Inquiry into the Magnitude of Neo-Liberal Constitutionalism" 63 LAW & CONTEMP. PROBLEMS 92; Raymond R. Coletta (1998) *The Measuring Stick of Regulatory Takings: A Biological and Cultural Analysis*, 1 U. PA. J. CONST. L. 20 n.23; Thomas T. Ankersen & Thomas

utilise their property, not only to their individual benefit but for the benefit of others as well. Adherence to classical liberalism's conception of individualised ownership without limits is unsustainable in this era of social-interdependence.<sup>1126</sup> Put differently, there must be a minimum level of social utility beyond which individual ownership of property should exist.<sup>1127</sup> Ownership entails obligations and owners have an affirmative duty to positively utilise their property and not neglect it or let it lie idle. In this vein, cultivable land which is neglected or a land restitution process which does not promote active, sustainable and productive utilisation of land is unacceptable. As discussed in chapter 4.5 as well as in the German and Brazilian cases where the social-obligation norm is utilised, it is important to balance the variance between private and public proprietary interests. The social-obligation norm has been successfully utilised in Germany and Brazil and it finds clear expression in the two countries' Constitutions. The norm has also subsequently been expressed in the two countries' legislation.<sup>1128</sup>

As argued in chapter six, South African constitutional property law already has roots laid for a positive expression of the social-obligation norm in the property clause in the Constitution. The courts too have indirectly conveyed their appreciation of the social-obligation norm through cases such as *FNB, Kranspoort* as well as *Baphiring*. However, what is needed in order to achieve a land restitution process that encourages optimal, sustainable and productive utilisation of cultivable land, which will also boost the rural economy through job creation, is a positive articulation of the social-obligation norm in legislation. Countries that apply the social-obligation norm to censure wasteful land ownership such as Germany and Brazil have positively framed legislative provisions providing for the social-obligation norm. To this effect therefore this chapter argues that section 25 of the Constitution should be positively framed.

## **7.2 A positively framed property clause in the Constitution**

In the examples of Germany and Brazil discussed in chapter five, the social-obligation norm principle finds positive and unconcealed expression in the two countries' Constitutions. In the case of South Africa and as a point of departure therefore, it is unavoidable to begin the

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Ruppert (2006) *Tierra y Libertad: The Social Function Doctrine and Land Reform in Latin America*, 19 TUL. ENVTL. L.J. 95; Charles A. Hale (2000) *The Civil Law Tradition and Constitutionalism in Twentieth-Century Mexico: The Legacy of Emilio Rabasa*, 18 LAW & HIST.REV. 275.

<sup>1126</sup> See discussion of this in chapter 4.3.

<sup>1127</sup> See Mirrow C (2010) 192.

<sup>1128</sup> See chapter 5.2.2; 5.2.3; 5.3.2 and 5.3.3.

process of adopting a social-obligation norm by suggesting constitutional changes to the property clause. Of course, robust discussions on whether or not it is necessary to have a positively framed property clause already took place during the transition from the Interim Constitution<sup>1129</sup> to the final Constitution<sup>1130</sup> of the Republic of South Africa. It is beyond the scope of this thesis to give a detailed discussion of what was said by the Constitutional Court in those deliberations here.<sup>1131</sup> However, it is worthwhile to briefly revisit some of the key arguments for or against a positively framed property clause.

Section 28 of the Interim Constitution paved the way for the incorporation of the property clause in the final Constitution by providing for the constitutional protection of property.<sup>1132</sup> In sub-section (1), the clause provided that “Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the right permits, to dispose of such rights.” This clause was worded positively in so far as it explicitly guaranteed the right to “acquire and hold rights in property and...to dispose of such rights.”<sup>1133</sup> According to Van der Walt, this positive formulation indicated that the entitlements accorded by section 28 “were determined by their nature and social function.”<sup>1134</sup> This positive formulation of the (draft) property clause resembled the German formulation of the property clause.<sup>1135</sup>

Several writers identified potential problems that would arise out of this positive formulation of the property clause.<sup>1136</sup> A major interpretation problem (that could arise) would be whether the positive guarantee related to (guaranteeing) the institution of property itself or an

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<sup>1129</sup> 200 of 1993.

<sup>1130</sup> 1996 Constitution of the Republic of South Africa.

<sup>1131</sup> See *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) par [70]-[75].

<sup>1132</sup> Section 28 of the Interim Constitution provided as follows –

**Property**

- (1) 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.
- (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
- (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

<sup>1133</sup> Van der Walt (1999) *Constitutional Property Clauses* 326.

<sup>1134</sup> Van der Walt (1999) 326.

<sup>1135</sup> Kleyn (1996) “The Constitutional Protection of Property: A Comparison between the German and the South African Approach” 11 *SAPL* 402 at 418-419.

<sup>1136</sup> See for example Chaskalson (1994) 10 *SAJHR* 131; Van der Walt (1995) 10 *SAPL* 298 at 302-305.

individual person's right to property.<sup>1137</sup> If it was an institutional guarantee, then the protection would only be for a "particular economic system apart from the individual protection of private property holdings in terms of sections 28(2) and 28(3)."<sup>1138</sup> As discussed in the previous chapter, this institutional guarantee of property applies to the German property clause which is positively formulated. Because of the institutional guarantee of property in the Constitution, the German State does not have the power to remove certain types of property from private ownership unless it is absolutely critical for the State to have such a removal take place.<sup>1139</sup> This situation would also present itself to South Africa if the interpretation of the property clause as a positive guarantee referred to protection of the institution of property. For South Africa, it would also mean that the State would not have the power to expropriate certain types of property such as agricultural land or mineral rights.<sup>1140</sup>

While a positively framed property clause may result in problems of interpretation, Kleyn argues that such problems with interpretation may also occur even in instances where the property clause is negatively framed.<sup>1141</sup> Interpretation problems are therefore not necessarily unique to positively framed property clauses. According to Kleyn, while it is not easy to justify an institutional guarantee of property in a negatively framed property clause, an interpretation of section 25 does show the existence of an institutional guarantee of property.<sup>1142</sup> Section 25's commitment to "land reform, access to resources, restitution of land as well as tenure security" points to the guarantee of property as an institution.<sup>1143</sup> If not so, then the property clause would be meaningless.<sup>1144</sup> A reading of section 25 shows that it is aimed at creating a mixed economy in which the previously disadvantaged landless people are also able to benefit from the institutional guarantee of property.<sup>1145</sup> The measures also reflect the State's duty to safeguard property as an institution.<sup>1146</sup>

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<sup>1137</sup> For a comprehensive explanation of this, please see Van der Walt *Constitutional Property Clauses* (1999) 326; Van der Walt AJ "Property rights, land rights and environmental rights" in Van Wyk et al (eds) *Rights and constitutionalism* (1994) 468-472; Kleyn (1996) "The Constitutional Protection of Property: A Comparison between the German and the South African Approach" 11 *SAPL* 402 at 418-419.

<sup>1138</sup> Van der Walt (1999) 326.

<sup>1139</sup> Kleyn (1996) "The Constitutional Protection of Property: A Comparison between the German and the South African Approach" 11 *SAPL* 402 at 418-419; see also Van der Walt (1999) 326.

<sup>1140</sup> See Van der Walt (1999) 326.

<sup>1141</sup> Kleyn (1996) 11 *SAPL* 402 at 418-419.

<sup>1142</sup> Kleyn (1996) 418-419.

<sup>1143</sup> Kleyn (1996) 418-419.

<sup>1144</sup> Kleyn (1996) 418-419.

<sup>1145</sup> Kleyn (1996) 418-419.

<sup>1146</sup> Kleyn (1996) 418-419.

Because of the potential challenges of interpretation, the positive property guarantee provided by section 28(1) of the Interim Constitution was omitted in the final Constitution. In section 25(1), the (final) Constitution reads as follows, “No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.” Unlike in the Interim Constitution, this is a negative formulation of property rights. This negative formulation of property rights resembles the American Fifth and Fourteenth Amendments.<sup>1147</sup> Of course, there were questions regarding whether such a negative formulation of the property clause could constitute constitutional protection of property or not. To this effect, two objections against section 25 were initially raised but were subsequently rejected by the Constitutional Court.<sup>1148</sup> Only the first objection will be discussed as it is relevant for purposes of this thesis. However, it suffices to note that the second objection concerned the failure of the draft Constitution to specifically provide for intellectual property and mining rights but this objection was rejected on similar grounds as the first objection.

The first objection to the draft property clause was that because of its negative formulation, the new property clause in section 25 did not expressly guarantee the right to acquire, hold and dispose of property as did section 28(1) of the Interim Constitution.<sup>1149</sup> For some, this negative formulation could easily mean that the right to property did not comply with the test of “universally accepted fundamental rights” set by Constitutional Principle II.<sup>1150</sup> To this, the Court responded by alluding to the fact that neither a positive nor a negative formulation of the constitutional property clause can be described as a “universally recognised formulation” of a property clause.<sup>1151</sup> Numerous international conventions and foreign Constitutions provide for the protection of property in various ways while some do not even have a specific provision for property protection.<sup>1152</sup> In the latter instance, property rights are provided for and protected in similar ways as other rights without the need for a specific and express provision.<sup>1153</sup> Other jurisdictions formulate the property right in either a positive way which

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<sup>1147</sup> Kleyn (1996) “The Constitutional Protection of Property: A Comparison between the German and the South African Approach” 11 *SAPL* 402 at 418-419; Van der Walt AJ “Property rights, land rights and environmental rights” in Van Wyk (et al) (1994) (eds) *Rights and constitutionalism* 468-472.

<sup>1148</sup> *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par [70]-[75].

<sup>1149</sup> 1996 4 SA 744 (CC) par [70]-[75].

<sup>1150</sup> See *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) par [70]-[75].

<sup>1151</sup> 1996 4 SA 744 (CC) par [70]-[75].

<sup>1152</sup> 1996 4 SA 744 (CC) par [70]-[75].

<sup>1153</sup> 1996 4 SA 744 (CC) par [70]-[75]; see for example the Canadian Charter of Rights and Freedoms and also the New Zealand Bill of Rights Act, 1990.

entrenches the right to acquire and dispose of property,<sup>1154</sup> or in a negative way which simply restrains State interference with property rights?.<sup>1155</sup>

Another alternative formulation is found in the Japanese Constitution. The Japanese Constitution's formulation of property rights simply provides that "private property is inviolable" and may be subject to expropriation in instances when it is necessary.<sup>1156</sup> This brief survey of the different expressions of constitutional property protection illustrates that there is no formulation of property rights which is universally recognised.<sup>1157</sup> What is important is to provide for constitutional protection of private property regardless of how this protection is phrased.<sup>1158</sup> A negative or a positive expression of constitutional property protection is therefore sufficient to ensure that private ownership is constitutionally guaranteed.

In holding that the negative or positive phraseology of the property clause was immaterial to the protection of property rights and thereby allowing a negatively framed property clause, the Constitutional Court inadvertently planted seeds for the current poor or under-utilisation of arable land. A positive framing of the property clause such as in the German and Brazilian Constitutions would have led to positively framed legislative provisions which compel positive and active beneficial utilisation of property. As discussed in chapter 5.2.2, in Article 14.1.1 of the German Constitution, the right to property is positively guaranteed. This positive guarantee is not absolute. It has to be read together with Articles 14.1.2, 14.2 and 14.3. The positive formulation of the German property clause provides a starting point for explaining "socially oriented limitations on private property."<sup>1159</sup>

A positive constitutional amendment to the property clause envisaged by this thesis will not require wholesale amendments to the whole of section 25 but rather, insertion of two key provisions that entrench the right to property and also, that reiterate property's social obligation. Although it is unusual for a property clause to be formulated positively,<sup>1160</sup> South Africa will benefit from a positively framed property clause that also provides for the social obligation norm of property.

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<sup>1154</sup> See for example the Namibian Constitution.

<sup>1155</sup> See for example the US Constitution and the Belgian Constitution.

<sup>1156</sup> See Article 29 of the Japanese Constitution.

<sup>1157</sup> 1996 4 SA 744 (CC) par [70]-[75].

<sup>1158</sup> 1996 4 SA 744 (CC) par [70]-[75].

<sup>1159</sup> Van der Walt (1999) *Constitutional Property Clauses* 127.

<sup>1160</sup> Van der Walt (1999) *Constitutional Property Clauses* 124, see also footnote 18.



Like the German and Brazilian Constitutions, section 25 should begin by reiterating that everyone has a right to property. The section should then also echo the social-obligation norm of property. Structurally therefore, the two key provisions that need to be added will be as follows:

## **25 Property**

- 1. Everyone has the right to property.**
- 2. Property must serve a social function.**
3. No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.
4. 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.
5. 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.
6. 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.
7. The State must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

8. A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.
9. A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.
10. 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).
11. Parliament must enact the legislation referred to in **subsection (8)**.

When the positive guarantee and the social-obligation norm of property have been spelt out in the Constitution, focus should then shift to amendments of the RLA in order to spell out the social-obligation norm of property.



### **7.3 Recommendations for the Restitution of Land Rights Act**

Currently, in terms of the RLA, the land restitution process may be subdivided into six phases. These six stages are acted upon by the Commission on Restitution of Land Rights in terms of section 4 of the Act. The first phase is the lodgement and registration of a claim to the Commission in terms of Chapter II section 10 of the Act. After lodgement of the claim, the Commission assesses the legitimacy of the claim. In this phase, all “frivolous or vexatious” claims are dismissed. After determination of the legitimacy of a claim, the Commission then scrutinises the claim for satisfaction of the formal requirements in terms of section 2 of the Act. When the Commission is satisfied that the claim has been lodged in the prescribed manner, a notice is published in the *Government Gazette* and media that a claim has been lodged. After publication of a claim, all parties who are affected by the claim are given an opportunity to make representations and raise objections. All interested and affected parties are then invited for negotiations aimed at finalising the claim. The last phase of the restitution process is the implementation stage. At this stage, the Commission sees to the actual transfer of the claimed land to the claimants. This stage marks the formal closure of the land restitution process.

As discussed in chapters one and two, suggestions on amending the RLA in order to include a social-obligation norm are aimed at broadening the scope of the Commission. It is therefore the latter whose mandate needs to be spelt out to include incorporating the social-obligation norm in the implementation stage of the land restitution process.

Chapter II of the RLA established and provides a detailed overview of the Commission. Section 6 of the Act sets out the general functions of the Commission. These include receiving all claims lodged or transferred to it in terms of the Act. It guides, advises and reports back on the progress of claims. In section 6(1) (cA), the Act also gives the Commission investigative powers where merits of a claim are concerned. The Commission also offers advice, legal support and in some instances even financial support to claimants. It is required to prioritize claims which affect large numbers of people, those who suffered substantial loss or those with urgent needs.<sup>1161</sup> In terms of section 6(2) (b), the Commission may also advise the Minister regarding the most appropriate form of relief for claimants who do not qualify for restitution under the Act. In fact, in terms of section 6(2) (e), the Commission generally has the power to do anything that is “necessarily connected with or reasonably incidental to the expeditious finalisation of claims.”

The role and function of the Commission needs to be broadened in the Act to include application of the social-obligation norm in the restitution process. The current implementation stage does not encourage active, optimal and sustainable use of arable land. In chapter II therefore, the Act must clearly spell out the following requirements for restitution of a right in land as part of the implementation stage -

**i. Requirement 1 - Clear intention to utilise land**

After a successful restitution claim and BEFORE land is actually transferred into the hands of the beneficiaries, the Commission must request that such claimant should show a commitment to utilise land actively and productively. Land must not be handed back to people who do not intend to utilise it. The intention to utilise the land must be a prerequisite for land to be handed over to the claimants. How this intention will be expressed is up to the Commission to decide; however, the intention to utilise the land actively must be communicated unequivocally and commitment to this effect must be clearly expressed. Land should not be allowed to lie fallow or be left unattended for speculative purposes.

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<sup>1161</sup> See section 6(2)(d).

Many arable farms fail not because the beneficiaries cannot farm but because they are not interested in farming.<sup>1162</sup> For example as alluded to in chapter two, in 2009, Ms Veronica Moos successfully claimed for restitution of Yzervarkfontein farm. As part of the post-settlement support offered to her, she received R200 000 which was meant to assist her in continuing with the farming enterprise.<sup>1163</sup> However, Ms Moos sublet the farm to another person because she was not interested in farming.<sup>1164</sup>

Evidently, giving farm-land to beneficiaries who do not intend to utilise it for farming purposes is an irresponsible and ill-considered approach to land restitution. It contravenes established progressive private law theories which respect the social-obligation norm of property. This undermines the agricultural potential of farm-land, leading to reduced agricultural yield and loss of farm-jobs as discussed in chapter two. To counter this, a prerequisite for the handing over of a successful restitution farm should be the beneficiaries' express intention to actually conduct farming activities on the land.

The RLA therefore should clearly provide that once a person has successfully lodged a land restitution claim on farm-land, they must first show a clear intention to farm the land before they receive their land. If the claimants and beneficiaries do not intend to use agricultural land for agricultural purposes even though they qualify for restitution, then section 6(2)(b) can be invoked in terms of which alternative relief can be sought.

## **ii. Requirement 2 –Clear outline of how the land will be used**

When a claimant has shown the clear and express intention to use the land for agricultural purposes, they then have to satisfy a second requirement. They have to provide a clear outline of how they intend to carry out their agricultural activities – optimally and sustainably.

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<sup>1162</sup> See chapter two.

<sup>1163</sup> Sapa (2009). *Government confiscates Yzervarkfontein farm*, SABC online at <http://www.sabcnews.com/portal/site/SABCNews/menuitem.5c4f8fe7ee929f602ea12ea1674daeb9/?vgnextoid=affd3a8ebf680210VgnVCM10000077d4ea9bRCRD&vgnextfmt=default> (12 December 2009).

<sup>1164</sup> Sapa (2009). *Government confiscates Yzervarkfontein farm*, (12 December 2009). In another example referred to in chapter one, in 2001, the Western Cape government initiated the formation of Toekomsrust Smallholders Trust. It had 47 members and each of these members R20 000 as financial support as start-up capital. They received Groenfontein farm through the land restitution process and the farm was cultivable. Besides farming equipment which they bought from the money that they received, nothing ultimately resulted from the project. It later emerged that the biggest challenge to the project was that of the 47 beneficiaries, only 17 of them were interested in farming. Unfortunately, these 17 beneficiaries did not have any knowledge, interest or expertise in farming.

Hebinck and Leynseele point out that the current land restitution process lacks strategic advance planning and this becomes evident in post-settlement stages of the process.<sup>1165</sup> This results in a lot of the activities regarding restitution being “outsourced with contract consultants, financing institutions, local farmers’ associations and local municipalities assuming a prominent role in post-settlement stages of the land restitution.”<sup>1166</sup> Often, coordinated land use planning initiatives are only later introduced by a conglomerate of “State-and non-State interests that draft business plans with claimant representatives and restitution officials.”<sup>1167</sup> The restituted land is often returned to its original owners without any changes to the current land uses. According to Brink, this is called a “same car, different driver principle.”<sup>1168</sup> This approach is very similar to what happened in Peru where the haciendas were “endowed” to the locals without much change to the “personnel, production structures and farming styles.”<sup>1169</sup>

While the Constitution is silent regarding this, the RLA must specifically spell out that the Commission is empowered to demand a clear plan or outline of how exactly the beneficiaries intend to utilise the land. Such a plan may be drawn up by different agricultural specialists who may include business people, agronomists and others whose speciality lie in agronomics. Of course challenges of funding may be encountered and where beneficiaries cannot afford to pay for the drafting of such a plan, the Commission must be given a budget aimed at assisting with the drafting of such a plan. The Commission already assists beneficiaries financially so expanding its funding to cater for these plans will be within its present mandate in terms of the Act anyway. While this may be expensive in the short term, in the long term, it will ensure that land is optimally and sustainably utilised to the benefit of the economy.

Section 35 (2) (a) of the RLA also provides that the court may “determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant.”<sup>1170</sup> Compelling the beneficiaries of restitution land to provide a clear outline of how they intend to use their land productively, sustainably and optimally would fall squarely within this

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<sup>1165</sup> Hebinck P and Leynseele VY (2008) “Through the prism: Local reworking of land restitution settlements in South Africa in Fay D and James D, (eds)*The Rights and Wrongs of Land Restitution* 165.

<sup>1166</sup> Hebinck P and Leynseele VY (2008) 165.

<sup>1167</sup> Hebinck P and Leynseele VY (2008) 165.

<sup>1168</sup> Brink van der R (2002) “Land Policy and Land Reform in Sub-Saharan Africa: Consensus, Confusion and Controversy,” World Bank Discussion Paper, 2 April 2003.

<sup>1169</sup> Lorenz D and Monique N (2008) “Restitution of Indian territories in the Central Andes of Peru,” in Fay D and James D, (eds)*The Rights and Wrongs of Land Restitution* 188-189.

<sup>1170</sup> See an example of this in *Makuleke Community Re:Pafuri area of Kruger National Park and Environs, Soutpansberg District Northern Province* (LCC90/98) [1998] ZALCC 26 (15 December 1998) para [21].

ambit. The expressed intention to use farming land for farming purposes must be corroborated by an outline detailing how farming activities will be conducted. It is inadequate to merely express the intention to carry out farming activities and receive farm-land based on such intention. Many restitution projects generally fail and have failed because there is no clear outline of how the project will be run.<sup>1171</sup>

### **iii. Requirement 3 - Capacity to conduct the intended farming activities**

The Commission must also be able to evaluate and make a determination regarding the beneficiaries' capacity to carry out agricultural activities optimally and sustainably. When claimants have illustrated their intention to actively, productively and sustainably use the land, corroborated by a clear outline of how they are going to do this, they should then prove that they have the capacity to do so. In terms of the RLA, it must be mandatory for the claimants of farm land, who intend to carry out farming activities, to be able to actually carry out the intended farming activities. Land restitution does not mean much when the beneficiaries of land do not have "the necessary means of production, infrastructure and support to actively engage in agriculture."<sup>1172</sup>

Farming is a trade that requires numerous specialised skills. Such skills include project management, economics, finance handling, planning and so forth. It is also capital intensive. The connection between the success of a farming enterprise and the capacity of the farmer is very close. Therefore, capacity to conduct farming activities should be a pre-requisite for claimants of agricultural land in the restitution process.

Mandating the beneficiaries of farm-land to have the capacity to use their land is not a new principle in South African law. This principle also exists in mineral law. In terms of the Mineral Petroleum Resources Development Act (MPRDA),<sup>1173</sup> the mineral and petroleum resources in South Africa belong to all South Africans but the state retains custodianship for the benefit of all South Africans.<sup>1174</sup> In terms of section 3(2)(a), the State, as the custodian of mineral and petroleum resources, may grant or refuse anyone mining rights. The MPRDA recommends that a prospecting and mining right should only be given to a person who has

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<sup>1171</sup> See for example the case of Magwa tea estate in the Eastern Cape online at *Mail and Guardian*, "Magwa Tea's failure bitter to swallow" 9 March 2012.

<sup>1172</sup> Levin R (2002) "Land and Agrarian Reform in South Africa: Contemporary Challenges and Perspectives" in *Agrarian Studies: Essays on Agrarian Relations in Less Developed Countries* (eds) Ramachandran VK and Swaminathan M 167.

<sup>1173</sup> 28 of 2002.

<sup>1174</sup> S 3(2)(a).

the capacity to conduct mining activities.<sup>1175</sup> Such capacity includes technical ability to conduct intended operations, financial resources, ability to comply with other laws.<sup>1176</sup>

The same principles should be adopted in the country's restitution project. All beneficiaries of land should recognise that the land belongs to all South Africans. Therefore, those that have it must have the capacity to use it productively, optimally and sustainably. However, it will be unfair to deny a successful land restitution claim because the claimant lacked the capacity to farm. This is where the government needs to actively engage skilled people in the field in order to assist with capacitating the beneficiaries.

Where a claimant has the intention to conduct farming activities and they have produced a clear outline of how they intend to carry out the farming activities but lack the capacity to do so, they must be capacitated with the requisite farming skills. For example, a "mentorship on land-use" programme can be arranged for claimants who lack capacity, to capacitate them for productive, sustainable and optimal use of farm land. Hebinck and Leynseele argue that the lack of necessary skills to work the land should inspire "educational, technocratic and administrative interventions that are geared" at equipping the beneficiaries with the required skills.<sup>1177</sup>

The lack of skills and inadequate post-settlement support of land restitution beneficiaries also lies closely at the root of farm-land failure that is experienced by land reform beneficiaries.<sup>1178</sup> In *Baphiring Community v Uys and Others*,<sup>1179</sup> the court alluded to 330 restitution projects in the North West province which had ALL failed as a result of, among others, a lack of skilled and well capacitated personnel to run the projects. The beneficiaries' lack of skills to run the project severely crippled the land restitution programme in the 330 examples cited by the court in *Baphiring*.

A skills-transfer arrangement will result in a "land-use mentorship" to beneficiaries by skilled people or even by the current owners. This will assist with capacitating and transfer of farming skills to unskilled beneficiaries until they are able to work the land sustainably, optimally and productively. This mentorship arrangement must run until a time when the

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<sup>1175</sup> S 17 and s 51.

<sup>1176</sup> *Mine Health and Safety Act*, 29 Of 1996.

<sup>1177</sup> Hebinck P and Leynseele VY (2008) "Through the prism: Local reworking of land restitution settlements in South Africa in Fay D and James D, (eds)*The Rights and Wrongs of Land Restitution* 180.

<sup>1178</sup> *Baphiring Community v Uys and Others*, 2010 (3) SA 130 (LCC), para [22]; Lahiff, E. and Cousins, B. (2005), *Smallholder Agriculture and Land Reform in South Africa*. IDS Bulletin, 36:129.

<sup>1179</sup> 2010 (3) SA 130 (LCC), para [25].

beneficiaries are able to work the land or run the projects independently. This practice of gradually equipping beneficiaries with skills for working the land is akin to “equity share schemes”.

*a. Semi-share equity schemes*

Farming equity share schemes are generally farming enterprises which are owned privately and operated like companies.<sup>1180</sup> They were pioneered in the Western Cape early in the 1990s in an attempt to “redistribute farm assets to land reform beneficiaries while maintaining the viability of commercial farming operations.”<sup>1181</sup> In 1998, Lyne *et al* estimated that about 50 equity share schemes had been initiated in South Africa and this number has increased.<sup>1182</sup> These schemes involve various enterprises such as vegetables, poultry, dairy, wine, eco-tourism and olives.<sup>1183</sup> These schemes have also been described as “a method of redistributing land without affecting the operation of individual farms or overall production levels; indeed, with better job satisfaction and greater participation, productivity should increase on farms where the workers are also the owners.”<sup>1184</sup> The owner of the farm teams up with the beneficiaries of that farm to become share-holders in that particular farm.<sup>1185</sup>

If current farm-owners or other skilled personnel are persuaded to enter into semi-farming equity share schemes with the beneficiaries of land, the land reform process would have a greater chance of being productive than when unskilled beneficiaries are simply given the farms without mentorship on how to farm. Full ownership of the farm will only pass onto the beneficiaries when they have proved that they are able to farm productively, sustainably and optimally.

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<sup>1180</sup> Knight S, Lyne M & Roth M (2003) “Best Institutional Arrangements For Farm-Worker Equityshare Schemes In South Africa” *Agrekon: Agricultural Economics Research, Policy and Practice in Southern Africa*, 42:3, 228.

<sup>1181</sup> Knight S, Lyne M & Roth M (2003) 228.

<sup>1182</sup> Lyne MC, Graham D, Pieters B, Hamman J & Zille P (1998) “Feasibility study for the support of commercial land transfer projects.” *Unpublished Report prepared for the Department of Land Affairs: Redistribution Policy, Pretoria, South Africa* p2.

<sup>1183</sup> Knight S, Lyne M & Roth M (2003): Best Institutional Arrangements For Farm-Worker Equityshare Schemes In South Africa, *Agrekon: Agricultural Economics Research, Policy and Practice in Southern Africa*, 42:3, 229.

<sup>1184</sup> Mather C & Adelzadeh A (1997). *Macroeconomic strategies, agriculture and rural poverty in post-apartheid South Africa*. Occasional Paper Series 10, National Institute for Economic Policy, Johannesburg, South Africa, 11.

<sup>1185</sup> Knight S, Lyne M & Roth M (2003) “Best Institutional Arrangements For Farm-Worker Equityshare Schemes In South Africa” *Agrekon: Agricultural Economics Research, Policy and Practice in Southern Africa*, 42:3, 229.



### ***b. Challenges to the schemes in the past***

Farming equity share schemes have experienced their fair share of problems in the past. In a study conducted by the Surplus Peoples' Project (SPP) in 1998, various concerns regarding these schemes were raised.<sup>1186</sup> It was inevitable for the schemes to have problems as they had just been pioneered. These problems seem to have been addressed because in another study on these schemes conducted in 2003, evidence showed that the schemes were doing exceptionally well.<sup>1187</sup>

Learning from the mistakes of the past schemes, semi-share equity schemes have the potential to improve the performance of land reform projects. The schemes have the potential to skill and capacitate the new beneficiaries of land. They can also assist in achieving equitable distribution of wealth, incentivise the provision of funding by financial institutions, attract top quality management, enhance credit worthiness all of which are key goals of the country's land restitution project.<sup>1188</sup>

### ***c. Advantages of the semi-share equity schemes***

A semi-equity sharing scheme would stand a better chance of attracting financial assistance because the mentor has the farming experience and expertise. This is in contrast to many of the failed land reform projects in South Africa which "succumbed to weak management institutions."<sup>1189</sup> The government has focused so much on restitution alone that it has given little attention to establishing institutions that would help the beneficiaries to manage their land. As a result, some of the restitution land "has become an open access resource with individuals who are unable or unwilling to finance improvements and inputs."<sup>1190</sup> Instead of changing the socio-economic conditions of the beneficiaries, the process has further entrenched poverty because the beneficiaries have no capital or skills to work their land.<sup>1191</sup>

The current occurrence of failed and failing restitution farms in South Africa does not have an end in sight unless the "institutional foundations of the *restitution* process are re-

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<sup>1186</sup> For a detailed report, please see FAST, H. (1999). "An examination of the impact of share equity schemes on beneficiaries in the Western Cape and Mpumalanga." *Unpublished report prepared for the Land and Agriculture Policy Centre, Johannesburg.*

<sup>1187</sup> See Knight SL (2003). "Best institutional practices for farmworker and community equity sharing schemes." *Unpublished Master of Agricultural Management Thesis, School of Agricultural Sciences & Agribusiness, University of Natal, Pietermaritzburg.*

<sup>1188</sup> Knight S, Lyne M & Roth M (2003) 42:3, 232.

<sup>1189</sup> Knight S, Lyne M & Roth M (2003) 42:3, 230.

<sup>1190</sup> Knight S, Lyne M & Roth M (2003) 42:3, 230; Pitout K, Greene P & Lyne MC (1998) "Options for government's settlement/land acquisition grant." *Unpublished Research Paper for the National Land Committee, LIMA Rural Development Foundation, Pietermaritzburg, South Africa, 47.*

<sup>1191</sup> Knight S, Lyne M & Roth M (2003) 42:3, 230.

designed.”<sup>1192</sup> The need therefore to adopt a land-use mentorship programme or semi-equity farm share schemes as a way towards achieving successful land restitution among all South Africans presents a viable alternative to the current process. This has the potential to promote active and optimal sustainable use of agricultural land and will go a long way towards redistributing wealth without compromising agricultural productivity and the rural economy.<sup>1193</sup> The establishment of “land-use mentorship” programmes through semi-equity farm share schemes should be incorporated into the country’s land reform policy and legislation.

The present land restitution legislation does not provide for the skilling of and or post-settlement support for the beneficiaries. The United Nations Food and Agricultural Organisation (FAO) appreciates the need to skill land reform beneficiaries and capacitate them in working the land. The FAO’s position in this regard is that “land reform becomes more effective when beneficiaries have or acquire the necessary experience in land use and management and when they have the capacity to generate sustainable income or sufficient food. Rural infrastructure, improved technologies and a range of responsive rural services, including training, have proved essential to effective and lasting agrarian reform.”<sup>1194</sup>

In some examples of failed land reform projects, the inability to manage the farms led to failed projects. This was affirmed in the *Baphiring Community* case,<sup>1195</sup> where the court held that most land restitution and redistribution beneficiaries lacked the expertise needed to run restitution and redistribution projects. One of the reasons why white farmers in the apartheid and colonial era flourished in their commercial farming activities was because they received huge government assistance to run their projects. Skweyiya explains that white commercial farmers had access to land bank loans, tax incentives and subsidies which enabled them to successfully embark on large scale commercial farming.<sup>1196</sup> Inevitably, the new farmers will also need much skilling and support if they are to use their land productively and sustainably – what better way to achieve this than through having a mentorship scheme on land-use for unskilled beneficiaries.

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<sup>1192</sup> Knight S, Lyne M & Roth M (2003) 42:3, 230

<sup>1193</sup> Eckert JB, Hamman JN & Lombard JP (1996). “Perceiving the future: Empowering farmworkers through equity sharing.” *Development Southern Africa* 16(3):693-712.

<sup>1194</sup> Food and Agriculture Organization —FAO’s Contribution to Good Policies and Practices in Agrarian Reform and Rural Development: A Brief Overview| Paper presented at the International Conference on Agrarian Reform and Rural Development Porto Alegre (2006).

<sup>1195</sup> 2010 (3) SA 130 (LCC), para [26].

<sup>1196</sup> Skweyiya, Zola (1990) “Towards a Solution to the Land Question in Post-Apartheid South Africa: Problems and Models Debating the Land Issue” *South African Journal of Human Rights* (6) 200.

The government only gives *ad hoc* support to land reform beneficiaries.<sup>1197</sup> There exists no “specific institution which has the mandatory responsibility for driving and coordinating the provision of post-transfer support to beneficiaries, and little has been forthcoming in this regard.”<sup>1198</sup> Even the *ad hoc* support that beneficiaries receive does not address the problem of farm failure. The support normally only concentrates on giving monetary backing instead of equipping the beneficiaries with the necessary skills for using and working the land.

The farm equity share schemes promote co-ownership and as such, they create an institutional environment which is conducive for investment. One of the reasons why land restitution beneficiaries have struggled to attract financial assistance from banks is because they have no skills that would guarantee the success of their projects to the banks. Banks see it as risky business to invest money into a farming enterprise that is run by an unskilled person.

#### **iv. Compensation**

Compensation will be the final stage in the suggested approach to applying the social-obligation norm practically in the land restitution process. The RLA and the Constitution both provide for compensation to claimants where restitution of land is not possible. In this context, the suggestion is that where the claimants will or cannot comply with all the requirements set out above, then the State should opt to rather compensate them.

##### ***a. Compensation in the Act and the Constitution***

In section 34, the RLA<sup>1199</sup> provides that in some instances, claimants of land should rather receive compensation for their land than receive the actual land which was dispossessed. The

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<sup>1197</sup> Jacobs P et al (2003) “Evaluating Land and Agrarian Reform in South Africa” *An occasional paper series No 1: Redistribution* PLAAS University of the Western Cape 19.

<sup>1198</sup> Jacobs P et al (2003) 19.

<sup>1199</sup> Section 34 of the Act states:

“(1) Any national, provincial or local government body may, in respect of land which is owned by it or falls within its area of jurisdiction, make application to the Court for an order that the land in question or any rights in it shall not be restored to any claimant or prospective claimant.

(2) Notice of any such application shall be given to the Commission, which shall investigate and submit a report to the Court on the desirability of making an order referred to in subsection (1):

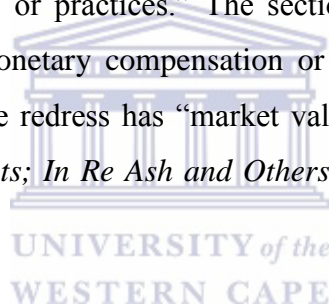
Provided that the provisions of sections 12 and 13 shall not be so construed that it prohibits the Commission from exercising the powers conferred by those sections for the purposes of such investigation.

(3) Any party making an application to the Court in terms of subsection (1) shall, at its own expense, take such steps as the relevant regional land claims commissioner (or in the case of proceedings in terms of Chapter IIIA, the Court) may direct in order to bring the application to the attention of other persons who may have an interest therein, in order that they may make submissions to and appear before the Court on the hearing of the application.

(4) The regional land claims commissioner concerned shall take such further steps as he or she deems appropriate to bring the application to the attention of persons who may have an interest.

section gives the court the power not to necessarily order restitution of the actual land in the event of a successful restitution claim. “The effect of such an order is to exclude in advance the remedy of restoration whatever the fate of the claim might otherwise be, where the public interest requires that it be done, rather than to decide on restoration in the final determination of the claim in the ordinary course.”<sup>1200</sup> The refusal to restore land rights espoused by section 34 (5) (b) should be, in terms of section 34 (6) (a), be in the public interest or, according to section 36 (b), because the restoration would cause substantial prejudice to the public.<sup>1201</sup>

This echoes the last part of section 25 (7) of the Constitution which provides that where restitution of property dispossessed as a result of apartheid discriminatory practices is not possible, the claimants are entitled to equitable redress for their land. According to section 1 of the RLA, equitable redress “means any equitable redress, other than the restoration of a right in land, arising from the dispossession of a right in land after 19 June 1913 as a result of past racially discriminatory laws or practices.” The section further explains that equitable redress can take the form of monetary compensation or the awarding of alternative land owned by the State.<sup>1202</sup> Equitable redress has “market value” as its starting point.<sup>1203</sup> In *Ex parte Former Highlands Residents; In Re Ash and Others v Department of Land Affairs*<sup>1204</sup> the court held that -



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- (5) After hearing an application contemplated in subsection (1), the Court may-
- (a) dismiss the application; (b) order that when any claim in respect of the land in question is finally determined, the rights in the land in question, or in part of the land, or certain rights in the land, shall not be restored to any claimant; (c) make any other order it deems fit.
- (6) The Court shall not make an order in terms of subsection (5)(b) unless it is satisfied that- (a) it is in the public interest that the rights in question should not be restored to any claimant; and (b) the public or any substantial part thereof will suffer substantial prejudice unless an order is made in terms of subsection (5) (b) before the final determination of any claim.
- (7) .....
- (8) Any order made in terms of subsection (5)(b) shall be binding on all claimants to the rights in question, whether such claim is lodged before or after the making of the order.
- (9) Unless the Court orders otherwise, the applicant shall not be entitled to any order for costs against any other party.”

<sup>1200</sup> *Minister of Defence and Another v Khosis Community at Lohatla and Others* (LCC16/97) [2002] ZALCC 39 (26 August 2002) para [3].

<sup>1201</sup> See *Minister of Defence and Another v Khosis Community at Lohatla and Others* (LCC16/97) [2002] ZALCC 39 (26 August 2002).

<sup>1202</sup> See also *In Re Kusile Land Claims Committee: Land Restitution Claim, Midlands North Research Group And Others* 2010 (5) SA 57 (LCC) para [10].

<sup>1203</sup> *Allie NO and Another v Department of Land Affairs and Others* (LCC13/00) [2002] ZALCC 50 (1 October 2002) para [45]; *Former Highlands Residents concerning area formerly known as the Highlands, Pretoria In re Ash and Others v Department of Land Affairs* [2000] 2 All SA 26 (LCC); *Khumalo and Others v Potgieter and Others* [2000] 2 All SA 456 (LCC); *Hermanus v Department of Land Affairs* 2001 (1) SA 1030 (LCC), [2000] 4 All SA 499 (LCC).

<sup>1204</sup> [2000] 2 All SA 26 (LCC).

“market value is the only factor of those listed in section 25(3) of the Constitution which is readily quantifiable, a determination of what constitutes just and equitable compensation would best be achieved by first determining the market value of the property and thereafter by subtracting from or adding to the amount of the market value, as other relevant circumstances may require.”

When the market value has been determined, other factors are then considered.<sup>1205</sup> The court also considers the provisions of section 33 of the RLA. Section 33 outlines more factors that should be regarded by the court in considering just and equitable compensation.<sup>1206</sup>

The compensation or equitable redress for land reflects a balance between the interests of those affected by the refusal to grant restitution and the public interest.<sup>1207</sup> This mirrors closely what happens in other foreign jurisdictions.<sup>1208</sup> For example, article 14(3) of the German Constitutional Court provides that balancing the interests of the public against the interests of the claimants provides the basis for determining compensation.<sup>1209</sup> In the German case of *BVerfGE*<sup>1210</sup> discussed in chapter 5.2.3, it was suggested that the compensation that a person or community could receive for their land in the public interest did not necessarily have to be equal to the market value of that property.

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<sup>1205</sup> *Allie NO and Another v Department of Land Affairs and Others* (LCC13/00) [2002] ZALCC 50 (1 October 2002) para [46].

<sup>1206</sup> Section 33 states:

“In considering its decision in any particular matter the Court shall have regard to the following factors:

- (a) The desirability of providing for restitution of rights in land to any person or community dispossessed as a result of past racially discriminatory laws or practices;
- (b) the desirability of remedying past violations of human rights;
- (c) the requirements of equity and justice;
- (cA) if restoration of a right in land is claimed, the feasibility of such restoration;
- (d) the desirability of avoiding major social disruption;
- (e) any provision which already exists, in respect of the land in question in any matter, for that land to be dealt with in a manner which is designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination in order to promote the achievement of equality and redress the results of past racial discrimination
- (eA) the amount of compensation or any other consideration received in respect of the dispossession, and the circumstances prevailing at the time of dispossession;
- (eB) the history of the dispossession, the hardship caused, the current use of the land and the history of the acquisition and use of the land;
- (eC) in the case of an order for equitable redress in the form of financial compensation, changes over time in the value of money;
- (f) any other factor which the Court may consider relevant and consistent with the spirit and objects of the Constitution and in particular the provisions of section 9 of the Constitution.”

<sup>1207</sup> Van der Walt AJ (1997) *The Constitutional Property Clause* 145.

<sup>1208</sup> See *BVerfGE* 24, 367 [1968]; *Sporrong and Lonnroth v Sweden* [1985] 5 EHRR 35; *James v United Kingdom* [1986] 8 EHRR 123 *European Convention of Human Rights, 1950*; *Dreher v Irish Land Commission and Others* [1984] ILRM 94 (Ireland).

<sup>1209</sup> See Van der Walt AJ (1997) *The Constitutional Property Clause* 145 footnote 5.

<sup>1210</sup> 24, 367 [1968] (*Deichordnung*).

### ***b. Sediba Reserve Land claim***

Another example of equitable redress preferred instead of actually giving back the land relates to the Free State Sediba Reserve claim.<sup>1211</sup> On the 10<sup>th</sup> of March 2012, about 500 families, who were part of the Sediba Reserve claimants were given R42-million by the Minister of Rural Development and Land Reform, Gugile Nkwinti. The reserves were established by the Native Land Act 27 of 1913. The ministry decided that because most of the claimants were too old to work the land productively and optimally, financial compensation was the appropriate remedy.<sup>1212</sup> The land was left in the hands of those that were willing and able to utilize it productively. This epitomizes a practical social-obligation norm. Agricultural land should not be restituted to those that will not utilize it actively and productively.

### ***c. Compensation not necessarily monetary***

Compensation need not necessarily be in monetary terms. Claimants can be compensated in various ways such as the provision of alternative settlement land. A precedent to this effect is the Pinetown example.<sup>1213</sup> In this case, 188 families were forcefully removed from Zeekoegat farm in KwaZulu-Natal near Pinetown in 1975 and 1976.<sup>1214</sup> These families had occupied this land since time immemorial. They were settled in KwaDengezi and KwaDabeka, which were nearby townships.<sup>1215</sup> With the advent of majority rule in South Africa, the families successfully claimed for restitution of their land. It was accepted that although they were entitled to restitution, the literal restoration of their land was not feasible. For this reason, while some beneficiaries would receive financial compensation, others (68) beneficiaries would receive residential sites from the council.<sup>1216</sup> This arrangement settled the claim.

A community in Chatha, from the Eastern Cape's Keiskammahoek also opted for compensation instead of literal restoration of its land. The community requested to have a community hall built for it, improvements to schools buildings and facilities, provision of sanitation, provision of four dams, and improvement of roads as compensation for their land.<sup>1217</sup>

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<sup>1211</sup> See <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=25615&tid=59118> ; <http://theweekly.co.za/?p=4263> (Both accessed 25.04.2012).

<sup>1212</sup> See <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=25615&tid=59118> ; <http://theweekly.co.za/?p=4263> (Both accessed 25.04.2012).

<sup>1213</sup> See Ria de Vos quoted by Surplus People Project (1999) *Land Restitution in South Africa and Alternative Forms of Compensation* p40 Surplus People Project: Cape Town.

<sup>1214</sup> See Ria de Vos quoted by Surplus People Project (1999).

<sup>1215</sup> See Ria de Vos quoted by Surplus People Project (1999).

<sup>1216</sup> See Ria de Vos quoted by Surplus People Project (1999).

<sup>1217</sup> See Ria de Vos quoted by Surplus People Project (1999).

#### v. No claim to be granted

If none of the alternatives suggested above is preferable to the claimants, then the RLA should authorise the State to deny the claim. This would be in the public interest. Section 34 (5) (b) and 34 (6) (a) and (b) of the RLA which have been referred to above, empower the court to refuse an application for restitution if this is either in the public interest or if restoration would prejudice the public. This is a principle which seems to filter even in mineral law as previously discussed. Of course, where a claimant feels that their claim was arbitrarily denied on account of failure to meet any of the suggested requirements, they can approach the Land Claims Court in terms of Chapter III of the Act.

### 7.4 Conclusion

The idea of property has been modified by new social realities. For this reason, the property clause as well as subsequent legislation should be changed to reflect these new social-realities and to this effect, property must serve a social function. In South Africa, the land restitution process was designed to address the injustices of the apartheid government which resulted in racially inequitable landownership patterns which favoured white people at the expense of indigenous black people. The challenge to the restitution process is dilemmatic in that on the one hand, it does return land to those that lost it unfairly while on the other hand however, it compromises the productiveness of such land. Of this, Mac Auslan<sup>1218</sup> and Cousins<sup>1219</sup> posit that land restitution laws encode divergent goals. Hebinck and Leynseele argue that the quandary of South Africa's land restitution process is that while it returns land to those that unjustly lost it, its economic flaws are significant and it raises concerns over its productivity, farm efficiency and community sustainability.<sup>1220</sup> This calls for a pragmatic and unconcealed introduction of the social-obligation norm principles to temper the rigid adherence to the *ius abutendi* of ownership in South Africa.

Landownership, particularly of arable cultivable land, must be limited to the extent that it promotes wasteful neglect of land. In fact, in 1984, Cowen argued that the understanding of ownership as unlimited and complete power over a thing was unacceptable in South Africa's modern day era.<sup>1221</sup> This understanding was strongly influenced by the reception of

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<sup>1218</sup> MacAuslan, P (1998) "Making Law Work: Restructuring Land Relations in Africa," *Development Change*.

<sup>1219</sup> Cousins, B (2000) "Introduction: Does land and agrarian reform have a future and, if so, who will benefit?" in B Cousins (ed) *At the Crossroads: Land and Agrarian Reform in South Africa into the 21<sup>st</sup> Century*, Cape Town/Johannesburg: PLASS.

<sup>1220</sup> Hebinck P and Leynseele VY (2008) 164.

<sup>1221</sup> Cowen DV *New Patterns of Landownership*. 71.

Pandectist philosophies as part of our law.<sup>1222</sup> Cowen argued that the new patterns of landownership which include sectional title, time-sharing, nature conservation areas, group and cluster housing – can only work in an environment which is not absolute, less rigid and less individualistic.<sup>1223</sup> Cowen therefore advocated for ownership which was not rigidly autonomous and individualistic.<sup>1224</sup> Ownership should rather recognize the social obligation norm of property ownership.<sup>1225</sup>

Constitutional and statutory reform entrenching the social-obligation norm is an effective means of addressing the problem of poorly performing land restitution projects. The protection and concomitant duty of the State in terms of section 25 of the Constitution is already welfare-oriented in order to assist the poor and landless in South Africa. A positively framed social-obligation norm will therefore not result in disruptive seismic changes to the Constitution. The changes will encourage an active rural economy based on agriculture and also assist in defining property rights in a way that allows those whose land was disposed unfairly in the past, to flourish. The need for a positive application of fundamental social-obligation principles in land restitution in South Africa is therefore clear. As discussed in chapter six, there already exists some recognition of the social-obligation norm principles in South African law. However, these principles need to be positively formulated in land restitution legislation. South Africa needs a bifurcated land restitution process that will act as an intervention strategy that assists in compensating victims of unjust historical land deprivations while also furthering a productionist agenda which promotes optimal, sustainable and productive use of land.

In all post-conflict societies such as those after the Cold War and post-apartheid countries like South Africa, restoration of land marked the “setting right some earlier breaking apart of the social fabric.”<sup>1226</sup> In some societies such as North America in the 1960s and early 1970s, land restitution was rapidly implemented to quell social unrest which saw the “seizure of Alcatraz in 1971 and the protest at the Wounded Knee in 1973.”<sup>1227</sup> In Canada as well, social unrest was quelled by land restitution when indigenous groups vehemently protested the Trudeau government’s attempts to do away with the Indian Act of 1876. The Trudeau

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<sup>1222</sup> Visser DP (1985) “The ‘Absoluteness’ of Ownership: The South African Common Law in Perspective” *Acta Juridica* 47.

<sup>1223</sup> Cowen DV *New Patterns of Landownership* 70-80.

<sup>1224</sup> Cowen DV *New Patterns of Landownership* 70-80.

<sup>1225</sup> Cowen DV *New Patterns of Landownership* 70-80.

<sup>1226</sup> Fay D and James D, (2009) “Restoring what was ours” (eds) *The Rights and Wrongs of Land Restitution* 3.

<sup>1227</sup> Fay D and James D, (2009) 3.



government promised land restitution strategies which simply sought to return lost land to people without any envisaged transformatory reforms for the “social fabric as a whole.”<sup>1228</sup> Of course, just like the current situation in South Africa, these restitution strategies were defective. They sought to deal with social unrest instead of being used as a bridge through which social transformation was achieved. There was inevitably a need to re-look the initial land restitution proposals which simply provided for the return of lost land, and replace them with more robust proposals that would provide solutions to the preliminary failed land restitution policies.<sup>1229</sup>

The reconsideration of failed land restitution policies also features in numerous parts of Latin America, particularly those that had protracted histories of the land issue. In Brazil, the passage of current restitution laws was prompted by the desire to correct the failures of the erstwhile restitution processes to produce the desired results. At the beginning of the 20<sup>th</sup> century, Mexico, whose land restitution policies simply sought to return land without ensuring the productive and agronomical utilization of such land, changed its policies and introduced a restitution policy which favoured market based policies that encouraged optimal and sustainable use of land.<sup>1230</sup>

The examples of Germany and Brazil that have been alluded to in chapter five contain positively framed constitutional property provisions. These have subsequently led to positively framed pieces of legislation. South Africa needs to have a positively expressed property clause which entrenches “socially oriented limitations on private property” in order to address the current problem of wasteful neglect of land. As argued in the entirety of this thesis, but mainly in the concluding chapter, the solution to poorly performing land restitution farms should begin by including a positively framed property clause in the Constitution and also by adopting the suggested application of, and amendments to, the RLA.

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<sup>1228</sup> Fay D and James D, (2009) 3.

<sup>1229</sup> See generally Crush Jonathan (1995) *Power of Development*.

<sup>1230</sup> Fay D and James D, (2009) 4.

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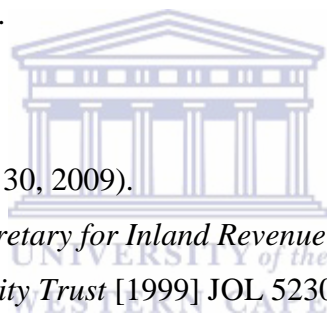
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