

*ENGAGED CITIZENSHIP AND THE ENABLING  
STATE AS FACTORS DETERMINING THE  
INTERFERENCE PARAMETER OF PROPERTY:  
A COMPARISON OF GERMAN AND  
SOUTH AFRICAN LAW*

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I INTRODUCTION

Since its conception, the idea of constitutional property protection and regulation in South Africa has been an academically captivating issue.<sup>1</sup> At first, politicians negotiated whether the Constitution should protect vested private property interests *and* contribute to the goals of political reform, and how such a compromise could be achieved.<sup>2</sup> Simultaneously, academics flexed their comparativist muscles, contemplating which of the prominent models of constitutional property protection encountered worldwide would lend itself best to adaptation for South Africa.<sup>3</sup> The main contenders were the

\* BA LLB LLM LLD (Stellenbosch). Special thanks to Prof Friedrich Schoch and his staff at the Institute for Public Law IV, University of Freiburg, for facilitating this research. I value greatly the input from and support of various colleagues, notably Cornie van der Merwe, Juanita Pienaar, Lourens du Plessis, André van der Walt, David Carey Miller, Tom Bennett, Peter Quint, Anne Pope and Elizabeth Cooke. I acknowledge with gratitude the technical and research assistance by Meyer van den Berg and Jacques Jacobs and the financial support of the Alexander von Humboldt Foundation and the National Research Foundation. Opinions and errors are my own and should not be attributed to any of these institutions or individuals.

<sup>1</sup> Representative of the earliest contributions are: Carole Lewis ‘The right to private property in a new political dispensation in South Africa’ (1992) 8 *SAJHR* 389; André van der Walt ‘Comparative notes on the constitutional protection of property rights’ (1993) 19 *Recht & Kritiek* 263; Shadrack Gutto *Property and Land Reform* (1995).

<sup>2</sup> More detail may be found in Hanri Mostert ‘South African constitutional property protection between libertarianism and liberationism: challenges for the judiciary’ (2000) 60 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 295.

<sup>3</sup> See eg André van der Walt ‘Notes on the interpretation of the property clause in the new constitution’ (1994) 57 *THRHR* 181; John Murphy ‘Interpreting the property clause in the constitution’ (1995) 10 *SA Public Law* 107; Duard Kleyn ‘The constitutional protection of property: A comparison between the German and the South African approach’ (1996) 11 *SA Public Law* 402; Andra Eisenberg ‘“Public purpose” and expropriation: Some comparative insights and the South African bill of rights’ (1995) 11 *SAJHR* 207; André van der Walt ‘“Double” property guarantees: a

Anglo-American and German models of constitutional property protection, although studies of many other jurisdictions were also undertaken.<sup>4</sup>

Eventually, the negotiators came up with s 25 of the 1996 Constitution. It regulates the extent to which the state can justifiably place restrictions on private property, and the circumstances under which compensation can be claimed for such restrictions. These are the kinds of provisions one finds in many jurisdictions boasting constitutional entrenchment of private property rights, and/or constitutionally imposed standards for the limitation of property rights. But the South African property clause goes further. It provides a blueprint for reforming existing patterns of control over land. It contains a commitment to the objectives of access to land, provision of legally secure land tenure, land restitution and related reforms. Accordingly, the South African property clause is characterised by an inherent tension between its dichotomously protective and reformative aspects.<sup>5</sup>

The characteristically comparative academic discourse, which arose from the enactment of the property clauses in the Interim Constitution and later the 1996 Constitution, eventually turned inward. Studies became more concerned with the unique nature of the South African property clause and the very specific contexts in which it had to be applied, although they generally remained mindful of the bigger comparative picture.<sup>6</sup> Most of the

structural and comparative analysis' (1998) 14 *SAJHR* 560; André van der Walt 'Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings' (1999) *SA Public Law* 273; André van der Walt 'Moving towards recognition of constructive expropriation' (2002) 65 *THRHR* 459. This list is not comprehensive.

<sup>4</sup> Most notably in André van der Walt *Constitutional Property Clauses — A Comparative Analysis* (1999). See also John Murphy 'Insulating land reform from constitutional impugment: An Indian case study' (1992) 8 *SAJHR* 362.

<sup>5</sup> André van der Walt *Constitutional Property Law* (2005) 17.

<sup>6</sup> Representative are: André van der Walt 'Exclusivity of ownership, security of tenure and eviction orders: A critical evaluation of recent case law' (2002) 18 *SAJHR* 254 and 372; André van der Walt 'Negating Grotius — the constitutional validity of statutory security rights in favour of the state: *First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Service* 2001 (7) BCLR 715 (C)' (2002) 18 *SAJHR* 86; André van der Walt 'Property rights v religious rights: *Bühmann v Nkosi*' (2002) 13 *Stellenbosch LR* 394; Theunis Roux (updated by Dennis Davis) 'Property' in Halton Cheadle, Dennis Davis & Nicholas Haysom *South African Constitutional Law: The Bill of Rights* 2 ed (Service 5, 2007); Kevin Hopkins & Kate Hofmeyr 'New perspectives on property' (2003) 120 *SALJ* 48; Theunis Roux 'Property' in Stuart Woolman et al (eds) *Constitutional Law of South Africa* 2 ed vol 3 (2003); André van der Walt 'Striving for the better interpretation — A critical reflection on the Constitutional Court's *Harksen* and *FNB* decisions on the property clause' (2004) 121 *SALJ* 854; André van der Walt 'Retreating from the *FNB* arbitrariness test already? *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC for Local Government and Housing, Gauteng (CC)*' (2005) 122 *SALJ* 75; André van der Walt 'The state's duty to protect property owners vs the state's duty to provide housing: Thoughts on the *Modderklip* case' (2005) 21 *SAJHR* 144; André van der Walt 'Ownership and eviction: Constitutional rights in private law' (2005) 9 *Edinburgh LR* 32; André van der Walt 'The state's duty

studies undertaken indicated that the political compromise embodied in the property guarantee, alongside the many comparative influences that shaped its character, caused some uncertainty as to the exact meaning and content of the property clause. Everyone eagerly awaited an authoritative judicial pronouncement on constitutional property protection and regulation. Some years passed,<sup>7</sup> however, before the South African judiciary had an appropriate opportunity in 2002 to test the provisions of the property clause.<sup>8</sup>

to pay “just and equitable” compensation for expropriation: Reflections on the *Du Toit* case’ (2005) 122 *SALJ* 765; Van der Walt *Constitutional Property Law* op cit note 5; Juanita Pienaar & Hanri Mostert ‘Uitsettings onder die Suid-Afrikaanse grondwet: Die verhouding tussen artikel 25(1), artikel 26(3) en die uitsettingswet’ 2006 *TSAR* 277 and 522; André van der Walt ‘Transformative constitutionalism and the development of South African property law’ 2005 *TSAR* 655 and 2006 *TSAR* 1; Warren Freedman ‘The constitutional right not to be deprived of property: the Constitutional Court keeps its options open’ 2006 *TSAR* 83; André van der Walt ‘Reconciling the state’s duties to promote land reform and to pay ‘just and equitable’ compensation for expropriation’ (2006) 123 *SALJ* 23. This list is not comprehensive.

<sup>7</sup> There was cursory consideration of the forerunner of the current property clause, i.e. s 28 of the 1993 (Interim) Constitution, in *Transkei Public Servants’ Association v Government of the Republic of South Africa & others* 1995 (9) BCLR 1235 (Tk) and *Transvaal Agricultural Union v Minister of Land Affairs & another* 1996 (12) BCLR 1573 (CC). More substantial discussion of s 28 in *Harksen v Lane* NO 1997 (11) BCLR 1489 (CC), which dealt with the distinction between deprivations and expropriations (see André van der Walt & Henk Botha ‘Coming to grips with the new constitutional order: Critical comments on *Harksen v Lane* NO’ (1998) 13 *SA Public Law* 17). In the *First Certification Case (In re: Certification of the Constitution of the Republic of South Africa, 1996)* 1996 (10) BCLR 1253 (CC) the Constitutional Court dismissed objections against the validity of s 25 of the 1996 Constitution along the lines that it did not make explicit provision for a right to acquire, hold and dispose of property; that the provisions concerning expropriation and compensation were inadequate; and that there was no explicit guarantee for immaterial property rights. The court held that there was no universal standard or formulation with which s 25 had to comply.

<sup>8</sup> The first extensive consideration of s 25 by the Constitutional Court was in 2002, in *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), which is discussed below. Various provincial and local divisions of the High Court and the Supreme Court of Appeal have also considered s 25 in a number of cases, which include: *Joubert v Van Rensburg* 2001 (1) SA 753 (W) (eventually heard by the Constitutional Court in *Mkangeli v Joubert* 2001 (1) SA 1191 (CC)); *Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 (SCA); *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* 2002 (1) BCLR 23 (T); *Transvaal Agricultural Union v Minister of Agriculture & Land Affairs & others* 2003 4 SA 411 (LCC); *City of Cape Town v Rudolph & others* 2003 11 BCLR 1236 (C); *Abrams v Allie* NO & others 2004 9 BCLR 914 (SCA); *Prophet v National Director of Public Prosecutions* 2006 (1) SA 38 (SCA); *Minister of Transport v Du Toit* 2005 (1) SA 16 (SCA); *Transnet Ltd v Nyawuza & others* 2006 (5) SA 100 (D); *National Director of Public Prosecutions v Gerber & another* 2007 (1) SA 512 (W); *City of Cape Town v Helderberg Park Development (Pty) Ltd* 2007 (1) SA 1 (SCA); *Carmel Trading Company Limited v Commissioner for the South African Revenue Service & others* [2008] 2 All SA 125 (SCA). More recent Constitutional Court decisions which involved an interpretation of s 25 are *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett & others v Buffalo City Municipality*; *Transfer Rights Action Campaign & others v Member of the Executive Council for Local*

The burgeoning body of case law, especially since 2002, shows that the universally unavoidable task, regardless of the intricacies of any given case, is to determine — and justify — the parameters of permissible legislative interference with specific property rights. This general task encompasses numerous, more specific, enquiries. It involves issues about: the exact make-up of constitutionally acknowledged interferences with property; which purposes would justify interference; what kind of interference should give rise to compensation; and how compensation should be determined in such cases. This array of legal questions will be referred to as the ‘interference parameter issue’.

My premise is that the interference parameter issue connects intimately to the relationship between existing private property interests and state purposes. This relationship is reflected by the questions, frequently broached in case law, about the kinds of duties attributed to the state in dealings with private property and public interest, and the responsibilities befalling individuals whose property rights are affected by state conduct. The balance between private and public interests in matters of property protection and regulation is neither novel, nor peculiar to the South African setting. Recent comparative scholarship<sup>9</sup> demonstrates that issues around the responsibilities of citizenship and the duties of the state are prevalent in at least the two jurisdictions which are favoured comparators with regard to South African constitutional property law. The question that arises is how these issues influence decisions about the parameters of constitutional property protection and regulation. In what follows, the South African Constitutional Court’s first major attempt to engage with the interference parameter issue is used to explain the point of departure in matters pertaining to constitutional property protection and regulation. A comparative survey of German law clarifies the meaning and importance of social contextual factors in the interpretation of second (and third) generation property clauses, once the relevance of the German example for South Africa is established. Subsequent South African Constitutional Court decisions are then discussed to reinforce the argument about the importance of social/contextual factors in the interpretation of a constitutional property clause. In the conclusion, the German law example is referred to again to evaluate the trends emerging from the South African situation.

*Government and Housing, Gauteng & others* 2005 1 SA 530 (CC), discussed below; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2005 (5) SA 3 (CC), discussed below; *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC), discussed below; *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC); *Prophet v National Director of Public Prosecutions* 2006 (2) SACR 525 (CC); *Monhuran & another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 4 SA 222 (CC); and *Phumelela Gaming and Leisure Ltd v Gründlingh & others* 2007 (6) SA 350 (CC). The lists are not exhaustive

<sup>9</sup> Gregory Alexander *The Global Debate Over Constitutional Property — Lessons for American Takings Jurisprudence* (2006).

## II THE FRAMEWORK FOR CONSTITUTIONAL PROPERTY PROTECTION IN SOUTH AFRICA: THE *FNB* DECISION

The 2002 Constitutional Court decision in *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance*<sup>10</sup> ('the *FNB* decision') was the first major engagement with s 25. It still represents the most comprehensive consideration to date of the structure and application of s 25 to particular disputes. As such, it remains a useful point of departure, and a valuable account of the framework for constitutional property protection and regulation in South Africa. The decision solved some of the interpretative difficulties with s 25, but raised new questions. It also challenged the acceptance of the role of comparative law in the interpretation of the South African constitutional property clause.

The case dealt with the constitutionality of a law permitting the confiscation, by the Revenue Service, of movable property (motor vehicles) belonging to First National Bank, to settle the tax debt of some of the bank's debtors, who were purchasing the property by way of installments.<sup>11</sup> In applying s 25 to the matter, the court took its cue from an idea of which different versions had long been supported in South African scholarship:<sup>12</sup> it confirmed that the South African Constitution foresees a broad range of limitations on property rights, generally designated as 'deprivations'. Deprivations that give rise to compensation form a special 'subcategory' within this system.<sup>13</sup> They are designated as 'expropriations'. In terms of this understanding of s 25(1), read with the general limitations clause (s 36(1) of the Constitution) all *deprivations* (also *expropriations*) must be undertaken by a law of general application, may not be arbitrary, and must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. In addition, s 25(2) expressly requires *expropriations* to be for a public purpose or in the public interest. Also, a constitutionally valid *expropriation* invariably must give rise to the payment of compensation, according to s 25(3).

<sup>10</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>11</sup> Section 114 of the Customs and Excise Act 91 of 1964. For more detail, see André 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)' op cit note 6.

<sup>12</sup> André van der Walt *The Constitutional Property Clause — A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 115; André van der Walt *Constitutional Property Clauses* op cit note 4 at 335–6, André van der Walt *Constitutional Property Law* op cit note 5 at 186–9; Roux 'Property' in Woolman et al (eds) *Constitutional Law of South Africa* op cit note 6 at 46–29. Roux (updated by Davis) 'Property' in Cheadle et al *South African Constitutional Law: The Bill of Rights* op cit note 6 at 20–19; and Kevin Hopkins & Kate Hofmeyr op cit note 6 at 54.

<sup>13</sup> *FNB* supra note 10 paras 59ff.

This valuable contribution clarifies two core concepts within the constitutional property inquiry.<sup>14</sup> The court went further, using the s 25(1) prohibition against ‘arbitrary’ deprivations to develop a flexible test by which to determine whether ‘sufficient reason’ existed for an infringement upon property rights.<sup>15</sup> The court’s brief comparative survey<sup>16</sup> confirmed its understanding of the non-arbitrariness requirement appearing in the deprivations clause. According to the court, the ‘sufficient reason’ test entailed the consideration of various relationships. These include: the purpose of the infringement in relation to the law effecting it; the purpose of the infringement in relation to the affected property or its owner; and the nature of the affected property in relation to the extent and purpose of the deprivation.<sup>17</sup>

In explaining the ‘sufficient reason’ test, the court outlined broadly the purposes that would justify infringement of property rights. Where ownership of land or corporeal movable items were affected by a restriction, the purpose of the restriction would have to be more compelling than in the case of less extensive property rights. Likewise, for an encompassing restriction affecting all the incidents of ownership, there would have to be a more compelling purpose than where only some of the incidents of ownership are affected.<sup>18</sup> The court stressed that ‘sufficient reason’ would sometimes be established by ‘no more than a mere rational relationship between means and ends’, while in other cases a full-blown proportionality inquiry would be necessary.<sup>19</sup> In this particular case, the court found that the ‘net was cast far too wide’.<sup>20</sup> The provision was struck down for being unconstitutional.

Although the *FNB* case is not the final word on the scope of permissible interference with property, it is an important signpost. First, through its identification of the types of considerations that would determine ‘sufficient reason’ for an infringement,<sup>21</sup> the court engaged with the complex relationship between the individual and the state, and the various levels at which it may be important.<sup>22</sup> The court provided very general guidelines to determine whether a particular infringement is excessive. The flexible ‘sufficient reason’ test was not designed to provide any clarity up front as to all possible purposes that would or would not justify infringement. The court’s exposition even suggested that uncertainty will prevail, for the sake of flexibility, in

<sup>14</sup> See comments on the court’s contribution in eg Roux ‘Property’ in Woolman et al (eds) *Constitutional Law of South Africa* op cit note 6 at 46–29 to 46–33; Hanri Mostert ‘The distinction between deprivations and expropriations and the future of the “doctrine” of constructive expropriation in South Africa’ (2003) 19 *SAJHR* 567.

<sup>15</sup> *FNB* supra note 10 para 100ff.

<sup>16</sup> The court covered five different jurisdictions between paras 71 and 99 of the decision.

<sup>17</sup> *FNB* supra note 10 para 100.

<sup>18</sup> *Ibid* para 100(e)–(f).

<sup>19</sup> For a more detailed analysis see Mostert op cit note 14.

<sup>20</sup> *FNB* supra note 10 para 108.

<sup>21</sup> See note 17 and its accompanying text.

<sup>22</sup> *FNB* supra note 10 para 100ff.

the young South African constitutional democracy. The instances where the additional requirements for expropriation are not applicable will probably be most problematic in future case law. In particular, the lack of a clear public purposes requirement in s 25(1) renders it uncertain which state functions would warrant permissible infringement *not* amounting to expropriation.

In the second place, the *FNB* decision suggested that the unique circumstances of South Africa would determine how particular legal rules should be understood, even if these originally had their roots in comparative law. Nevertheless, the court's analysis still acknowledged that comparative law is important for constitutional property discourse. *FNB* used a comparative inquiry to confirm that uncompensable deprivation of private property may be in the public interest.<sup>23</sup> It also illustrates that the justification for valid infringement pivots on the relationship between 'the sacrifice the individual is asked to make and the public purpose this is intended to serve'.<sup>24</sup> This latter point has gained further importance in subsequent case law, even though reliance on comparative law has waned, regrettably. In the following sections, I illustrate how reference to comparative law can elucidate the relationship between the individual, the public and the state in matters of property.

### III PROPERTY AND THE SOCIAL OBLIGATION IN GERMAN LAW

Whereas one may turn to a number of jurisdictions for comparative guidance, my focus here is the German system. Although the German and South African societies nowadays are confronted with very different issues, the perception that vast social differences between these systems may limit the significance of any legal comparative work, is mistaken. There are important correlations between the two systems, which render comparison suitable and valuable. South African property law is very similar to the German system of property law, due to their shared roots in the Roman property law tradition, and the influence of the German Pandectists on early developments in South African property law.<sup>25</sup> Major transitional events marked the introduction of constitutions with justiciable bills of rights in both systems: the end of the Second World War in 1945 for Germany, and the end of apartheid in 1994 for South Africa. Further, both the South African and German legal systems acknowledge the effect of their respective

<sup>23</sup> *Ibid* para 97.

<sup>24</sup> *Ibid* para 98.

<sup>25</sup> André van der Walt 'The South African law of ownership: A historical and philosophical perspective' (1992) 2 *De Jure* 454, with reference to the first edition of Cornie van der Merwe *Sakereg* (1979) that reflected the framework and content of the Dutch Asser series, which was influenced by the Pandectist methodology and terminology.

constitutions on private law.<sup>26</sup> German law was thus of particular interest in the early days of comparative academic discourse on South African constitutional property protection.

The German Basic Law is described as a second-generation (post-World War II) constitution, and in this sense it is juxtaposed with the American Constitution, which is a typical eighteenth-century, first-generation, classical-liberal constitutional document.<sup>27</sup> Whereas the libertarian American Constitution deals with civil and political rights only, the German Basic Law focuses on rights *as well as* duties, and is distinctly dignitarian.<sup>28</sup> The German Basic Law had a tremendous influence on the modern world, especially on many of the countries whose constitutions were written after the Second World War.<sup>29</sup> In particular, German constitutional property law was one of the fundamental examples relied upon in the drafting of the various versions of the South African constitutional property clause prior to its enactment.<sup>30</sup> South African interest in German law as a comparative agent dwindled after the final Constitution was enacted, partly because of practical problems of access to sources, and partly because of politics. On the practical side, problems such as the 'language barrier'<sup>31</sup> and the non-availability of German literature in South Africa<sup>32</sup> may be mentioned. Moreover, political factions within the constitutional assembly that wanted to secure the strictest possible protection of property for private individuals were hesitant to support a model of strong property protection tempered by the possibility of state interference with private property for the sake of the public interest, such as that encountered in German law.<sup>33</sup> For a while after the introduction of the final Constitution, comparative focus veered towards the Anglo-American jurisdictions. Interest in German law is, however, on the increase again.<sup>34</sup>

<sup>26</sup> Eg Van der Walt 'Transformative constitutionalism and the development of South African property law (part II)' op cit note 6.

<sup>27</sup> Alexander op cit note 9 at 11.

<sup>28</sup> Ibid at 11–12.

<sup>29</sup> Ibid at 12.

<sup>30</sup> Jörg Fedtke *Die Rezeption von Verfassungsrecht* (2000) 329–33.

<sup>31</sup> Matthew Chaskalson 'The problem with property: Thoughts on the constitutional protection of property in the United States and Commonwealth' (1993) 9 *SAJHR* 388 envisaged the dominance of Anglophonic jurisdictions as far as comparative choices are concerned. However, the 'language barrier' argument holds true only partially. The abstract and deductive reasoning processes of the continental legal family continue to be attractive to South African comparative lawyers. See John Murphy 'Property rights and judicial restraint: A reply to Chaskalson' (1994) 10 *SAJHR* 386; Johan de Waal 'A comparative analysis of the provisions of German origin in the Interim Bill of Rights' (1995) 11 *SAJHR* 1–2n1.

<sup>32</sup> Van der Walt 'Notes on the interpretation of the property clause in the new constitution' op cit note 3 at 192ff.

<sup>33</sup> See Fedtke op cit note 30 at 342.

<sup>34</sup> See eg Van der Walt 'Transformative constitutionalism and the development of South African property law' (part I) op cit note 6 at 1 and (part II) op cit note 26 at 26ff, where it is argued that German law has some relevance for the South African judiciary's recent focus on the state's duty to protect fundamental rights.

German constitutional property law certainly offers interesting insights as regards problems such as those discussed here.

The South African Constitution, like the German Basic Law, is a modern and transformative instrument.<sup>35</sup> They are similar as regards the acknowledgement of more than only civil and political rights. Being of the third generation, however, the South African Constitution goes even further by enumerating specific social and economic rights as positive constitutional rights. As such, the South African Constitution is liberationist, rather than libertarian.<sup>36</sup> With this typification, focus is placed on: adherence to ideologies ranging from social-democratic to the democratic-socialist; some degree of tolerance for an interventionist state, for the sake of equality; and fair social distribution. Hence, socio-economic upliftment is a core goal of the South African Constitution.<sup>37</sup>

Despite their different contexts, the German and South African constitutional property systems limit the constitutional right to property from the outset. In both systems, an overriding obligation is imposed on property: it must be socially useful. Both the German and South African property clauses textually affirm that the constitutional right to property serves the needs of their respective societies.<sup>38</sup> Contrary to the American system of constitutional property protection, the German and South African constitutional paradigms already incorporate a textual acknowledgement that private rights are subject to societal considerations.<sup>39</sup> Conversely, a responsibility rests upon private owners to exercise their rights in a way that promotes the general public good. What remains is to establish the scope of such an individual responsibility for promoting the public interest. This is where the comparative insights from German law may be most helpful for the South African setting.

The German system hence is a valuable comparative agent here, mainly because of how it deals with the relationship between the individual and society in defining the parameters of permissible infringement on property rights.<sup>40</sup> The German judiciary's focus on the state's duty to protect

<sup>35</sup> Van der Walt (part I) *ibid*, relying on Klaus Stern *Staatsrecht der Bundesrepublik Deutschland* III/1 (1988) 1553.

<sup>36</sup> See Lourens du Plessis 'The genesis of the chapter on fundamental rights in South Africa's transitional constitution' (1994) 9 *SA Public Law* 17; Lourens du Plessis 'Drafting the chapter on fundamental rights' in Bertus de Villiers *Birth of a Constitution* (1994) 89 at 91–2; and the implications of this characterisation in Hanri Mostert *op cit* note 2 at 295–330.

<sup>37</sup> Du Plessis *SA Public Law* *ibid* at 3 and Du Plessis in De Villiers *Birth of a Constitution* *ibid*.

<sup>38</sup> Alexander *op cit* note 9 at 7.

<sup>39</sup> *Ibid*.

<sup>40</sup> A preliminary assessment may be found in Hanri Mostert 'The constitutional state, the social state and the constitutional property clause — Observations on the translation of German constitutional principles into south african law and their treatment by the judiciary' (2002) 62 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 347. See in general Ulrich Hösch *Eigentum und Freiheit — Ein Beitrag zur inhaltlichen Bestimmung der Gewährleistung des Eigentums durch Art. 14 Abs. 1 Satz 1*

fundamental rights is a particular point of interest, because it provides a valuable counterpoint to the similar South African discourse. The inherent dichotomy resulting from the political compromise incorporated in the South African property clause — to regard the constitutional guarantee as a tool for both protecting individual freedom and for initiating social change<sup>41</sup> — renders evaluative comparison all the more important. German law provides a helpful standard for such an exercise.

(a) *The 'basic right with several variables'*

The German property clause, art 14 of the Grundgesetz (GG/'Basic Law'), endorses the institution of property and simultaneously acknowledges that property rights are created and restricted by their specific social context. Commentators do not agree about whether this dual commitment of art 14 GG is inherently dichotomous<sup>42</sup> or not.<sup>43</sup> This commitment nevertheless is the backbone of the German courts' interpretation of the property guarantee, and accounts for the description of the German property clause as 'the basic right with several variables'.<sup>44</sup>

In German law, the constitutional model of property that developed during the twentieth century endorses the elementary idea that property should benefit its holders.<sup>45</sup> This means that, constitutionally, the factual ability of owners to use their property (Privatnützigkeit/Nutzungsbefugnis) and their legal ability to dispose of it (Verfügungsbefugnis) are guaranteed, alongside the constitutional entrenchment of the institution of property as such (Bestandsgarantie).<sup>46</sup> Accordingly, the institutional legitimacy of private property is confirmed and positive constitutional protection is envisaged.<sup>47</sup> 'Property' (Eigentum) is not defined in the German property clause,<sup>48</sup> but art 14 I 1 GG is phrased in general terms, enabling an all-encompassing

GG, (2000); Jan-R Sieckmann *Modelle des Eigentumsschutzes — Eine Untersuchung zur Eigentumsgarantie des Art. 14 GG* (1998); Jochen Rozek *Die Unterscheidung von Eigentumsbindung und Enteignung* (1998).

<sup>41</sup> Compare Frank Michelman 'Mr Justice Brennan: A property teacher's appreciation' (1980) 15 *Harvard Civil Rights — Civil Liberties LR* 304 as regards the American context.

<sup>42</sup> Eg Van der Walt *Constitutional Property Clauses* (1999) op cit note 4 at 122; Samuel Finer, Vernon Bogdanor & Bernard Rudden *Comparing Constitutions* (1995) 37–8.

<sup>43</sup> Eg Gregory Alexander 'Property as a fundamental constitutional right? The German example' (2003) 88 *Cornell LR* 733.

<sup>44</sup> Bodo Pieroth & Bernard Schlink *Grundrechte — Staatsrecht II* (2006) 226–7 margin note 895.

<sup>45</sup> Joachim Wieland 'Artikel 14 [Eigentum, Erbrecht, Enteignung]' in Horst Dreier (ed) *Grundgesetz Kommentar* 2 ed (2004) 1251 margin note 29.

<sup>46</sup> *Ibid.*, and Pieroth & Schlink op cit note 44 at 226–7 margin note 895.

<sup>47</sup> Alexander op cit note 43 at 736.

<sup>48</sup> Hans-Jürgen Papier 'Art. 14' in Theodor Maunz & Günter Dürig *GG Kommentar* (service issue 40, 2002) margin note 62. BVerfGE 36, 281 at 290–1; BVerfGE 42, 263 at 292–3; BVerfGE 51, 193 at 218; BVerfGE 58, 300 at 335–6.

understanding of property in its constitutional sense.<sup>49</sup> It is left to the legislature expressly (in art 14 I 2 GG), and the judiciary by implication, to determine which proprietary interests would qualify for constitutional protection. As in South Africa, the lack of a constitutional definition of property opens the system of constitutional protection to the dynamics in German society, enabling the legislature and the judiciary to incorporate changes in common perceptions into the law, while maintaining the Basic Law as a guideline by which to measure such changes.<sup>50</sup>

(b) *Property, self-realisation and the social obligation*

The entrenchment of private rights is juxtaposed with the regulative ability of the German legislature to determine the limits and contents of property (*gesetzgeberische Gestaltungsbefugnis/Inhalts- und Schrankenbestimmung*).<sup>51</sup> The regulative ability of the legislature (*Gestaltungsbefugnis*) is, however, tempered by its duty to develop a social model which acknowledges private property on the one hand (in art 14 I 1 GG), and which supports *socially responsible conduct* with property on the other hand (in art 14 II GG).<sup>52</sup> This is the 'social obligation' (*Sozialbindung*) of property.

The regulatory leeway varies from case to case, depending on the social relevance of the particular property interest at stake: disputes that arose from German rent control law<sup>53</sup> and land use control rules<sup>54</sup> demonstrate that the more socially relevant a particular property interest, the greater the legislative scope to regulate such an interest.<sup>55</sup> Simultaneously, case law demonstrates that property tends to be protected in a fundamental sense, in so far as an individual needs it to develop fully as a moral agent and a participating member of the broader community.<sup>56</sup> So, property is protected in Germany, not to create a secure zone against the powerful and threatening state, but to enable individuals to reach their full potential.<sup>57</sup> Accordingly, the purpose of

<sup>49</sup> Private property and productive property (*Produktiveigentum*); immovables and movables; as well as small commercial enterprises and large corporations are protected in terms of art 14 GG. Yet, the wide concept of property recognised for purposes of article 14 GG does not simply include all rights or interests that have some patrimonial value. Martin Thormann *Abstufungen in der Sozialbindung des Eigentums* (1996) 63–75.

<sup>50</sup> BVerfGE 20, 351 at 355; BVerfGE 24, 367 at 389; BVerfGE 25, 112 at 117–18; BVerfGE 36, 281 at 290; BVerfGE 58, 300 at 335. All these decisions confirm that content and functions of property can and must be adapted to serve social and economic conditions. The legislature should undertake such adaptation where necessary, keeping in mind the fundamental constitutional and ethical values.

<sup>51</sup> Wieland op cit note 45 at 1279 margin note 74.

<sup>52</sup> BVerfGE 25, 112 at 118; BVerfGE 52, 1 at 32–3.

<sup>53</sup> BVerfGE 95, 64 at 84.

<sup>54</sup> BVerfGE 101, 54 at 76–7.

<sup>55</sup> Wieland op cit note 45 at 1287–8 margin note 89. Further also BVerfGE 50, 290 at 340–1.

<sup>56</sup> BVerfGE 24, 367 at 389.

<sup>57</sup> Alexander op cit note 43 at 748.

constitutional property protection in Germany is ‘moral and civic’, rather than economic. Conversely, the right of property implicates the values of human dignity and self-realisation and is understood to follow the lines of civic republicanism.<sup>58</sup>

A sophisticated system has developed in German law to help the courts deal with the political undercurrents of the state’s regulatory powers pertaining to property,<sup>59</sup> define the ambit of interference with property,<sup>60</sup> and determine (financial and other) consequences of various kinds of interference.<sup>61</sup> To illustrate, the history of expropriation jurisprudence may be mentioned. Under German law, the courts are specialised. Expropriation issues nevertheless fall within the purview of both the administrative and civil courts.<sup>62</sup> This has resulted in different theories, developed by these courts, about the distinction between expropriation and regulation (*Inhalts- und Schrankenbestimmungen*) of property.

The Federal Supreme Court’s approach had the upper hand for some time. It supported a broad notion of expropriation.<sup>63</sup> The Federal Supreme Court’s expropriation-oriented approach focused on the idea that expropriation requires a *sacrifice* from the affected landowner that needs to be evened (ie the so-called *Aufopferungsgedanke*).<sup>64</sup> It applied a very formal criterion to determine whether an infringement of property expected a *special sacrifice*<sup>65</sup> from the owner, which went against the principles of equality. This became known as the ‘doctrine of individual sacrifice’ (*Sonderopfertheorie*). It introduced a relatively simple criterion — that of the *unzumutbare Sonderopfer* (unacceptable, unreasonable and extraordinary sacrifice) — to determine whether compensation for expropriation was necessary. The problem was that the court’s application of this theory over time resulted in a

<sup>58</sup> *Ibid* at 739.

<sup>59</sup> Christoph Engel ‘Die soziale funktion des eigentums’ in Thomas Von Danwitz, Otto Deppenheuer & Christoph Engel *Bericht zur Lage des Eigentums* (2002) 25; Wieland *op cit* note 45 at 1286–9 margin notes 86–91. See also the discussion of transformative tendencies in the jurisprudence of the Federal Constitutional Court on article 14 by Markus Appel ‘Eigentumsgrundrechtlicher bestands- oder rechtsstaatlicher Vertrauensschutz — was schützt den Eigentümer?’ (2005) *Deutsches Verwaltungsblatt* 340.

<sup>60</sup> Wieland *op cit* note 45 at 1289 margin notes 86–91.

<sup>61</sup> Uwe Kischel ‘Wann ist die Inhaltsbestimmung Ausgleichspflichtig?’ (2003) *Juristenzeitung* 604.

<sup>62</sup> The Federal Supreme Court (*Bundesgerichtshof*) has jurisdiction with regard to the compensation that has to be paid for expropriations, whereas the Federal Administrative Court (*Bundesverwaltungsgericht*) has jurisdiction concerning the validity of administrative decisions and actions pertaining to expropriation. The Federal Constitutional Court (*Bundesverfassungsgericht*) has jurisdiction with regard to the question whether legislation, actions of the state or court decisions are in accordance with the Basic Law.

<sup>63</sup> Hartmut Maurer *Allgemeines Verwaltungsrecht* 16 ed (2006) 705 (§ 27 margin notes 15–16).

<sup>64</sup> *Ibid* at 701–4 (§ 27 margin notes 7–11).

<sup>65</sup> BGHZ 6, 270 at 280.

broadening of the notion of expropriation to the extent that the state's regulative capacity over private property was jeopardised.<sup>66</sup>

Other theories, developed in academic literature and in the administrative courts, focused rather on the substantive delimitation of the concepts of expropriation and deprivation/regulation of property.<sup>67</sup> There is no scope here for a detailed analysis. The 'doctrine of intensity' (Schweretheorie) of the Federal Administrative Court, for instance, entailed that the gravity of the administrative measure directed against the property, together with the weight of the burden placed upon the individual owner, would determine whether the limits of the social function of property had been overstepped.<sup>68</sup> This would dictate whether compensation was required.

The application of these different theories eventually resulted in the deeply contested distinction between expropriatory infringements (enteignende Eingriffe) and quasi-expropriatory infringements (enteignungsgleiche Eingriffe).<sup>69</sup> This distinction pivots on the effects, legality and consequences of any given administrative action.<sup>70</sup> German lawyers regard this topic as a potential quagmire of problems.<sup>71</sup> For current purposes, it suffices to note that the introduction of these notions into the law confused the terminology of constitutional property protection and state liability.<sup>72</sup> It was argued that

<sup>66</sup> Maurer op cit note 63 at 707–10 (§ 27 margin notes 20–4).

<sup>67</sup> These include, eg the Schutzwürdigkeitstheorie, Substanzminderungstheorie, Zumutbarkeitstheorie, Privatnützigkeitstheorie and the Zweckentfremdungstheorie. More detail may be found in *ibid* at 706 (§ 27 margin note 17).

<sup>68</sup> E.g. BVerwGE 5, 143 (145); BVerwGE 19, 94 (99). See *ibid* 706 ff (§ 27 margin notes 18ff). Otto Kimminich 'Property Rights' in Christian Starck (ed) *Rights, Institutions and Impact of International Law* (1987) 87–8; Rudolf Dolzer *Property and Environment: The Social Obligation Inherent in Ownership — A Study of the German Constitutional Setting* (1976) 25.

<sup>69</sup> Maurer op cit note 63 at 707–10 (§ 27 margin notes 20–4).

<sup>70</sup> If such a measure directly and sufficiently intrudes upon an individual owner to such an extent that she is expected to make a special sacrifice, an expropriatory infringement (enteignende Eingriff) has occurred. BGHZ 92, 34 (41ff). This is an atypical, unintended and unexpected side effect of a legitimate administrative action, and gives rise to a claim for compensation. On the contrary, had the administrator acted illegally or had it omitted to act where a legal duty existed, and had an infringement arisen as result of this action or omission, a quasi-expropriatory infringement (enteignungsgleiche Eingriff) occurred. Friedrich Schoch 'Die Haftung aus enteignungsgleichem und enteignendem Eingriff' 1990 *Jura* 141.

<sup>71</sup> See Fritz Ossenbühl *Staatshaftungsrecht* 5 ed (1998) p VI; Wolf-Rüdiger Schenke 'Der Rechtsweg für die Geltendmachung von Ausgleichsansprüchen im Rahmen der Sozialbindung des Eigentums' 1995 *Neue Juristische Wochenschrift* 3151; Werner Thiene 'Über die Notwendigkeit einer Reform des allgemeinen Verwaltungsrechts' (1996) *Die Öffentliche Verwaltung* 763; Arnulf Schmitt-Kammler 'Das "Sonderopfer" — ein lebender Leichnam im Staatshaftungsrecht' 1990 *Neue Juristische Wochenschrift* 2515; Jürgen Schwabe 'Entschädigung für Naturschutzmaßnahmen — BGH-Urt. V. 18.2.93 — III ZR 20/92 — BGHZ 121, 328' 1994 *Jura* 529; Ulrich Hösch 'Staatshaftung und Aufopferung' 1999 *Die Öffentliche Verwaltung* 192. The list is not exhaustive.

<sup>72</sup> Friedrich Schoch 'Die Haftungsinstitute des enteignungsgleichen und enteignendem Eingriffs im System des Staatshaftungsrechts' (1989) *Jura* 534–6.

this distinction amounted to a degradation of the basic right of property to an aspect of state liability law.<sup>73</sup>

Then the Federal Constitutional Court introduced a ‘Copernican turn’ in a series of cases<sup>74</sup> of which the so-called Wet Gravel Extraction (*Nassauskiesung*) case<sup>75</sup> was the most prominent.<sup>76</sup> This legendary and oft-cited case gave the Federal Constitutional Court the long-awaited opportunity to design a truly constitutional conception of property and its delimitation. The case entailed a complaint by an owner/operator of a gravel pit directed at administrative action taken in terms of the Federal Water Resources Act (*Wasserhaushaltgesetz*) of 1957. On the strength of this law, the relevant local authority denied the owner of the gravel pit further permission to continue extracting gravel from his land, because of the risk it entailed for the relevant municipal water wells. The Constitutional Court found itself unable to support the ruling of the Federal Court of Justice, which upheld the complaint. Instead, the Constitutional Court used the case as an opportunity to revise the earlier jurisprudence of the other branches of the German judiciary, and to redefine the scope of the expropriation mechanism.<sup>77</sup> It supported a strict distinction between regulatory deprivations and expropriations of property,<sup>78</sup> and a narrow conception of expropriation.<sup>79</sup> In this way, it put an end to the continual expansion of the notion of expropriation.<sup>80</sup>

The decision in the *Nassauskiesung* case resulted in the critical rethinking of the notions of expropriatory and quasi-expropriatory infringements<sup>81</sup> and caused further refinement of the idea of compensable regulatory infringe-

<sup>73</sup> See further Fritz Ossenbühl ‘Enteignungsgleicher Eingriff im Wandel — BGH, NJW 1987, 1945’ 1988 *Juristische Schulung* 193–6; Hans-Jürgen Papier ‘Enteignungsgleiche und enteignende eingriffe nach der Nassauskiesung-Entscheidung — BGHZ 90, 17 und BGH, NJW 1984, 1876’ 1985 *Juristische Schulung* 184–8; Arno Scherzberg ‘Die Subsidiarität des “enteignungsgleichen Eingriffs”’ 1991 *Deutsches Verwaltungsblatt* 84.

<sup>74</sup> BVerfGE 52, 1; BVerfGE 58, 137; BVerfGE 58, 300; BVerfGE 56, 249.

<sup>75</sup> BVerfGE 58, 300.

<sup>76</sup> Jochen Rozek *Die Unterscheidung von Eigentumsbindung und Enteignung* (1998) 8–10.

<sup>77</sup> Friedrich Schoch ‘Rechtliche Konsequenzen der neuen Eigentumsdogmatik für die Entschädigungsrechtsprechung des BGH’ in Carsten Ebenroth, Dieter Hesselberger & Manfred Rinne (eds) *Verantwortung und Gestaltung — Festschrift für Karlheinz Boujong* (1996) 660–1.

<sup>78</sup> Maurer op cit note 63 at 715–6 (§ 27 margin note 34).

<sup>79</sup> The Constitutional Court progressively developed this narrow conception of expropriation. See BVerfGE 24, 367 (394); BVerfGE 52, 1; BVerfGE 58, 137; BVerfGE 58, 300 and beyond that BVerfGE 70, 191; BVerfGE 74, 264; BVerfGE 79, 174 and BVerfGE 83, 201. Rozek op cit note 76 at 19–81 presents a thorough analysis of this progression.

<sup>80</sup> Maurer (op cit note 63 at 707–10 (§ 27 margin notes 20–4)).

<sup>81</sup> See inter alia Schoch in Ebenroth, Hesselberger & Rinne (eds) *Verantwortung und Gestaltung Festschrift für Karlheinz Boujong* op cit note 77 at 655; Hösch op cit note 71 at 192–200.

ments of property.<sup>82</sup> Importantly, for current purposes, the decision illustrated the significance of the ‘social obligation’ of property in matters dealing with the distinction between regulation and expropriation. In this case, the landowner was expected to sacrifice the profitable use of his land, because of the public interest in maintaining water supplies fit for human consumption.

Subsequent case law followed suit. In more recent rulings regarding constitutional property protection, the moral and civic dimensions of the German constitutional property clause continues to provide guidance in matters pertaining to the interference parameter with private property. The distinction between regulation (*Inhalts- und Schrankenbestimmung*) and expropriation (*Enteignung*) of property continues to enjoy particular judicial attention, regardless of the specifics of recent cases.<sup>83</sup> From among these, the 1999 decision of the Federal Constitutional Court in the Monument Protection (*Denkmalschutz*) case<sup>84</sup> may be highlighted. The case concerned the fate of a villa, an architectural specimen from the *Gründerzeit* (ie founder years). Such buildings enjoy a particular appreciation in Germany, because of the grandeur of their neo-baroque style and because so many of them were destroyed during the Second World War. They represent the entrepreneurial spirit of the late 19th century, and the onset of an industrialised society in Germany.

The particular villa was poorly situated, and had become so costly to maintain that neither the owner nor the municipality of the area where the building was situated could find an economically sustainable personal, commercial or other use for the villa.<sup>85</sup> Since leaving the building to run to a ruin was not an option, the owner applied for a demolition permit. Because of the provisions of the Monument Protection Act of the Rhineland-

<sup>82</sup> Maurer op cit note 63 at 716–17 (§ 27 margin notes 35–6).

<sup>83</sup> Federal Constitutional Court activity relating to constitutional property protection over the past decade dealt with (i) protection of cultural or natural heritage (BVerfGE 100, 226; BVerfG, *Neue Juristische Wochenschrift* (1998) 367; BVerfGE 102, 1); (ii) extension of telecommunication services (BVerfG, *Neue Juristische Wochenschrift* (2000) 798; BVerfG, *Neue Juristische Wochenschrift* (2001) 2960; BVerfG, *Neue Juristische Wochenschrift* (2003) 196); (iii) protection of shareholders’ rights (BVerfGE 100, 289; BVerfG, *Neue Juristische Wochenschrift* (2001) 279–81); change of land use (BVerfGE 104, 1); (iv) taxation (BVerfGE 115, 97); (v) re-regulation of property in the former DDR (inter alia BVerfG, *Zeitschrift für Vermögens- und Immobilienrecht* (2001) 111–14; BVerfG, *Neue Zeitschrift für Verwaltungsrecht* (2000) 792–3; BVerfG, *Zeitschrift für Vermögens- und Immobilienrecht* (2001) 330–3; BVerfG, *Zeitschrift für Vermögens- und Immobilienrecht* (1998) 101–103; BVerfGE 112, 1); (vi) rights of pre-emption (BVerfG, *Neue Juristische Wochenschrift* (2000) 1486–7); (vii) various pension payments (BVerfGE 100, 138–95; BVerfG, *Neue Zeitschrift für Verwaltungsrecht* (2007) 437–41). See further BVerfG, *Neue Juristische Wochenschrift-RR* (2005) 454–6; BVerfG, *Neue Juristische Wochenschrift* (2005) 589–90; BVerfG, *Neue Juristische Wochenschrift* (2002) 3460–1.

<sup>84</sup> BVerfGE 100, 226.

<sup>85</sup> *Ibid* at 229–30. The building had stood empty since 1981, when maintenance costs were estimated at 300 000 DM per annum; and the renovation costs of the building were estimated to amount to more than one million DM.

Palatinate, however, the relevant local heritage office hesitantly refused the owner's application for a demolition permit.<sup>86</sup> The refusal was subsequently contested. In the course of these proceedings, the Federal Constitutional Court was asked to consider the constitutionality of the Rhineland-Palatinate's Monument Protection Act, which determined that the authorities consider the demands of the public interest in allowing a demolition application, but had no similar provision for a consideration of the owners' interests. It had to determine whether the Monument Protection Act was unconstitutional for not allowing consideration of factors outweighing the public interest in the protection of monuments.<sup>87</sup>

Two interesting, interlinked aspects of the Federal Constitutional Court's decision are relevant here. First, the court distinguished between the regulation and expropriation of property, and found that the refusal to grant a demolition permit in this case amounted to a legislative regulation of property, and not to an expropriation.<sup>88</sup> The court affirmed that the distinction between regulation and expropriation did not turn on the *intensity* of an imposition on property. Instead, the *intention* behind such an imposition, as it appears from the relevant law, and the *formal criteria* stipulated in the property clause for regulations and expropriations respectively, should be decisive.

Secondly, the court rejected the idea that the contested and supposedly one-sided provision for a consideration of public interests in general burdened the owners of protected buildings disproportionately. It accepted that the particular provision is necessary and appropriate in serving the purpose of the provincial legislature to protect the German cultural heritage.<sup>89</sup> Considering the 'social function' of property, the court found that a landowner could be expected to tolerate the fact that the full profitability of property cannot be exploited. The court reiterated that the legislative capacity to regulate private property depends on the function of that property in a particular setting. If it serves the personal freedom of the individual, especially as concerns patrimonial interests, the legislature has less regulative leeway. If the property has a distinct social function, serving society in general, the legislative scope for regulation is much broader.<sup>90</sup> However, in

<sup>86</sup> Ibid at 230–1.

<sup>87</sup> Ibid at 231–2. Considerations applying in the particular case, such as the fact that building was no longer useful for anybody and that maintenance thereof rendered use of the building uneconomic, could not be taken into account under the particular provision of the Monument Protection Act. The Act provides only for exceptions to the protection of monuments where the public interest so requires.

<sup>88</sup> Ibid at 239–41. The relevant legislative imposition limited in a general and abstract way the use of land upon which monuments were situated. It was not intended to withdraw the rights of a particular owner to fulfill a particular purpose. The fact that the act had a particularly harsh effect in this specific case did not render the provision expropriatory, rather than regulatory.

<sup>89</sup> Ibid at 242.

<sup>90</sup> Ibid at 241 and 242.

this case there was *no* meaningful use *whatsoever* for the protected building, and/or no solution that the owner could be expected to tolerate. A more lenient take on the social function was accordingly appropriate.<sup>91</sup>

The *Denkmalschutz* case provides an example of how an otherwise perfectly lawful and constitutionally justifiable provision for the regulation of property could have particularly harsh consequences for an individual (a so-called Härtefall). Whereas the unfortunate owner cannot be expected to tolerate such an infringement, the exceptionally harsh effects of the regulatory action do not justify a finding of unconstitutionality. In these circumstances, the court indicated, it would be appropriate to consider the payment of compensation as a means of financially equalising the burden on the individual owner, after other possible equalisation measures, such as transitional arrangements, exceptions from the rule, and other possibilities have been exhausted.<sup>92</sup> The provisions of the Monument Protection Act were eventually declared unconstitutional, but not because of the one-sidedness of the considerations to be taken into account in considering demolition permits. The Act was unconstitutional in that it did not deal appropriately with the possibility of a disproportionate burdening of individuals: it did not envisage that particularly harsh effects for individuals could be equalised by allowing exceptions or providing for other administrative or technical arrangements. Instead of striking down otherwise acceptable legislation, the court gave the provincial legislature an opportunity to revise the act to insert appropriate measures to cater for such individual instances of intolerable severity.<sup>93</sup>

The *Denkmalschutz* and *Nassauskiesung* cases demonstrate how German constitutional property law creates a hierarchy among resources<sup>94</sup> by varying the type of protection afforded, depending on the type of property involved and the purposes served by the impositions thereupon.<sup>95</sup> This continuum of the social obligation<sup>96</sup> is the secret to the successful balance between ownership interests and the public good. The layered approach ensures an effective distinction between limitations on ownership serving the social obligation, and those that amount to expropriation.<sup>97</sup> The social necessity of a particular resource, alongside the degree of social interdependence associated with it, and the conditions of contemporary society, contribute to determine its social 'rank', ie its position on the continuum.<sup>98</sup> So, for instance, greater legislative power is recognised over assets with an acknowl-

<sup>91</sup> Ibid at 243.

<sup>92</sup> Ibid at 245–6.

<sup>93</sup> Ibid at 248.

<sup>94</sup> Alexander op cit note 43 at 753.

<sup>95</sup> German scholarship refers to this as the *Abstufung der eigentumsrechtlichen Grenzen* (translation: 'layering of the limits of property'). See Martin Thormann op cit note 49 at 214–18.

<sup>96</sup> Ibid.

<sup>97</sup> Alexander op cit note 43 at 757.

<sup>98</sup> Ibid at 764.

edged social importance, than over property used for leisure.<sup>99</sup> In this way, German law distinguishes the economic functions of property from its personal functions. It tends to provide stronger protection in cases where a particular property interest is applied in *a way which enhances or ensures personal development or self-realisation of its holder*.<sup>100</sup> The Federal Constitutional Court's mantra in matters dealing with the function of the constitutional property guarantee is 'to secure a sphere of economic liberty' (Freiheitsraum im vermögensrechtlichen Bereich sicherzustellen) in which the owner 'can lead a self-responsible life' (eine eigenverantwortliche Gestaltung des Lebens zu ermöglichen).<sup>101</sup>

(c) *Relevance of the German example*

The German Basic Law set a trend in modern constitutional property law through its express acknowledgement of the social function of property.<sup>102</sup> The social obligation espoused by art 14 GG has become one of the main vehicles for the realisation of the dual commitment to individual freedom and social welfare. The point of departure is that ownership entails a special, constitutionally entrenched *duty* towards the community in general: *property rights must be exercised responsibly, not to benefit only the individual owner, but also the community at large*. Benefit 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. Cases in which the social obligation was invoked to support the public interest, addressed a range of considerations from ensuring health or safety and warding off public crises to situations where the modern life demanded individual sacrifice for the sake of development, progress or the ideals of a social-democratic state.<sup>103</sup>

These principles had a considerable influence on subsequent constitutional developments elsewhere in the world, including South Africa.<sup>104</sup> Indeed, the express commitment (in the preamble to the South African Constitution) to the core value of social justice attests to the influence of the idea of social

<sup>99</sup> Compare eg BVerfGE 50, 290 in which a legislative regulation of the relationship between labourers and management in German industries was found to be a constitutionally permissible social bind upon ownership, even though it reduced the powers of shareholders in specific environments; and BVerfGE 52, 1 in which a law severely restricting the abilities of owners to terminate small garden plot leases was found to have become unconstitutional due to changing social circumstances.

<sup>100</sup> See examples in Engel op cit note 59 at 59–70.

<sup>101</sup> Inter alia in BVerfGE 24, 367 at 389; BVerfGE 52, 1 at 30; BVerfGE 83, 201 at 209; BVerfGE 89, 1 at 6; BVerfGE 100, 226 at 241; BVerfGE 101, 239 at 273; BVerfGE 102, 1 at 15; BVerfGE, NJW-RR 2004, 1710–12; BVerfGE 104, 1 at 8; BVerfGE 105, 252 at 277; BVerfGE 112, 93 at 107; BVerfGE 115, 97 at 110. The list is not exhaustive.

<sup>102</sup> Alexander op cit note 9 at 149.

<sup>103</sup> BVerfGE 58, 300; BVerfGE 42, 193; BVerfGE 52, 1; BVerfGE 24, 367; BVerfGE 50, 290; BVerfGE 89, 1.

<sup>104</sup> Alexander op cit note 9 at 149.

responsibility on South African constitutional law.<sup>105</sup> Even more so, the constitutional commitment to land reform demonstrates the impact of the social-justice norm on property in particular. Adherence to principles such as the rule of law and the social state in the South African Constitution mirrors the idea of the social obligation as it appears in the German Basic Law.

The dual character of s 25 as a means to protect private property rights and to promote social justice,<sup>106</sup> and the inevitable interpretive tensions between individual rights and social responsibilities<sup>107</sup> further emphasise that, under the South African Constitution, property does not have the same kind of conceptual integrity and inviolacy as is thought to exist in conventional, private-law thinking. Instead, the property guarantee is based on the recognition that private property is limited by the exercise of state powers for the public good. The constitutional paradigm thus already incorporates an acknowledgement that private property rights are subject to societal considerations or, conversely, that a responsibility rests upon private owners to exercise their rights in a way that contributes to the general public good.

The challenge now is to establish the scope of the individual's responsibility to promote the public interest. This in itself already justifies the analysis here, to understand how the South African law has developed. The rest of this analysis identifies how South African law continues to correspond with German law as regards the core principle of the social responsibility of ownership, despite the different socio-political contexts of the two jurisdictions. The analysis below further indicates, however, that South African law has begun to diverge in some respects from its original source of inspiration in German constitutional law. The discussion ventures an explanation for this development.

#### IV A SOUTH AFRICAN UNDERSTANDING OF THE SOCIAL OBLIGATION

The *FNB* 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. The court in *FNB* distinguished between interests in land and other types of property, and between singular aspects of ownership as opposed to an entire collection of ownership entitlements. This was done to indicate that in some instances the reasons for infringement would have to be 'more compelling' than in others.<sup>108</sup> The distinction hence anticipates the ranking of interests according

<sup>105</sup> See a more thorough exposition of constitutional support for the social state in Mostert op cit note 40 at 360–1.

<sup>106</sup> *FNB* supra note 10 paras 50–2.

<sup>107</sup> See, in general, the work of a major proponent of this view, André van der Walt, much of which is listed in notes 3 to 6 above, and confirmed in *FNB* ibid and *Port Elizabeth Municipality v Various Occupiers* supra note 8 para 15.

<sup>108</sup> *FNB* ibid para 100(f).

to their social relevance in determining the validity of infringements upon property.

The challenges in conceptualising the social obligation in South African law, with its peculiar political baggage, are becoming clearer with the proliferation of case law. The South African judiciary ever more frequently has to find solutions to sensitive legal problems with strong socio-political dimensions. As is evident from some of the Constitutional Court decisions after *FNB*, the recurring issue is the relation between existing private property interests and state purposes.

Three subsequent decisions, all handed down within a six-month period between 2005 and 2006, demonstrate specific parallels with the German position as set out above. As with the German examples, each of the three cases discussed below involved disputes between the state and private parties as regards fundamental-rights claims, and in each the constitutional protection of property had to be considered either directly or indirectly. In each, an inevitable question was the extent to which an individual can be expected to contribute to promoting or meeting the state's goals and/or obligations. In this respect too, the chosen cases correspond with the German examples. The cases diverge from the German examples in that they all involve (either directly or indirectly) the phenomenon of unlawful occupation of land. Unlawful occupation of land in South Africa is not criminalised. In fact, legislative mechanisms protect unlawful occupants from severe eviction practices,<sup>109</sup> to avoid apartheid-style forced removals from land. The interests of landowners invariably clash with those of the unlawful occupants. This means that in disputes between the state and landowners, or the state and unlawful occupants, there inevitably is a third dimension, in that the opposing interests of *two* different private stakeholders must be weighed against those of the public. The South African examples are hence necessarily rather more complicated than the German examples, which involved state interference with ownership simpliciter. In addition, landlessness and homelessness (which is at the root of unlawful occupation of land) is a social phenomenon that has been manipulated to gain access to government housing. By invoking dire circumstances, unlawful occupiers sometimes hope to get preferential treatment in the allocation of housing. This is generally referred to as 'queue-jumping'. The South African constitutional provisions compel a search for case-specific solutions, with reference to all relevant factors.<sup>110</sup> The analysis below attempts to be brief, without losing sight of the mentioned nuances.

*Port Elizabeth Municipality v Various Occupiers*<sup>111</sup> dealt with the eviction of unlawful occupants, in a context where the appellant state organ (the Municipality) denied its alleged legal obligation to find suitable alternative

<sup>109</sup> In particular the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act ('PIE') 19 of 1998.

<sup>110</sup> *Port Elizabeth Municipality v Various Occupiers* supra note 8 para 22.

<sup>111</sup> Supra note 8 (hereinafter referred to as '*PE Municipality*').

accommodation for the evictees.<sup>112</sup> The appeal was denied, with the effect that the unlawful occupants could remain on the land. Essentially, the issue relevant for current purposes was the manner in which the constitutional right to property can be restricted by the applicability of other fundamental rights, such as the right to housing espoused by s 26 of the Constitution.

The various cases joined for hearing in *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett & others v Buffalo City Municipality*; *Transfer Rights Action Campaign & others v Member of the Executive Council for Local Government and Housing, Gauteng & others*<sup>113</sup> all dealt with the question whether state interference with individual owners' ability to alienate their land was permissible to promote the state's ability to collect outstanding debts. The disputes arose because of a number of laws<sup>114</sup> establishing security interests for the state (again on municipal level) regarding payment of water and electricity charges. These laws embargoed the sale of land where such charges were outstanding, hence placing the responsibility for ensuring payment on the landowners,<sup>115</sup> even where they did not incur the debts because the land was occupied either unlawfully or by tenants.<sup>116</sup> In some instances the owners were not even aware that the debts were escalating<sup>117</sup> due to the poor administrative practices of the municipalities involved.<sup>118</sup>

<sup>112</sup> The occupiers were not enrolled for the municipality's housing development programme and could anyway not benefit from it immediately, due to the waiting period involved (para 55). They were prepared to vacate the premises if suitable alternative accommodation could be provided, but did not want to relocate to the area suggested by the municipality (Walmer) because they feared further eviction (para 49), because of the upheaval this would cause for their school-going children, and because of the longer commute to work. The municipality was not prepared to consider two areas suggested by the occupiers, Fairview and Seaview, as options for relocation (para 54).

<sup>113</sup> *Supra* note 8 (hereafter cited as '*Mkontwana*').

<sup>114</sup> Section 118 of the Local Government: Municipal Systems Act 32 of 2000; ss 49 and 50(1)(a) of the Gauteng Local Government Ordinance 17 of 1939, which have more or less the same effect.

<sup>115</sup> In the one *quo* decision, *Geyser & another v Msundizi Municipality & others* 2003 (5) SA 18 (N), the High Court of KwaZulu-Natal held that the provisions did not result in arbitrary, unconstitutional deprivations of property. The South Eastern Cape Local Division of the High Court, however, held in two instances (*Mkontwana v Nelson Mandela Municipality* case no 1238/02 (unreported) and *Bissett v Buffalo City Municipality* case no 903/02 (unreported)) that an arbitrary deprivation was indeed caused by the relevant provisions, which conflicted with s 25 of the Constitution.

<sup>116</sup> In most of the cases joined for hearing, there were either tenants or unlawful occupants on the property.

<sup>117</sup> *Mkontwana* *supra* note 8 paras 18–21.

<sup>118</sup> The municipalities were in a predicament because they were simply not able to collect outstanding charges through other means. The debts were bad already, and the ultimate municipal weapon — the disconnection of services — was ineffective because services were simply reconnected unlawfully. Whether the predicament was due to the lack of effort on the part of the municipalities, or to the lack of reasonable and responsible conduct on the part of the owners, was something about which the parties could not agree. *Ibid* para 22.

The Constitutional Court found that the relevant legislation did not result in arbitrary deprivations of property.<sup>119</sup>

The case of *President of the RSA & another v Modderklip Boerdery (Pty) Ltd & others*,<sup>120</sup> arose from the inability of the state to assist landowners in exercising a legitimate eviction order<sup>121</sup> to control the massive, incessant influx of unlawful occupiers onto their land. A vast informal settlement had established itself by the time the matter came before the Constitutional Court.<sup>122</sup> It had to decide upon the kind of relief that the state was obliged to provide to the landowners.<sup>123</sup> The court ordered the payment of compensation to the landowners.

Two preliminary comments about these cases are necessary. First, it is necessary to comment on the centrality of the property clause for the outcomes of these decisions. For *Mkontwana*, an FNB-style analysis and application of s 25 was central to the court's decision. While neither *PE Municipality* nor *Modderklip* included outright analyses of s 25,<sup>124</sup> they nevertheless are important for an understanding of the interference parameter of private property, because of the manner in which they deal with the relation between property and other fundamental rights, such as housing.<sup>125</sup>

Secondly, the problems posed by each of these cases had serious implications for the public order. The housing need, homelessness and queue-jumping were issues that arose in both *PE Municipality* and *Modderklip*.<sup>126</sup> The effectiveness of the sanctions available to the state was at stake in both *Modderklip* and *Mkontwana*.<sup>127</sup> All these cases reflected problems with social transformation where the state is clearly incapable of providing basic means to enforce rights. There are no parallels for these issues in the German

<sup>119</sup> Ibid paras 31, 33ff.

<sup>120</sup> *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* supra note 8 para 34 (hereafter cited as '*Modderklip*').

<sup>121</sup> The order was obtained in terms of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, in the decision reported as *Modderklip Boerdery (Pty) Ltd v Modder East Squatters* 2001 (4) SA 385 (W). Subsequent attempts to have the order enforced went to the Supreme Court of Appeal, in *Modderfontein Squatters, Greater Benoni City Council v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)*; *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd (Agri SA and Legal Resources Centre, Amici Curiae)* 2004 (6) SA 40 (SCA) (hereinafter cited as '*Modderfontein Squatters*') para 9.

<sup>122</sup> In the year that passed while the application for eviction was being heard, the informal settlement of unlawful occupiers grew from an initial 400 people in 50 makeshift structures to almost 40 000 people in 6000 structures. The numbers kept growing, even after the eviction order was granted. *Modderfontein Squatters* supra note 121 para 2.

<sup>123</sup> *Modderklip* supra note 8 para 42.

<sup>124</sup> Ibid para 29.

<sup>125</sup> André van der Walt *Constitutional Property Law* op cit note 5 at 162.

<sup>126</sup> *Modderklip* supra note 8 paras 13–15, 33–6. *PE Municipality* supra note 8 paras 3–5, 12, 55.

<sup>127</sup> *Modderfontein Squatters* supra note 121 para 7, *Mkontwana* supra note 8 paras 22, 50–4.

examples discussed above; yet the same kind of considerations upon which the German decisions were based arose — quite independently — in the South African context. Most importantly, in all three cases the court engaged with the duties and responsibilities of the state and the various private stakeholders involved. It is noticeable that the court in each of these three decisions adheres to a notion of individual duty towards the achievement of state goals in ways very similar to the social obligation approach of the German Constitutional Court. The term used in *Mkontwana* is ‘civic responsibility’.<sup>128</sup> I refer to this notion as ‘engaged citizenship’ where appropriate.

(a) *Civic responsibility (or: ‘engaged citizenship’)*

In the *Mkontwana* case,<sup>129</sup> as in the *FNB* case, the decision turned upon an application of the ‘sufficient reason’ test. However, in *Mkontwana* the test was applied in a slightly adapted and less flexible way:<sup>130</sup> it was found that a government purpose which is ‘legitimate’ and ‘compelling’ would constitute ‘sufficient reason’, and that it would have to be reasonable to expect an individual to carry the burden of such a purpose in the particular case. Under the particular circumstances of the *Mkontwana* case, the court (per Yacoob J) decided that owners could reasonably be expected to bear the risk of unpaid charges.<sup>131</sup> The court explained its view as follows: Municipal services benefit the land, being an integral, value-enhancing aspect thereof.<sup>132</sup> Because of this, landowners should remain responsible for consumption charges, even where the service was delivered to non-owners, and even where municipalities’ debt collection structures were patently deficient.<sup>133</sup> So, the bottom line is that owners must protect their property themselves and ensure that its entitlements can be exercised.<sup>134</sup> Essentially, this reasoning arose from the court’s confirmation that ownership does not entail only rights, but also responsibilities, and its subsequent, heavy reliance on the idea that private owners must be engaged citizens, ie that they must contribute

<sup>128</sup> *Mkontwana* supra note 8 paras 38 and 52.

<sup>129</sup> *Ibid.*

<sup>130</sup> *Ibid* paras 35ff. See the discussion of Van der Walt (2005) 122 *SALJ* op cit note 6 at 83ff.

<sup>131</sup> *Mkontwana* supra note 8 para 51.

<sup>132</sup> *Ibid* paras 40–3.

<sup>133</sup> *Ibid* para 47. The court stressed that a municipality cannot simply ‘sit by and allow consumption charges to escalate . . . in the knowledge that recovery will be possible whenever the property falls to be transferred’ (*ibid* para 49). In further deciding that it was not procedurally unfair that the contested legislation did not expressly oblige municipalities to keep owners informed about outstanding debts, the court also recognised that the duty to keep owners informed placed a burden on the resources of and processes within the municipality (paras 65–7). Yet the court indicated that non-performance of public duties, and lack of control over property because of unlawful occupation could be remedied by private-law mechanisms, such as delictual claims and eviction respectively (*ibid* para 62).

<sup>134</sup> *Ibid* para 59.

proactively to discharging the state's duties. This is what the court dubbed 'civic responsibility':<sup>135</sup> individual landowners are expected to shoulder the burden of achieving some state goals or exercising of some state duties, because they benefit directly or indirectly from it through their property. The *Mkontwana* decision was criticised for the manner in which it elevated a dubious attempt to improve municipal debt management and collection practices to a compelling public purpose, to be secured by an act of depriving private individuals of their property.<sup>136</sup>

The *PE Municipality* decision (simultaneously)<sup>137</sup> developed ideas about the role and responsibilities of both the state (particularly local authorities) and individuals in matters of eviction. Sachs J's decision acknowledged that the judiciary must manage the constitutional attempt to create a 'caring society based on good neighbourliness and shared concern'.<sup>138</sup> This approach reflects the idea of civic responsibility or engaged citizenship, and is underscored by the court's references to the communitarian philosophy of ubuntu and the 'need for human interdependence, respect and concern'.<sup>139</sup> For those involved in issues of property protection and housing, this means that they must avoid self-victimisation and be adaptable and resourceful in finding ways out of their predicaments. They should look beyond the stereotypes of social nuisance to recognise the dire needs created by poverty and homelessness and *do something about it!*<sup>140</sup> In matters of eviction, civic responsibility hence requires sacrifice *and* proactiveness from both landowners and occupants. On the one hand, landowners cannot simply rely on the exclusivity and scope of their rights to demand removal of the social problem caused by unlawful occupation.<sup>141</sup> On the other hand, despite the strong protection of ss 25 and 26 of the Constitution, people living in informal settlements may yet lose their homes.<sup>142</sup>

The idea of 'civic responsibility' as developed in these decisions certainly promises transformation-friendly solutions to property problems. It engages private stakeholders, both landowners and other citizens, to become involved in reaching objectives to be fulfilled by the new South African state.

<sup>135</sup> Ibid paras 38 and 52. In considering the *purpose* of the contested legislative provisions, the court concluded that the provisions intend to secure payment of services rendered as a matter of public duty by municipalities, thereby placing the cost risk upon the owners. The court then remarked (para 38): 'The purpose is important, laudable and has the potential to encourage regular payments of consumption charges and thereby to contribute to the effective discharge by municipalities of their constitutionally mandated functions. It also has the potential to *encourage owners of property to discharge their civic responsibility by doing what they can* to ensure that money payable to a government organ for the delivery of service is timeously paid.' (Emphasis supplied.)

<sup>136</sup> Van der Walt (2005) 122 SALJ op cit note 6 at 84.

<sup>137</sup> It was decided just a few days before *Mkontwana* supra note 8.

<sup>138</sup> Ibid para 37.

<sup>139</sup> Ibid.

<sup>140</sup> Ibid para 41.

<sup>141</sup> Ibid para 20.

<sup>142</sup> Ibid para 21.

However, the outcome of *Mkontwana* suggests that civic responsibility or engaged citizenship can also place patently unreasonable burdens on individuals. This is demonstrated by the state's argument in the *Modderklip* case, and was addressed by the *PE Municipality* decision, which is discussed further below.

(b) *The state as 'enabler'*

In the *Modderklip* decision,<sup>143</sup> the court had to deal with potentially disastrous implications for the public order if the state was unable to enforce a legitimate court order for eviction.<sup>144</sup> The problem in this context was created by the exponential growth of the informal settlement in the time it took to obtain an eviction order. The dilemma was that, even if the eviction order could have been executed, about 40 000 people would thereby be put out on the streets, with nowhere to go, causing major social upheaval and exacerbating homelessness.<sup>145</sup> The unlawful occupation in this case was clearly not an instance of malicious 'queue-jumping'.<sup>146</sup> Yet, if the court did nothing about the unlawful conduct, public order and the supremacy of the law would be jeopardised. Mere further confirmation of the eviction order, or a simple declaration of the rights of the owners, would obviously not have provided effective relief. In fact, it would have frustrated the reformative goals of the legislation in terms of which the original eviction order was granted.<sup>147</sup> The Constitutional Court thus had to consider whether the state was obliged to provide relief to the landowners. It found that compensating the landowners was an appropriate solution<sup>148</sup> after considering the duties and responsibilities of the state and private landowners respectively, in view of the state's land-reform goals and the problems created by landlessness.

The state raised an argument à la *Mkontwana*: the owners of *Modderklip* brought their woes upon themselves by not taking effective steps to protect their property at a point when the problem could still have been manageable.<sup>149</sup> The Constitutional Court here acknowledged the duty of private owners to protect their own property. The state's argument was found to be unconvincing, however, given the *Modderklip* owners' ongoing, yet futile,<sup>150</sup> attempts to resolve their problem themselves, and the lack of assistance (and in some instances even the lack of a basic response) from

<sup>143</sup> *Modderklip* supra note 8 para 34.

<sup>144</sup> There was a flagrant and ongoing contempt of court, aggravated by the state's inability to deal with it effectively through criminal prosecution, because of the sheer magnitude of the problem. The cost of enforcing the order, if outsourced to private contractors, would far exceed the value of the land. *Modderfontein Squatters* supra note 121 paras 7, 10–11.

<sup>145</sup> *Modderklip* supra note 8 paras 13, 34–6.

<sup>146</sup> *Ibid* para 34.

<sup>147</sup> *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* 2003 (6) BCLR 638 (T) 682.

<sup>148</sup> *Modderklip* supra note 8 para 42.

<sup>149</sup> *Ibid* para 27.

<sup>150</sup> *Ibid* para 44.

various organs of state.<sup>151</sup> The aberrance of the state's argument in this case demonstrates that civic responsibility or engaged citizenship as a factor influencing the interference parameter needs to be counterposed. It was insightful of the court in *Modderklip* to recognise that in that case *the state* was itself central to the solution of the problem. The court then considered how the state is obliged to provide relief for the landowners.<sup>152</sup>

The idea of the state's duty as enabler in the realisation of fundamental rights indeed presents itself as a suitable counterpoint to engaged citizenship. In fact, the court in *PE Municipality* had already engaged seriously with the *duties of the state* in resolving the problems created by that municipality's attempt to evict unlawful occupants. It acknowledged the idea of civic responsibility or engaged citizenship as described above, but stressed that the state is obliged to ensure justice and equity in land use and enjoyment, under conditions that are 'socially stressful and potentially conflictual'.<sup>153</sup> The state must play an enabling role, in other words. Sachs J saw the state's obligation as one of mitigating, rather than intensifying, the marginalisation of the poor and the homeless,<sup>154</sup> to meet the demands of the Constitution. So, although civic responsibility was endorsed unequivocally in *PE Municipality*, even *more* was demanded from the state, especially in view of the duty to provide access to housing. Where difficult social problems are at stake, the state more than ever must be both provider and mediator. It cannot pick sides or pit different stakeholders against each other. In *PE Municipality*, the court refused to endorse the granting of an eviction, because *the municipality did not do enough* to find a mediated solution, and did not attend to the genuine needs of the unlawful occupiers.<sup>155</sup>

The *Modderklip* case clearly shows that passivity on the part of the state can be catastrophic.<sup>156</sup> The state's dilemma here, of course, was that if it carried out the eviction order, it would cause major social upheaval and misery;<sup>157</sup> but if it failed to ensure the enforcement of the eviction order, it would disrupt the public order.<sup>158</sup> Either way, the rule of law would be compromised. Avoiding an outright reliance on s 25 of the Constitution,<sup>159</sup> the court regarded the state's conduct as unreasonable, because it forced private owners to shoulder the burden of providing alternative housing for the unlawful

<sup>151</sup> Ibid paras 8, 9, 13, 41ff and 48.

<sup>152</sup> Ibid para 42.

<sup>153</sup> *PE Municipality* supra note 8 para 18.

<sup>154</sup> Ibid.

<sup>155</sup> Ibid para 59.

<sup>156</sup> *Modderklip Boerdery (Edms) Bpk v President van die Republiek van Suid-Afrika* supra note 147 at 683.

<sup>157</sup> *Modderklip* supra note 8 paras 46–7.

<sup>158</sup> It did not help, moreover, that the state was partially the architect of the problem: the Department of Land Affairs refused to accept the offer of the landowners to sell the land to the state, whilst other organs of state ignored the landowners' pleas for assistance as the informal settlement expanded.

<sup>159</sup> *Modderklip* supra note 8 para 29.

occupants.<sup>160</sup> It held that the state cannot simply ‘stand by and do nothing’.<sup>161</sup> Expecting the state to be an ‘enabler’ means that its obligations cannot end with the provision of a legislative framework entailing mechanisms to resolve disputes and the infrastructure to facilitate enforcement of court orders.<sup>162</sup> The state must ‘take reasonable steps . . . to ensure that large-scale disruptions in the social fabric do not occur [to undermine] the rule of law’.<sup>163</sup> The state is constitutionally obliged to ensure progressive realisation of the right to access to housing and land, even if its task is immensely difficult, resources scarce and competition intense among people living in the bleakest conditions. Its passivity cannot be justified by the (admittedly understandable) desire to discourage the homeless from trying to jump the housing queue.<sup>164</sup> Its actions cannot aggravate the victimisation of the landowners affected by rampant and massive unlawful occupation.<sup>165</sup>

Eventually, the court in *Modderklip* found that a more serious attempt could have been made to expropriate the occupied land, thereby alleviating the Modderklip owners from bearing a burden patently befalling the state.<sup>166</sup> The court ordered that the unlawful occupiers stay on the land, against payment of compensation by the state to the landowners.<sup>167</sup> The compensation seems to be intended as an equalisation payment.<sup>168</sup> So, even though s 25 was not central to the analysis of the problem in *Modderklip*, the court’s approach still amounts to a finding that a limitation of landowners’ rights of exclusion can be regarded as compelling and legitimate, i.e. a valid deprivation of property. The high levels of tolerance expected from individuals affected by curtailments of their property rights are set off against the eventuality of compensation for their loss.

<sup>160</sup> Ibid paras 49ff.

<sup>161</sup> Ibid para 48.

<sup>162</sup> Ibid paras 41 and 43.

<sup>163</sup> Ibid para 43.

<sup>164</sup> Ibid para 34 and 49.

<sup>165</sup> Ibid para 44.

<sup>166</sup> Ibid para 50, referring to s 34 of the Constitution.

<sup>167</sup> Ibid para 68, confirming the award made by the Supreme Court of Appeal; *Modderfontein Squatters* supra note 121.

<sup>168</sup> According to the court, this solution was feasible because it would make good the violation of rights of the Modderklip owners, whilst simultaneously ensuring the minimum disruption of the occupiers and relieving the state of the urgent task of finding suitable alternatives (*Modderklip* ibid para 59). The compensation was to be determined on the same basis as compensation for expropriation, with reference to market value (para 65). The court did not comment on the supposed nature of such compensation, but indicated that if the state decides to expropriate the land at a later stage, the amount awarded was to be set off against the eventual expropriatory compensation decided upon (para 65). The compensation order seems to be in the nature of an order for ‘constitutional damages’. Such an award did not exist in common law, and was not foreseen in the context of new land reform legislation, but is welcomed as an act of transformative constitutionalism. See Van der Walt op cit note 26 at 29. See also Van der Walt (2005) 21 *SAJHR* op cit note 6; Van der Walt *Constitutional Property Law* op cit note 5 at 333.

*(c) Judicial 'management' of state duties and civic responsibility*

The *Port Elizabeth Municipality* case<sup>169</sup> confirmed that the new, complex function of the judiciary is to manage actively the achievement of full respect for property rights,<sup>170</sup> in the face of 'diametrically opposed fundamental interests'.<sup>171</sup> Against the chequered South African past of dispossession and denial of secure land rights,<sup>172</sup> the judiciary must manage the balancing of the conventional rights of ownership against the new, equally relevant right not to be arbitrarily deprived of a home,<sup>173</sup> without creating hierarchies of privilege. The manner in which this is done, is to invoke both civic responsibility and state duty in resolving disputes about property and fundamental rights.

Considerations of state duty and civic responsibility influenced the outcome of *PE Municipality* and *Modderklip*. In *Mkontwana*, however, considerations of civic responsibility were strong enough to induce the court to ignore the passivity (even the possible inefficiencies) of the state in fulfilling its function of fiscal administration. In *Modderklip*, the passivity of the state also aggravated the problem initially, as the court pointed out. Part of what made the judgment against the state so convincing in *Modderklip* was that the landowners acted in a 'civilly responsible' manner. In *PE Municipality*, the court unequivocally endorsed the idea of engaged citizenship or civic responsibility in balancing competing interests, but it demanded even more from the state, especially in view of the duty to provide access to housing.<sup>174</sup> Acknowledging that it may sometimes be necessary to evict people from land unlawfully occupied,<sup>175</sup> the court refused to do so in the case of *PE Municipality*, because the municipality did not try hard enough to find a mediated solution, and did not attend to the genuine needs of the occupiers.<sup>176</sup> Moreover, the owners themselves advanced no other productive

<sup>169</sup> *PE Municipality* supra note 8.

<sup>170</sup> *Ibid* paras 13, 36.

<sup>171</sup> *Ibid* para 34, quoting *Port Elizabeth Municipality v People's Dialogue on Land and Shelter & others* 2000 (2) SA 1074 (SE).

<sup>172</sup> *PE Municipality* *ibid* para 15.

<sup>173</sup> *Ibid* para 23.

<sup>174</sup> Referring to its ground-breaking decision in respect to housing rights in *Government of the Republic of South Africa & others v Grootboom & others* 2001 (1) SA 46 (CC), the court in *PE Municipality* *ibid* para 56 reiterated that municipalities are obliged to improve access to housing systematically for all within their areas. It must be done with an understanding for the complex socio-economic problems at the core of the phenomenon of unlawful occupation of land, especially in urban areas. It further required, however, of municipalities to embrace the complexity of their tasks: Not only must a housing programme be in place that works *in practice* and responds to the needs of the most desperate. The municipality must further also take into account the specific needs of the particular occupiers and even must explore the potential of the affected landowners to make a contribution to the solution (paras 29, 31, 52–5).

<sup>175</sup> *PE Municipality* *ibid* para 21.

<sup>176</sup> *Ibid* para 59.

purpose for, or use of, the land.<sup>177</sup> As the guardian of the public interest, the court stressed that ‘the greatest good for the many cannot be achieved at the cost of intolerable hardship for the few, particularly if . . . such human distress could be avoided’.<sup>178</sup>

The *PE Municipality* decision, in lieu of a specific analysis of the provisions of s 25(1), advanced seminal ideas on the legitimacy and compelling nature of certain state goals, and the impact thereof on the manner in which property is restricted. It stressed that the imposition placed upon landownership by anti- eviction measures is legitimate and compelling, even where their effect is rather extreme. Yet the decision further indicated that tolerance of such impositions is a proverbial two-way street, especially where more than one set of private stakeholders are involved. In such cases especially, the state’s involvement must be facilitative.

The *PE Municipality* decision is thus an important response to the questions left open by *FNB* about how the parameters of permissible infringement are to be identified and treated. If the *FNB* decision represents the Constitutional Court’s attempt to resolve the structural issues emanating from the constitutional property inquiry, the *PE Municipality* decision is its counterpart in establishing the importance of social-contextual factors within such an inquiry. Attempts at reconciling structural and social-contextual considerations are made in both *Mkontwana* and *Modderklip*, but the results vary to a large extent, and impact on attempts to define the interference parameter of property. This suggests that the South African courts have only just begun developing a model for the interplay between civic responsibility and state duty. It renders the parallel model of the ‘social function’ of ownership in Germany very interesting for comparative purposes.

## V ASSESSMENT

The Constitutional Court decisions discussed here are but a cross-section of the developing jurisprudence on state duty and civic responsibility in the property context, but they are directional. They illustrate how difficult it is to abstract principles from precedent for subsequent re-application, especially where legal questions have significant socio-political dimensions. In South Africa, like in Germany, there are many variables influencing the unresolved issues about the interference parameter of private property. The interference parameter is, for one, not determined by s 25 alone, but by its relation to other constitutional provisions, such as s 26.<sup>179</sup> Development of legal principles in the particular context of s 25 hence cannot be separated from the broader objective of general socio-political development of the new South African

<sup>177</sup> *Ibid* para 52.

<sup>178</sup> *Ibid* para 29. The court further condemned both queue-jumping and land-grabbing and articulated the risk these phenomena pose for the provision of access to housing (para 26).

<sup>179</sup> The just administrative action clause of s 34 is another provision that may influence the interpretation of s 25.

society. Currently, the main problem that remains is to assess the specific considerations of the public interest that will justify inroads on property, and the extent to which such inroads could be permitted. The judiciary will have to decide which interests should enjoy strong protection, and how much protection is apt.

Progressively, the role that state duty and civic responsibility are playing in the judicial resolution of such issues in South Africa is becoming clearer. Although German constitutional law might have been the original source of inspiration for importing the idea of the social obligation of ownership into the South African context, the idea of civic responsibility seems to have been developed thus far without significant reference to comparative law. Reasons for the discontinuity were mentioned above. This does not mean, however, that comparative law has nothing to offer for the further development of a model of civic responsibility and state duty as regards the determination of the interference parameter of property. On the contrary, it provides insight into the kinds of purposes justifying infringement upon property, the scope of such infringement and the manner in which this is determined by a constitutional property inquiry. It also suggests possible consequences of particular inroads on property.

(a) *Purposes justifying infringement upon private property*

German constitutional jurisprudence has acknowledged a quite extensive range of state purposes justifying the regulation of private property to varying extents. Among these are: (i) securing the quality of public water wells;<sup>180</sup> (ii) public health and safety;<sup>181</sup> (iii) provision of housing;<sup>182</sup> (iv) dealing with historical injustices and socio-political transition;<sup>183</sup> (v) keeping pace with changing social circumstances;<sup>184</sup> and many more. The general tenor of these decisions always is to assess whether such impositions would affect an individual's *sphere of personal liberty* and her *ability to lead a self-responsible life*, while keeping in mind the *public usefulness of specific types of property*.<sup>185</sup> The more others evidently depend on the use of specific property, the greater the state's scope generally is to regulate such property.<sup>186</sup> Where the effects of such regulation are particularly severe for a specific individual, equalisation measures are expected to be in place and to be employed.<sup>187</sup>

In South Africa, the *FNB* structure and its application in *Mkontwana* demonstrates the need for 'compelling and legitimate' state purposes. Fiscal efficiency was held to be such a state purpose in *Mkontwana*,<sup>188</sup> but the

<sup>180</sup> BVerfGE 58, 300.

<sup>181</sup> BVerfGE 20, 351; BVerfGE 24, 367; BVerfGE 102, 1.

<sup>182</sup> BVerfGE 95, 64; BVerfGE 89, 1.

<sup>183</sup> BVerfGE 101, 239; BVerfGE 112, 93.

<sup>184</sup> BVerfGE 52, 1; BVerfGE 101, 54; BVerfGE 105, 252.

<sup>185</sup> Section III(b) above.

<sup>186</sup> Alexander op cit note 9 at 135.

<sup>187</sup> BVerfGE 100, 226 discussed in section III(b) above.

<sup>188</sup> See section IV(a) above.

decision was severely criticised for the dubious manner in which it elevated deficiencies in the state's debt management system to a public purpose, to be remedied by depriving individuals of property rights.<sup>189</sup> The relation between *FNB* and *Mkontwana* show that even for a single state purpose — that of the state's fiscal efficiency — the application of the 'sufficient reason' test may have different consequences.

By contrast, the purposes at stake in *Modderklip* and *PE Municipality* were the eradication of homelessness alongside the duty to give effect to the fundamental right to housing. *PE Municipality* confirmed that the imposition placed upon landownership by anti-eviction measures is legitimate and compelling, even where their effect is rather extreme.<sup>190</sup> *Modderklip* also confirmed that limitation of landowners' rights of exclusion for this reason can be legitimate and compelling, although *Modderklip* indicated significantly that landowners can be expected to *tolerate* this infringement, but not to *carry the risk* of achievement thereof, as was the case in *Mkontwana*. The order made by the court in *Modderklip* takes this into account, and attempts to equalise the sacrifice of the *Modderklip* owners with an award for compensation.<sup>191</sup> This approach corresponds with the equalisation rule in German law, although the latter is more developed. From a comparative perspective, the South African judiciary and legislature may want to note the various possibilities that exist for equalisation of particularly severe individual cases as they developed in German law. Developing this aspect in South African law would be well in line with the emerging jurisprudence on engaged citizenship and the enabling state.

(b) *Scope of infringement*

It is trite that ownership entails not only rights, but also responsibilities.<sup>192</sup> Yet the examples from South African case law illustrate that the line between what can be regarded as tolerable, and what cannot, is sometimes very fine. Occasionally it may simply be sufficient to hold (as in the *FNB* decision) that the legislature has 'cast the net far too wide' in attempting to protect the public interest by impinging upon private property rights.<sup>193</sup> In other instances, as *PE Municipality* illustrates, a cocktail of social and political considerations — such as neighbourliness and shared concern, resourcefulness against the odds, and state involvement, provision and mediation — is required.<sup>194</sup>

*Mkontwana* (like *FNB*) turned upon the question of 'how far' the relevant infringement went: a question that depended on how the interests of the owners and the nature of the property affected are weighed against the public

<sup>189</sup> Van der Walt (2005) 122 *SALJ* op cit note 6 at 84.

<sup>190</sup> See section IV(b) above.

<sup>191</sup> See note 168 above.

<sup>192</sup> André van der Walt *Property in the Margins* (2006) 213.

<sup>193</sup> See section II above.

<sup>194</sup> See section IV(c) above.

interest. The politics at the heart of this assessment — or conversely the importance of a ‘pro-government’ decision — was not openly acknowledged. By contrast, in both *Modderklip* and *PE Municipality*, the *state’s duty* to deal with the problem of homelessness was decisive for the outcome of these cases, even though the *involvement of the affected landowners* in finding a solution to the problem also received attention. Both *Modderklip* and *PE Municipality* expressly recognised pressing social realities such as poverty and ‘intense competition for scarce resources’ in finding that passivity on the part of the state cannot be tolerated in matters of housing. In view of this aspect of *Modderklip* and *PE Municipality*, it is surprising that state passivity was overlooked in *Mkontwana*, and private individuals were expected to bear the risk where the purpose of fiscal efficiency was at stake.

The German model of the social function of property as a sliding-scale has, in that setting, subsumed much of the difficulty in determining the scope of infringements. The fact that the German judiciary is open about the core purpose of constitutional property protection,<sup>195</sup> namely to secure individual liberty to facilitate responsible self-governance, permits it to assess the extent to which that value is jeopardised by a particular imposition. In this way, the German model of property protection fosters engaged citizenship. The core purpose of constitutional property protection in South Africa appears from the *PE Municipality* decision: the aim to create a society based on ‘neighbourliness and shared concern’; the acknowledgement of the public interest in protecting both existing property relations and new need-based interests in land; and the court’s aversion to passivity on the part of any of the players in finding context-sensitive solutions. However, in *Mkontwana* the jeopardy to this core purpose was not considered as openly as it was in *Modderklip*. This suggests that further judicial development and endorsement of the notion of engaged citizenship and the enabling state is necessary to entrench the idea in South African jurisprudence.

(c) *Effect on the structure of the constitutional property inquiry*

On a structural level, reliance on civic responsibility and state duty may open up possibilities that were eliminated by what Roux has dubbed the ‘artificiality vortex’ created by the *FNB* structure of inquiry.<sup>196</sup> In brief, the

<sup>195</sup> Alexander op cit note 9 at 139.

<sup>196</sup> The South African judiciary seems to prefer a ‘two-stage’ approach to an inquiry concerning the constitutional (in)validity of statutes (*S v Makwanyane* 1995 (3) SA 391 (CC) paras 100–2). The *FNB* decision particularised the two-stage inquiry for application to s 25 specifically. In terms of its approach, the starting point is to consider s 25(1), i.e. whether the conduct complained of is *arbitrary*. If it is, the second step is to determine whether the conduct is justifiable under s 36(1). If it is (or if the conduct was found not to be arbitrary to begin with), the next step is to assess whether the conduct amounts to an expropriation as envisaged by s 25(2) and (3). If the conduct passes the scrutiny of s 25(2) and (3), it is constitutionally legitimate and permissible. If not, it could be justified by another application of s 36(1). If this is impossible, the conduct is unconstitutional. See Roux ‘Property’ in Woolman et al (eds) *Constitu-*

structure of the constitutional property inquiry resulted in a contraction of two core questions: first, whether the infringement complained of affected *property*; and secondly, whether there was *any* mentionable infringement at all.<sup>197</sup> As Roux prophesied,<sup>198</sup> even this contracted question often receives no more than passing notice, because courts tend to assume that the property rights at stake *do* warrant constitutional protection and *are indeed* curtailed by disputed actions of the state. This complicates the South African constitutional property inquiry unnecessarily, since findings are then generally made upon considerations of proportionality and justifiability of infringements, of which arbitrariness becomes a main determinant. A potential mechanism with which to ‘filter out’ some matters at an early stage of the inquiry is thereby severely reduced, if not eliminated.<sup>199</sup> Moreover, because *FNB* and *Mkontwana* made it evident that even for a single state purpose (ie that of fiscal efficiency)<sup>200</sup> the application of the test to determine arbitrariness may have different consequences, it seems that the structure of the constitutional property inquiry is prone to manipulation. These pitfalls of the flexible arbitrariness standard, demonstrated further by a comparison of *Mkontwana* and *PE Municipality*,<sup>201</sup> suggest that there is a need for further development of a theory of the interplay between state duty and civic responsibility in the notion of engaged citizenship and the enabling state.

Both *Mkontwana* and *Modderklip* suggest that an actual acknowledgment that rights had been curtailed seems to be much more important than has been assumed up to now. Up to now, such an approach had not enjoyed much scholarly consideration, and even less support. Even so, these decisions respond to the difficulties of a structure that essentially requires findings to be based upon rationality or proportionality of interference. Though it may inform these aspects of an inquiry too, reliance on civic responsibility and state duty could additionally pave the way for a doctrine in terms of which the social function of property assumes that some types of interference with property does not even warrant a more intensive level of scrutiny. This approach has been applied in Germany quite successfully.<sup>202</sup>

*tional Law of South Africa* op cit note 6 at 46–2 to 46–5. What is noticeable within this structure is that it is assumed: (a) that the conduct affects an interest, which is classifiable as property; and (b) that the conduct amounts to an interference with such an interest.

<sup>197</sup> Van der Walt *Constitutional Property Law* op cit note 5 at 53ff.

<sup>198</sup> Roux ‘Property’ in Woolman et al (eds) *Constitutional Law of South Africa* op cit note 6 at 46–19ff.

<sup>199</sup> *Ibid* at 46–20.

<sup>200</sup> See section V(a) above.

<sup>201</sup> See section IV(a) above.

<sup>202</sup> Wolff Heintschel Von Heinegg & Ulrich Haltern ‘Keine Angst vor Art. 14 GG!’ 1993) *Juristische Schulung — Zeitschrift für Studium und Ausbildung* 123. Further details in Hanri Mostert *The Constitutional Protection and Regulation of Property and its Influence on the Reform of Private Law and Landownership in South Africa and Germany — A Comparative Analysis* (2002) 99ff.

*(d) Consequences of particular inroads on property*

What is also necessary is more clarity on the results of particular inroads on property, especially taking into account the *FNB* legacy. *FNB* left very little room for an argument that the violation of property rights under the deprivations clause may give rise to compensation. After the *FNB* decision, it was assumed that the judiciary would not recognise such an ‘intermediate’ category of impositions (‘constructive expropriation’).<sup>203</sup> These are typically necessary exercises of the state’s regulatory powers, which detrimentally affect individual owners rather than whole classes of owners. For such impositions, some kind of financial reward or damages may be justifiable because of the sacrifice they entice from individual owners. However, if the *FNB* reasoning is applied, such (excessive) exercises of regulatory power are constitutionally not permissible, because they ‘cast the net far too wide’.<sup>204</sup>

This approach provides one solution to the question of how the particularly harsh effects of a regulation of property on an affected owner should be treated. However, it does not deal effectively with the issue of the acceptable, even desirable, regulation that has a particularly harsh effect for a single individual. *Modderklip* dealt with this issue by foreseeing monetary compensation for violation of the rights guaranteed by the deprivations clause. The nature of this compensation (ie damages, equalisation, or some kind of reward similar to expropriatory compensation) was not clarified.<sup>205</sup> Although the decision contextualised the homelessness problem in relation to the state’s constitutional duty to do what is possible, within its limited resource capacity, to eradicate the problem, it still is a far cry from the thoroughly developed idea of equalisation measures that have emerged from the German Constitutional Court, particularly in the wake of the *Monument Protection* case.<sup>206</sup>

*(e) Concluding remarks*

If a viable model for determining the interference parameter of property is to be found, there can be no denial of the state’s goals, and the politics behind them. These are to be juxtaposed with the core intent of constitutional property protection. Within this context, more confidence needs to be placed in the potential of supposedly ‘soft’ considerations such as civic responsibility or engaged citizenship in shaping the structure of constitutional property protection in South Africa. It can have a very real impact on the technical aspects of the law.

The German example of ranking interests according to their social function illustrates this well. There, interests that enjoy strong protection are those reaffirming a right holder’s status as an engaged citizen (in the sense of

<sup>203</sup> Roux ‘Property’ in Woolman et al (eds) *Constitutional Law of South Africa* op cit note 6 at 46–32; Mostert op cit note 14 at 592.

<sup>204</sup> See note 20 above.

<sup>205</sup> See note 168 above.

<sup>206</sup> See section III(b) above.

being a moral or political agent), rather than those that serve exclusively economic interests such as wealth maximisation.<sup>207</sup> The layering of resources and/or interests according to their social importance greatly aids decisions about the extent to which interferences upon particular property interests are permissible and should be tolerated, and the purposes justifying such interferences.

So, in the South African context, considerations of state duty and civic responsibility in the curtailment of individual property rights for the public good certainly are present, but an abstraction thereof is underdeveloped. At a doctrinal level, these need to be considered more thoroughly. To do so, the transitional context within which South African constitutional law functions must of course be acknowledged. Also, it must be accepted that property does not denote only rights of ownership in the narrow conventional private-law sense, but includes also a broader range of entitlements and interests. Moreover, this notion of property needs to develop not so much along rights-based lines, but instead towards a more serious awareness of the responsibilities underlying property rights. The South African Constitution endorses, much like that of Germany, that owners must be tolerant of inroads upon their rights, for the sake of the broader public good. In fact, even more is required by the South African judiciary: owners and other right holders must be both *proactive* and *resourceful* in finding solutions to property problems with significant socio-political dimensions. They must behave like engaged citizens.

But this responsibility on private owners by no means implies that the state may abdicate its own duties in creating a society based on the values of democracy, freedom, social justice and the rule of law. A heightened awareness of the *duties* inherent in private ownership brings with it an increased demand on the state to be involved, facilitative, mediating, in fact *instrumental*, in resolving the tensions between the public interest and private rights.<sup>208</sup> The state is under pressure to become an enabler.

It would have been easier to generalise about how far civic responsibility could be stretched, and the extent to which state duty counterposes individual involvement in the resolution of property measures, if there were more clarity as to the kinds of state purposes that would justify severe inroads on private rights. As demonstrated above, in German law there already are a host of examples of state purposes that over time have justified even severe inroads on private property. The South African examples deal at present mainly with the solution of the homelessness problem and with the state's fiscal efficiency. As concerns homelessness, the South African courts tend to require strong intervention from the state, even if a good measure of civic responsibility is demanded — both from landowners and unlawful occupants

<sup>207</sup> Alexander op cit note 43 at 739; cf Engel op cit note 59 at 70–6 and 95.

<sup>208</sup> It has been illustrated convincingly by Van der Walt op cit note 34 at 655 and op cit note 26 at 1, for instance, that the 'doctrine' of state duty has overridden the debate about horizontal applicability of fundamental rights.

— to make solutions work. As regards the state's ability to manage debt effectively, there seems to be less of a trend, and less expectations upon the state.

What definitely is noticeable, though, is the impatience of the South African Constitutional Court with any form of passivity, be it on the part of the state or the private stakeholders involved in property disputes. In *Modderklip, PE Municipality and Mkontwana* — despite their different issues and outcomes — the Constitutional Court criticised attitudes smacking of an unwillingness on the part of all interested parties to *get involved* and to *be resourceful* in tackling problems related to property. This gives an idea about the outcome of future decisions about the interference parameter.

To conclude, it is appropriate to remark on the most fundamental insight gained from revisiting the original link between the South African and German constitutional property contexts. This relates to the notion of 'engaged citizenship' as explained above: the transformative South African context displays promising potential to develop the idea espoused in German constitutional property law that property entails rights as well as responsibilities. The South African judiciary appears willing to go *even further* than requiring individual *self-governance* (in the sense of *eigenverantwortliche Gestaltung des Lebens*).<sup>209</sup> *PE Municipality* indicates that the Constitutional Court requires *self-restraint* from owners in the exercise of interests that are not conducive to the public good. But the contestable *Mkontwana* ruling suggests that even more is required: *self-denial* for the sake of the public interest.

This illustrates the curious comparative dimension involved. The comparison involved two jurisdictions that demonstrate similarities in the *nature* of the law applicable to the issue of the interference parameter of property, but which are dissimilar as regards the *mechanics* (the structure and process) of the applicable rules. Yet, the considerations determining *interpretation* of the applicable legal rules are strikingly similar, despite the very different *socio-political contexts* in which these interpretative exercises are undertaken. Only the *intensity* of the application differs. For this reason, it may be very useful to continue consulting German law, if the notion of engaged citizenship and the enabling state is to be cultivated more concertedly in South Africa.

<sup>209</sup> See note 100 above.