

Deconstructing section 25 of the Constitution: Has the inclusion of property rights in section 25 of the Constitution helped or hindered the transformation purpose of the Constitution, and specifically the state's commitment to land reform?

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Abstract

Prior to the advent of the Constitution and constitutional democracy land policies of the apartheid state secured resource ownership and control of land exclusively for the white minority, whilst dispossessing large communities of black, coloured and Asian people and banishing them to designated ‘native reserves’. Shortly before the transition to democracy liberation groups together with the old apartheid regime, sought to negotiate on land policies which not only constitutionalized property rights but which also constitutionalized a priority to land reform in order to redress the injustices of the past. This paper examines whether the law, as captured in section 25 of the Constitution, has helped or hindered government in unfolding a progressive programme of land reform. As a contribution to the debate surrounding issues on the appropriateness of the expropriation of land as a means of accelerating the pace of land redistribution, this minor dissertation offers a critical lens through which the state’s current land reform policy is evaluated against the Constitution’s transformative agenda of land reform. Through an analysis of constitutional jurisprudence- including academic literature and legislation- this minor dissertation aims to investigate whether section 25 (by reason of a failure on the part of the state to accelerate expropriation for the purposes of redistribution of land), is anti-transformational. By deconstructing section 25 (the property clause) my minor dissertation offers insight into a rebuttable presumption that it is in fact not the Constitution, specifically section 25, but in fact the state and its own current policies that are responsible for hindering the pace of transformation in regards to progressive land reform.

KEY PHRASES: Land reform, expropriation, transformative constitutional agenda, land redistribution, property rights, equitable land rights.

Table of Contents

Declaration	II
Acknowledgements	III
Abstract	IV
Table of Contents	V
1. INTRODUCTION	
1.1 Research question and aims of the paper	1
1.2 Chapter Outline	2
2. SOUTH AFRICA’S TRANSFORMATIVE CONSTITUTIONAL AGENDA WITHIN PROGRAMMES OF LAND REFORM	3
2.1 Summary of the meaning of South Africa’s transformative constitutional agenda	3
2.2 The Bill of Rights and its role in defining the state’s role in the promotion, respect and fulfillment of the Constitution’s transformative agenda	7
2.3 Conclusion	8
3. LEGISLATIVE HISTORY OF PROPERTY RIGHTS PRIOR TO THE CONSTITUTION	9
3.1 Discussion of legislative history surrounding property rights preceding the advent of the Constitution	9
3.2 An evaluation of the Constitutional negotiations and debate on property rights and land reform that ultimately resulted in the final Constitutional property provision (s 25).	11
3.3 Conclusion	14
4. LITERATURE REVIEW OF RELEVANT ACADEMIC CONTRIBUTIONS	15
4.1 Current Literature Relevant to Research Question	15
4.2 Conclusion	23
5. ANALYSIS OF S 25 OF THE CONSTITUTION	23

5.1 Discussion and analysis of the interpretation of s 25 of the final Constitution in light of the Constitutional Court’s purposive approach to interpretation.	23
5.1.1 Foundational democratic values and the purposive mode of interpretation.	24
5.1.2 A consideration of the conflicts between a generous purposive approach to individual property rights and the ideal of social transformation.	28
5.1.3 Purposive interpretation and the interrelationship of socio-economic rights.	30
5.2 Discussion of the legislative history post 1996, dealing with the parameters of individual property rights as outlined in section 25 vs the limitation of those rights in relation to the advancement of land reform projects through policies of expropriation and land redistribution.	34
5.2.1 Holistic view of the property clause: Property and measures that advance the socio-economic right to land.	34
5.2.2 Structural framework of section 25: Section 25(1) to (3) “the right to property” and section 25(4) to (9) “the socio-economic right to land”.	35
5.2.3 Evaluation and commentary on section 25(1) and (2) versus the socio-economic rights to land in section 25(4) to (9).	36
5.2.4 Conclusion.	43
6. CONFLICT BETWEEN STATES OBLIGATIONS TO PROMOTE LAND REFORM v JUST AND EQUITABLE IN RELATION TO EXPROPRIATION	44
6.1 Feasibility constraint concerns raised by the state in fulfillment the Constitution’s promise towards land reform.	44
6.1.1 Principles extracted from the cases.	44
6.1.2 Expropriation: A matter of balancing land reform interests and the individual interests of those affected by the expropriation.	49
6.1.3 Defining ‘just and equitable’ for the purposes of reconciling the state’s duties to promote land reform, and to pay just and equitable compensation	49
7. CONCLUSION	52
7.1. Where to from here?	57
BIBLIOGRAPHY	59

1. INTRODUCTION

The fall of Apartheid brought with it the adoption of a type of democracy premised on the supremacy of the Constitution in South Africa. The architects of the newly formed democracy believed that it was necessary to design, draft and put into place a Constitution that was capable of legitimising a system of principles and values upon which an agenda for transformation is possible. This agenda can be identified as transformative constitutionalism. Transformative constitutionalism is characterized as an agenda that seeks to reform a country from a past characterized by conflict, inequality and injustice, to a future founded on the recognition of human rights, substantive justice in social, economic and political realities and development opportunities for all South African citizens.¹ At the heart of transformative constitutionalism lies a commitment towards a continuous transformation of the country's social, political, economic and legal culture.² It is through the project of transformative constitutionalism that the possibility of a reformed, equitable system of land rights that will provide development opportunities for all South Africans, can and should be attained within a constitutional democratic state. The presence of a Bill of Rights as a corner stone of South Africa's constitutional democracy, serves as an influential instrument useful for strengthening the commitment towards the pursuit of transformation. The Bill of Rights not only safeguard fundamental human rights from infringement, but also imposes positive obligations upon the state to progressively promote the realisation of these rights in fulfilment of achieving substantive equality. The agenda of transformative constitutionalism serves to guide the nation towards a better future, a future in which all citizens irrespective of race and class, are no longer precluded from partaking in the development of their well-being and social standing as a result of opportunities brought on by the establishment of an equitable system of land rights

1.1 RESEARCH QUESTION AND AIMS OF THE PAPER

This paper intends to reflect on whether the inclusion of a provision protecting existing property rights in section 25(1) of the Constitution of South Africa Act 108 of 1996 (Constitution) has helped or hindered the transformative purpose of the constitution, and

¹ AJ Van der Walt "Dancing with Codes" 2001 118 *South African Law Journal* 258.

² Mashele Rapatsa "Transformative Constitutionalism in South Africa" *Mediterranean Journal of Social Sciences* Vol 5 at 887-888.

specifically, the state's commitment to land reform in South Africa? The purpose is to critically reflect and ascertain whether the law, and specifically section 25 of the Constitution, has stood in the way of government unfolding a programme of land reform that is consistent with the objectives of land redistribution? Although it is undoubtedly a rebuttable proposition, for the purposes of this critical assessment of section 25, I propose to proceed on the basis of the assumption: that land reform has not happened at a pace sufficient to properly serve the constitution's transformative agenda. Accordingly, I can dispense with, or rather avoid, any policy argument on this issue, since the objective of this paper is to explore and debate any constraints imposed by the constitution to a progressive land reform policy. Framing my (legal) inquiry in this way gives rise to a number of critical questions. This is essential as it will assist in ascertaining whether section 25 is the reason for the staggered pace at which land reform is happening, or whether section 25 is the reason that there is a lack of land reform at all thus leading to a vital and fundamentally over-arching question, namely: is the Constitution "Anti Transformational"?

1.2 CHAPTER OUTLINE

Chapter two begins with a summary of the meaning of South Africa's transformative constitutional agenda and what implications it has for socio-economic policy issues such as land reform, followed by a discussion of the legislative history surrounding property rights preceding the advent of the Constitution in chapter three. Chapter four focuses on an outline of a literature review conducted critically by relevant academics, in order to determine which prevailing arguments support or weaken my proposition. Chapter five analyses section 25 for the purposes of evaluating how it may either aid or hinder progressive land reform, and finally chapter six critiques the legitimacy of a claim based on 'lack of available resources' raised by the state in contemplation of its fulfilment of section 25(5) in respect to progressive land reform. This will be evaluated alongside the jurisprudence surrounding the issue between the obligations imposed on the state to realize the Constitution's transformative agenda, and plausible reasons why the state is or has been unable to give effect to its obligations.

2. SOUTH AFRICA'S TRANSFORMATIVE CONSTITUTIONAL AGENDA WITHIN PROGRAMMES OF LAND REFORM

2.1 SUMMARY OF THE MEANING OF SOUTH AFRICA'S TRANSFORMATIVE CONSTITUTIONAL AGENDA

From a period of injustices represented by discriminatory laws, and a biased parliamentary system that favoured the interests of the dominant white minority a new constitutional system emerged with the sole directive of establishing a new democratic order supported by a transformative agenda. This agenda seeks to enact just laws for all citizens whom the constitution suggests is entitled to equal access to resources and services at the state's disposal. The Interim Constitution together with the Final Constitution comprehended the necessity of inextricably linking and intertwining political freedom, with socio-economic justice.³ My understanding of South Africa's transformative constitutional agenda is informed by the Constitution's desire to not merely proclaim the existence of new democratic political rights, but to commit the state (as a representative of the South African people) to transforming society into one in which citizens have access to social and economic resources which enable for the realization of their self-worth and dignity.⁴ Having had a glimpse at the Preamble, it is my understanding that the Constitution's purpose is to promote a consistent process of transformation in order to establish a society based on social, as well as political justice and equality. In achieving equality, the Constitution outlines an overriding and ever present commitment towards realising substantive (redistributive) equality and justice, and not just formal equality and justice.⁵ Substantive equality and justice means a commitment to achieving equality in the lived, social and economic circumstances of those previously disadvantaged and left vulnerable by the apartheid land laws.⁶

According to Klare 'the constitutional principles in terms of which the 1996 text was certified', (Constitution of the Republic of South Africa, 1993, No 200 of `93, Schedule 4), include the foundational assumptions that the final Constitution shall provide for a system of government committed to achieving equality', and that 'equality before the law' contemplates

³ Karl Klare 'Legal Culture and Transformative Constitutionalism' (1998) 14 *South African Journal on Human Rights* at 153.

⁴ *Du Plessis v De Klerk*, 1996 (5) BCLR 658 (CC) at para 132.

⁵ K Klare (note 3) at 154.

⁶ *Ibid.*

laws, programs, and activities designed to ‘ameliorate the conditions of the previously disadvantaged’.⁷ This translates to my understanding that the Constitution commits the government to combating poverty and promoting social welfare, through the affirmation and promotion of democratic values, human rights and equality.⁸ This commitment is extended to the areas of land reform and access to land to be specific.⁹ In normative terms this idea of the transformative constitutional agenda has implications for the establishment of an overriding and ever-present commitment towards realising substantive (redistributive) equality for those previously disadvantaged by unjust apartheid land laws. This is likely to be achieved by establishing mechanisms that are capable of facilitating the progressive redistribution of land to ameliorate the social, and economic conditions of vulnerable people previously disadvantaged by unjust apartheid land laws. In constitutional terms this is translated into section 25(4) to 25(8) setting out the Constitution’s transformative agenda in relation to those previously dispossessed of their rights to property. The implications of this is the formulation of 25(5) which articulates the Constitution’s desire for the implementation of reasonable legislation or policies geared towards realising the constitutional right to land, in order to overcome the socio-economic legacy of apartheid land law. Sections 1(a), section 7(2), section 25(4) -(8) and section 39(1) (a) set out strong normative frameworks that are useful for understanding the Constitution’s transformative agenda, and how substantive (redistributive) justice, particularly through land reform programmes, is to be achieved in the lived, social and economic circumstances of those previously dispossessed.¹⁰

Karl Klare developed the notion of ‘transformative constitutionalism’ which defines the notion as ‘a transformative enterprise of inducing large-scale change through non-violent political processes grounded in law’.¹¹ He further argued that in some instances transformative constitutionalism encounters a restraining force from the prevailing static legal culture, the result being the resistance of transformation.¹² A pre-constitutional legal culture that is static and representative of ‘a set of intellectual habits’ that uncritically accepts legal practices of apartheid land law, stifles the progression of the Constitution’s transformative aspirations and

⁷ Ibid.

⁸ Preamble and subsections 1(a), 7(2) and 39(1)(a) of the Final Constitution of the Republic of South Africa Act 108 of 1996.

⁹ K Klare (note 3) at 154.

¹⁰ The Constitutional Court implicitly recognized the redistributive aspirations of the Constitution in *Certification of the Constitution of the Republic of South Africa*, 1996 (1) BCLR 1253 (CC) at para 63-69. My emphasis.

¹¹ K Klare (note 3) at 150.

¹² Ibid,

slows down the rate of transformation.¹³ He argues that by adhering to the tenets of transformative constitutionalism, South Africa will be better placed in strengthening the projects of constitutional enactment, interpretation and enforcement.¹⁴ This will invariably strengthen the commitment towards the reconstruction and transformation of the current legal and socio economic cultures, which arguably safeguard the remnants of apartheid land law within a new constitutional democracy.¹⁵

Upon examination of South Africa's constitutional democracy one becomes aware that the current legal culture (in the context of an unqualified protection of existing property rights) has influenced the interpretation, application and enforcement of section 25. The current legal culture has also influenced how section 25 and its underlying values and principles, influence the advancement of socio-economic development in the area of land reform. The current legal culture appears to differ from the ideals of transformative constitutionalism in that the desire for legal formalism and conservatism often obstructs the transformation, and development of a legal culture primarily concerned with the Constitution's transformative aspirations. This reality is relevant in the context of the need to showcase how a post constitutional legal culture ought to influence the interpretation, application and enforcement of section 25, and how the values and principles underlying section 25 ought to drive the process of transformation and land redistribution.

Despite the tendency of the current legal culture to revert to a conservative and formalistic approach towards the constitutional interpretation, enactment and enforcement of s 25 the Constitution establishes the necessary normative institutional framework through which the ideals of large scale, and egalitarian socio-economic transformation are capable of being infused into the current legal culture.

The commitment towards achieving substantive justice, represents a shift in the roles of institutions responsible for promoting and supporting a system of transformative constitutionalism that creates an egalitarian society of justice oriented ideology. This ideology is capable of safeguarding the interests held by previously disadvantaged black majority, in relation to access and ownership of land. The institutions include the judiciary

¹³ AJ van der Walt "Legal History, Legal Culture and Transformation in a Constitutional Democracy" 2006 (12) *Fundima* at 18.

¹⁴ K Klare (note 3) at 150.

¹⁵ *Ibid.*

and other quasi-judicial bodies presenting the Constitution and its values in its best light.¹⁶ These institutional bodies are able to present the Constitution in its best light, through the use of adjudicative processes that rely on a purposive interpretative approach which acknowledges the comprehensive transformative ambition of the Constitution.

It is argued that the Constitution has embedded within it what Karl Klare describes as a ‘transformative constitutional ethos’ which informs a commitment to long term projects of constitutional enactment, interpretation and enforcement.¹⁷ The Constitution subscribes to a value-laden system that defines its transformative role and mission, and guides its understanding of that role and mission in regards to the projects of constitutional enactment, interpretation and enforcement.¹⁸ The values assist the Constitution to become more social, redistributive, caring and self-conscious of the historical context, in the way it regards its transformative mission.¹⁹

The commitment to the progressive transformation of South Africa’s land holding and ownership regime relies on the support that is given to these projects.²⁰ This means that ‘transformative constitutionalism’ invites what Klare remarks as “the adoption and development of a new imagination and self-reflection about legal method, analysis and reasoning consistent with the Constitution’s transformative goals”.²¹ The implications that this has for section 25 and land reform is progressive, in that section 25 and the underlying transformative values can be harnessed to change the *status quo ante* and to level the economic playing field between the interests of existing property holders and the aspirations of the previously dispossessed. This is to be achieved through the adoption of a critical reflection of the analysis, legal method and reasoning of property law in a manner that is consistent with the Constitution transformative goals. The implications of this is that section 25 can be utilised as a mechanism to facilitate transformation of the existing property law (which by and large still depends on traditional rules and institutions like private ownership,

¹⁶ Roux T ‘Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction without difference’ *Stellenbosch Law Review* 258-285.

¹⁷ K Klare (note 3) at 150.

¹⁸ The value laden system is laid out in the Preamble. Of importance are the following for emphasis: “*Heal the divisions of the past and establish a society in which government is based on democratic values, social justice and fundamental human rights*”. “*Improve the quality of life of all citizens and free the potential of each person*”.

¹⁹ This is confirmed in *S v Makwanyane*, 1995 (6) BCLR 665(CC) at para 262.

²⁰ Klare (note 3) at 150.

²¹ *Ibid* at 156.

with their predilection for the strict protection of existing property interests)²², in order to facilitate the right to access to land through state expropriation and land redistribution.²³

What will follow is a brief discussion of the Bill of Rights and the particular importance of section 25, in relation to provisions dealing with the state's obligation to respect, promote and fulfil section 25.

2.2 THE BILL OF RIGHTS AND ITS ROLE IN DEFINING THE STATE'S ROLE IN THE PROMOTION, RESPECT AND FULFILLMENT OF THE CONSTITUTION'S TRANSFORMATIVE AGENDA.

The South African Bill of Rights epitomise a post liberal constitutional democracy founded on the values of human dignity, the advancement of human rights and freedoms within a democratic state.²⁴ What is unique about the South African Bill of Rights is that it was drafted in such a way so as to render the rights enshrined therein to be capable of being given concrete effect, through subjecting the rights to judicial enforcement.²⁵ Another unique aspect of the Bill of Rights is the inclusion of economic and social rights which set out the obligations imposed upon the state and its functionaries, to establish effective measures that give effect to their progressive realisation. The measures that impose these obligations operate in negative and positive ways. For the purposes of this dissertation I will be focusing particularly on section 25(4), section 25(5) and section 25(8), and the positive duties these provisions impose upon the state to provide for equitable access to and ownership of land through the implementation of policies centred on the expropriation and redistribution of land.²⁶

Section 7(2) of the Constitution sets out the state's primary role of creating an environment through which persons are capable of not only accessing a right, as entrenched in the constitution, but advancing the realisation of that right in order to give effect to the transformative ethos of the Constitution. The commitment to such an endeavour ensures that

²² AJ van der Walt "Constitutional Property Law" 2005 at 402.

²³ Ibid.

²⁴ Chris Landsberg & Shaun Mackay "South Africa 1994-2004" a chapter from "Reflections on Democracy and Human Rights: A decade of the South African Constitution" 2006, available at www.sahrc.org.za at 6.

²⁵ Sandra Liebenberg "Human Development and Human Rights South African Country Study" Human Development Report 2000 Background Paper accessed on the 30th of September at http://hdr.undp.org/sites/default/files/sandra_liebenberg.pdf at 8.

²⁶ Section 25(5)-(8) of the Constitution of the Republic of South Africa Act 108 of 1996.

the state remains committed to the long term project of the constitutional enactment of legislation and policies which not only establish a more just social order, but progressively ‘shift the South African land regime from one of unjust domination on the basis of skin colour and status to one that complies with the transformative ethos of the Constitution’.²⁷ Section 7(2) is particularly important for practical purposes because it indicates the scope and nature of the entitlements of section 25 (4) to 25(8) as well as outlining when and how the right can be used to advance a claim.²⁸ The practical implications of this is that the constitutional long term projects of constitutional interpretation and enforcement are enhanced and strengthened, whenever the judiciary is charged with determining whether the state has acted in accordance with its positive duty to Section 7(2) and more broadly speaking, the Constitution’s transformative ethos.

Section 7(2) applies to all organs of state, that is the executive and the legislature within the national, provincial and local spheres of government, and these particular organs are required by the Constitution to engage fully in their positive duties to fulfil the right as representative of the Constitution’s underlying transformative ethos. The branches, as components of the state, must ‘adopt appropriate legislation, executive policy, and other measures’ in order to ensure that those who are currently unable to enjoy access to equitable land are able to do so, as a result of the implementation of effective land reform policies and programmes.²⁹

When one considers how section 25, particularly subsections (4)-(8), is framed we can see how important the provision is in practically setting out the nature and scope of the state’s duty to promote and fulfil the underlying transformative ethos embedded in section 25, through the implementation of land reform policies and programmes. It is argued that section 7(2) plays a crucial role in focussing the lens through which the interpretation and enforcement of the underlying transformative values and principles embedded in section 25, can be utilised to ascertain whether the state has truly acted in accordance with the Constitution’s transformative agenda of transforming the prevailing land regime.

2.3 CONCLUSION

²⁷ Hanri Mostert “Land restitution, social justice and development in South Africa” (2002) 119 *South African Law Journal* at 402.

²⁸ Brand & Christof Heyns “Introduction to socio economic rights in the South African Constitution” (1998) 2 *Law, Democracy and Development* 153 at 9.

²⁹ *Ibid* at 10.

Prior to the advent of the Constitution property rights in relation to access and ownership of land, were informed by the discriminatory edifice of the apartheid land law system. The legacy of such a system had to be dismantled in order to make way for the adoption of a constitutional democratic project, committed to a reform of the land law system representative of an equitable system of land rights. In order to better understand how the need for the adoption of land reform programmes and policies influenced the formulation of section 25 in its current state, inclusive of provisions advancing the Constitution's transformative agenda, what will follow is a discussion of the legislative history surrounding property rights and the effect that history had on the development of a land law system preceding the advent of the Constitution.

3. LEGISLATIVE HISTORY OF PROPERTY RIGHTS PRIOR TO THE CONSTITUTION

3.1 The legacy of the colonial conquest period and the apartheid regime following it, worked effectively to restructuring ownership and control of resources in South Africa.³⁰ Legislative measures were enacted to restrict access, control and ownership of the country's land to only thirteen per cent of which eighty per cent of the black South African population would be entitled to access, control and own.³¹ These legislative measures entrenched deep disparities between the minority white population who owned and controlled majority of the land, thereby acquiring and sustaining wealth, and the majority black population being subjected to large scale poverty due to landlessness.³² The project of acquisition of land from the black majority advanced by the colonial regime, systematically institutionalised an informal system of spatial separation based on race.³³ The purpose was to swiftly acquire land in order to develop a land regime which secured economic domination of land, in favour of the individuals who acquired land from colonial powers. The acquisition of this land was made possible by the promulgation of a long line of racially motivated land laws.³⁴ These respective land laws reinforced the

³⁰ Hanri Mostert (note 27) at 403.

³¹ T W Bennett 1996) '*African land -A history of dispossession*' in Reinhard Zimmermann & Daniel Visser (eds) Southern Cross: Civil Law and Common Law in South Africa at 65.

³² Hanri Mostert (note 27) at 401.

³³ Ibid.

³⁴ The Black Land Act 27 of 1913. This act provided the statutory basis for territorial segregation by dividing South Africa into the so-called 'black spots' on the one hand and the 'non-African' areas on the other hand. The latter covered approximately 87 per cent of the country's surface area and black South Africans could not

apartheid government's access and control of land as a resource, in order to institutionalise racial and socio economic class segregation by developing a hierarchical 'primacy' of ownership in terms of private law.³⁵

The apartheid land laws³⁶ operated together to fragment the racial groups of the Black, Coloured and Indian population, by assigning portions of land mass to specific groups of people based on their race.³⁷ The purpose of these policies underpinning these laws was the removal of land as a resource/commodity from the other racial groups, in order to secure the best economically valuable pieces of land (i.e. agricultural and residential) which was then to be reallocated to the minority white population. This was done in order to entrench a system of land rights to which ownership, in terms of a civil law-oriented private law system, was protected.³⁸ The result of the enactment of these laws and the implementation of these policies underpinning these laws was that a legal institution of property law, became an effective vehicle through which land rights for the white minority ensured strong and effective protection against any infringement of their land rights.³⁹ The majority Black, Coloured and Indian population however were subjected to a flawed allocation of land rights at a remarkably lower value, based on a private-civil land law system which didn't provide them with the same kind of protection.⁴⁰ In essence the majority Black, Coloured and Indian population received rights only to 'statutory defined tribal land' or land rights solely based on land granted to them by government, through the issuing of 'residential permits or certificates of occupation'.⁴¹

Arising from the dark depths of the apartheid period, the collective negotiations between liberation groups and the old apartheid regime sought to reform the old property regime in order to institutionalise a constitutional order predicated on the ethos of transformative constitutionalism. The motivation behind this was to ensure rectification of the state of affairs stemming from the old property regime. The Constitutional negotiations sought to establish a more just political, social and legal system which reformed land and

purchase, hire or in any other way acquire rights to land in these areas. See A J van der Walt 'Property rights and hierarchies of power: A critical evaluation of land-reform policy in South Africa' (1999) 64 *Koers* 259 at 261-3.

³⁵ AJ Van der Walt (note 1) at 261-263.

³⁶ The Black Land Act and the Group Areas Act 36 of 1966.

³⁷ Hanri Mostert (note 27) at 402.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

property distributions in order to facilitate for greater access to land, through the implementation of land reform policies such as expropriation. The negotiations further sought to arrange the new constitutional property regime in such a way as to provide the state with enough institutional mechanisms to alleviate poverty, by reversing the effects of the unjust system of land distribution and land ownership rights.

Following from the legislative history of property rights prior to the Constitution, I will now consider an evaluation of the constitutional negotiations held before the introduction of the Constitution in order to debate how the new constitutional order not only acknowledged individual rights to ownership of property, but also committed itself to a transformative agenda premised on the transformation of the existing land regime by way of land reformation and the redistribution of land through expropriation as espoused in section 25(4)(a) and section 25(5).

3.2 AN EVALUATION OF THE CONSTITUTIONAL NEGOTIATIONS AND DEBATE SURROUNDING THE FRAMING OF PROPERTY RIGHTS AND LAND REFORM BROUGHT ABOUT SECTION 25.

At the negotiation table the African National Congress together with other liberation parties acknowledged that the effects of hardship in the form of poverty and socio economic exclusion from equitable development, needed to be addressed by advocating for policies centred on the return of the land “to those who worked for it”.⁴² It appeared that at the cusp of the transition from one regime to another was the key issue of land reform, and how such an issue would find a place in South Africa’s new constitutional order.⁴³ Although the then ruling National Party was made aware of the need to broker agreement between itself and the other negotiating parties by committing to some form of land reform, the National Party was reluctant to move away from the protection of existing property rights in the new Constitution.⁴⁴ This brought about numerous stalemates and breakdowns in negotiations.

⁴² The Freedom Charter of 1955, one of the ANC's foundational documents, declares that “[r]estrictions of land ownership on a racial basis shall be ended, and all the land re-divided amongst those who work it to banish famine and land hunger”. Land reform, in one form or another, has always been on the agenda of the ANC.

⁴³ The Constitution of the Republic of South Africa Act 200 of 1993 (hereafter 'interim Constitution') in subsections 8 and 121-3 made special provision for land reform, and particularly for the restitution of land.

⁴⁴ Jill Zimmerman “Property on the line: Is an expropriation-centred land reform constitutionally permissible?” (2005) *South African Law Journal* 122 at 380.

However, despite the stalemates and breakdowns compromises were made in order to push forward a successful transition to a new constitutional democracy.

South Africa's constitution was formulated in two stages, the interim Constitution of 1993 (the first stage in which initial negotiations between the African National Congress and the National Party were staged) followed by the final Constitution of 1996 which was drafted by the democratically elected Constitutional Assembly.⁴⁵ How the Constitution was to ultimately approach and deal with property rights on one hand, and the commitment to a transformative agenda of land reform on the other was very contentious during both stages of negotiations and drafting.⁴⁶ From the beginning of the negotiations, the notion of land reform premised on expropriations was placed at the forefront of the debate surrounding the preferred approach to property rights in the Constitution.⁴⁷ During the negotiation stage of the Interim Constitution, the African National Congress had presented draft land and property clauses in May 1992 which heavily focused on equitable redistribution of land and which contemplated the use of expropriation to service land reform in order to address poverty and landlessness.⁴⁸ Despite the African National Congress having presented its vision for property, the Multi party negotiating members sought to adopt a different vision for property by formulating a property clause in the Interim Constitution which, by its language, questioned the economic feasibility of an expropriation driven land reform.⁴⁹ The African National Congress and the other allied parties rejected the terms of the formulated property clause included within the Interim Constitution, citing that a compromise to such a clause would serve to entrench forever rather than reverse the inequality and injustice of apartheid.⁵⁰

Cyril Ramaphosa, having been appointed as the chairperson of the Constitutional Assembly charged with drafting the final Constitution, found himself in a precarious position

⁴⁵ Ibid at 383.

⁴⁶ Ibid.

⁴⁷ Ibid.

⁴⁸ The full text of these clauses are available in: The African National Congress 'A Bill of Rights for the New South Africa' as quoted by Chaskalson in "Negotiations over the protection of property rights in the interim Constitution" (1995) 11 *South African Journal on Human Rights* 222 at 238.

⁴⁹ Although land reform was called for by the interim Constitution, it was kept separate from the property clause at the National Party's insistence and appeared instead in the equality clause. Apparently, the National Party's insistence on this transfer was predicated on the premise that, if land rights were discussed under the heading 'property', the property clause might be read to protect only rights in land, leaving other forms of property unprotected; Chaskalson (note 48) at 231-232; See also The Constitution of the Republic of South Africa Act 200nOf 1003 (hereafter interim constitution') subsections 8 and 121-123.

⁵⁰ Jill Zimmerman (note 44) at 384.

in terms of promoting the African National Congress's first choice⁵¹ or advancing a property clause that was sensitive to the interests of white agriculture and the white business community.⁵² The ANC had however relooked at its initial stance by September 1995 and had conceded and accepted the inclusion of a property clause that would describe the circumstances under which property may be expropriated, rather than restate those property rights which already existed.⁵³ This new position was presented during further negotiations between the National and Democratic Parties and other allied parties. The National Party (NP), representing the interests of the white minority, were opposed to the ambitions of redistribution of land as laid out in the African National Congress's new stance. In order to resolve the breakdown in negotiation and advance the successful transition from the old regime to the constitutional democracy, all parties conceded to drafting a clause which was to achieve some compromise between the two widely divergent positions on property.⁵⁴ Section 25 of the Final Constitution is the result of that compromise. Section 25 outlines:

- (1) *No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.*
- (2) *Property may be expropriated only in terms of law of general application-*
 - (a) *For a public purpose or in the public interest; and*
 - (b) *subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.*
- (3) *The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including-*
 - (a) *The current use of the property;*
 - (b) *The history of the acquisition and use of the property;*
 - (c) *The market value of the property;*
 - (d) *The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and*

⁵¹ Right up until the deadline, the ANC maintained that its first choice with respect to the legal recognition of property was that property should not be protected in the Constitution at all; Baleka Mbete-Kgositsile pointed out that the ANC's goal was to ensure "that poverty and landlessness would be addressed in the new dispensation": Jill Zimmerman (note 44) at 384.

⁵² Ibid.

⁵³ Ibid: It was also around this time that the ANC took the decision to address land rights for the landless and existing property rights in a single clause, to avoid the possibility that the latter rights could be adjudged to override the former in a balancing contest between competing rights; See also Katherine Savage 'Negotiating South Africa's new Constitution: An overview of the key players and the negotiation process' at 178.

⁵⁴ Jill Zimmerman (note 44) at 384

- (e) *The purpose of the expropriation.*
- (4) *For the purposes of this section-*
- (a) *The public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to land on all South Africa's natural resources: and*
- (b) *Property is not limited to land.*
- (5) *The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.*
- (6) *A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.*
- (7) *A person or community dispossessed of property after 19 June 19213 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.*
- (8) *No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).*
- (9) *Parliament must enact the legislation referred to in subsection (6).*

A number of party advisers and external interests' groups participated in the on-going debate on property as the negotiations continued between the African National Congress, the National Party and other allied parties for the formulation and drafting of the final constitution. These interested parties sought to lobby the National Party to broker an agreement for the formulation of the right to property along the lines of the right to 'acquire and hold' as was contained in the Interim Constitution.⁵⁵ On the flip side the external interested parties of the Congress of South African Trade Unions (COSATU) and the National Land Committee (NLC), lobbied the African National Congress to push for a property clause that would not entrench existing inequalities but would rather advance commitment to land reform in the Final Constitution.⁵⁶

⁵⁵ When it came time for the newly appointed Constitutional Court to certify compliance with the Constitutional Principles, the National Party launched an unsuccessful challenge to the clause's validity. In failing to provide for a positive right to acquire and hold property, the National Party argued, the clause contravened Constitutional Principle II, which required that the Constitution entrench 'all universally accepted fundamental rights, freedoms and civil liberties'. The Constitutional Court held that 'no universally recognised formulation of the right to property exists': *Ex Parte Chairperson of the Constitutional Assembly: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) para 72.

⁵⁶ Jill Zimmerman (note 44) at 385.

3.3 CONCLUSION

Despite a divergence of views of the ideal constructed version of the property clause that is entrenched in the final Constitution, it is commonly accepted that section 25 was constructed with the foresight that it would facilitate rather than frustrate land reform.⁵⁷ Section 25 not only secures existing property holdings against improper state interference, but makes explicit provision for land reform including provision for regulating deprivation and for expropriation for the sake of land reform.⁵⁸ Upon reflection of section 25 in this mould I submit that it would not be unreasonable to take the position that there is no need for amendments to section 25, in order to ensure that progressive land reform occurs. The Constitution, particularly section 25, creates a sufficient framework in which government is capable of invoking its powers of expropriation to promote and facilitate effective land reform, for the purposes of advancing the redistribution of land. However, my observation of the current state of land reformation and the debate surrounding the lack of transformation in this area has lead me to hypothesise that the state's failure to progressively unfold a programme of land reform is solely as a result it's misguided interpretation of section 25 as an obstacle to progressive land reform policies.⁵⁹ I hypothesise that this misguided interpretation has contributed to the state's inability to follow section 25's constitutionally mandated guidelines of advancing land reform policies that ensure that there is an equitable distribution of land.⁶⁰ I intend to explore this hypotheses and debate them further as the thesis moves along.

From this point, I will consider the relevant academic literature that has helped shape my understanding of the debate on land reform, the right to equitable access to land and the protection of existing property rights.

4 LITERATURE REVIEW OF RELEVANT ACADEMIC CONTRIBUTIONS

⁵⁷ AJ van der Walt "Reconciling the state's duties to promote land reform and to pay an equitable compensation for expropriation" 2006 123 *South African Law Journal* at 26.

⁵⁸ AJ Van der Walt (note 1) at 282.

⁵⁹ *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at para 64

⁶⁰ Jill Zimmerman (note 44) at 399.

4.1 CURRENT LITERATURE RELEVANT TO RESEARCH QUESTION

South Africa's final Constitution has been acknowledged as a text that possesses transformative ideals and principles that drive a continuous process of institutional transformation of South Africa's democratic society, based on values of non-racialism, non-sexism, the Bill of Rights and the rule of law.⁶¹ With principles and values of substantive equality freedom and human dignity underpinning the Constitution's transformative agenda, South Africa's Constitution is concerned with the enterprise of inducing a major social, political and legal change to South Africa's land ownership regime. The mechanisms that embody the Constitution's hope of a transformed society in which the previous unjust apartheid land law system is readdressed, are sections 25(2), sections 25(5), s25(7) and sections 25(8) of the Bill of Rights.

Several articles have been written addressing the role of sections 25(2), 25(3), 25(5) and 25(8) in facilitating expropriation centred land reform by the state, whilst preserving the fundamental guarantees of property rights reflected in s 25(1). In this dissertation, at least four articles are reflected upon. I selected these particular articles as they are relevant to my enquiry of whether the law, and specifically section 25, has stood in the way of government in unfolding a programme of land reform that is consistent with the objectives of s 25(5). These particular articles discuss the contentious and progressive aspects of the South African legal discourse surrounding section 25, and land reform since 1993. Furthermore these articles critically reflect on the impact that the current legal culture has had on the use of 'available tools and methods for construing and implementing law(section 25) as an agent of transformation'.⁶² The articles underscore the need for imagination and development of alternative ways of reading, interpreting and thinking about property, property rights and the constitutional protection of property in light of the constitutional obligation to promote land reform.⁶³ These articles are crucial to my inquiry as they outline the constitutional guidelines that the state should to be mindful of in order to creatively overcome the challenge of protecting vested property interests, and at the same time broadening access to land through land reform for the purposes of redistribution.

⁶¹ Mashele Rapatsa (note 2) at 888.

⁶² WJE Du Plessis 'Compensation for Expropriation' LLD (North West Univerisity) 2009, available at www.ssrn.com/abstract=24663639, accessed on 16 February 2017 at 6.

⁶³ AJ van der Walt (note 57) at 31-32.

My perspective of whether the construction and content of property rights, as included in section 25(1), has helped or hindered the transformative purpose of the Constitution and specifically the state's commitment to land reform, is informed by theoretical perspectives. These perspectives suggest that the drafters of the Constitution intended the long term projects of constitutional enactment, interpretation and enforcement of the provisions of sections 25(2), 25(4), 25(5) and 25(8), to facilitate a transformation of the apartheid land law system and power relations that is reflective of "participatory and egalitarian democracy".⁶⁴ Understanding the essence of Klare's⁶⁵ theorisation of South Africa's transformative Constitution helps develop the foundations of a common understanding that the Constitution, through the Bill of Rights, endeavours to recreate a society which is vastly different from the past in terms of a land law system that was in disparity with the rights of the marginalised majority. His theory in my opinion best develops a solid foundation upon which an effective analytical framework is developed, whereby the processes of law-making, adjudication and legal culture can be analysed critically in order to determine how extensively these processes operate as mediums for accomplishing socio-economic change and social justice.⁶⁶ His work is a good starting point because it positions the constitution and its transformative aspirations at the centre of an advanced, progressive and innovative democracy that is not only self-conscious of the importance of its continuous development, but is committed to innovating its law-making, adjudication and legal culture practices into appropriate mediums for achieving social justice and socio-economic transformation.⁶⁷ Klare based his understanding of the Constitution on the precepts of transformative constitutionalism, which endeavours to institutionalise a normative framework of legal principles and values that guide systematic processes of legal change.⁶⁸ Such change can be characterised in the underlying principles and values that permeate within the provisions of section 25(2), 25(4), 25(5) and 25(8), which seek to entrench and re-establish fundamental rights to ownership and access to property that was previously dispossessed.

Klare's writings highlight that often times the legal culture and its relationship with the judiciary, the legislature and the executive, shape section 25's transformative agenda in terms of how it is to be interpreted and how provisions dealing with land reform are to be applied and enforced. Section 25 fundamentally provides guidelines on how the state is to

⁶⁴ Karl Klare (note 3) at 150.

⁶⁵ Ibid.

⁶⁶ K Klare (note 3) at 147.

⁶⁷ K Klare (note 3) at 147.

⁶⁸ Ibid.

manage the tension between protecting vested property interests, and at the same time broadening access to land through land reform measures such as expropriation for the purposes land redistribution.⁶⁹ However, post-apartheid property law and the current legal culture surrounding it are still very much defined by traditional rules and institutions like private ownership, that still have a predilection for the strict protection of property interests at the peril of land reform initiatives.⁷⁰ This may very well result in an obscuring of section 25's transformative potential. This ties in with the fundamental theoretical foundation of the dissertation which seeks to ascertain as to whether the law, as captured in section 25, can be interpreted and applied in such a manner as to impede the state from unfolding programmes of land reform.

Borrowing from Klare and his writings on transformative constitutionalism and its relationship with the concept of legal culture, creates the foundation upon which one can frame the argument that South Africa's legal culture has arguably remained conservative and formalist in form. This has lent to what may be argued as structural impediments curtailing the comprehensive realisation of the transformative agenda of land reform, as envisaged in section 25(2), 25(4), 25(5) and 25(8). Taking from his writings I put forward the argument that the infusion of transformative constitutional norms within the fabric of section 25, enables the judiciary, the legislature and the executive from not being constrained in the interpretation, application and enforcement of section 25(2) to 25(8). The infusion of these transformative constitutional norms within these provisions, create a legal framework through which socio-economic transformation receives constitutional justification through law and policy. The 'infusion' impacts on law reform policies and programmes because the constitutional norms prioritize the development of laws and policies as mechanisms and tools which are capable of being construed, and implemented as agents of transformation. The by-product is the adoption of laws and policies that are not only insulated from constitutional attack, but are empowered to pursue the establishment of a more equitable system of land rights for those previously dispossessed.

In light of Klare's writings on transformative constitutionalism and the legal culture thereof, Jill Zimmerman⁷¹ critically explores whether expropriation centred land reform can be constitutionally permissible in light of the complexities of South Africa's constitutional

⁶⁹ WJE du Plessis (note 62) at 6.

⁷⁰ AJ van der Walt (note 22) at 402; WJE du Plessis (note 62) at 6.

⁷¹ Jill Zimmerman (note 44).

dispensation. Like Klare Zimmerman concurs that South Africa's constitution, particularly section 25, possesses a principal characteristic that fundamentally expands and reinforces the ideals of a commitment to transformation within the legal realities of society. These include; legal realities surrounding the reconstruction of an equitable system of land rights through expropriation and land distribution.⁷² Zimmerman highlights that the Constitution was constructed in such a way as to provide flexible limits of constitutionally permissible land reform that is in keeping with the constitution's aspirational commitment to transformation and the achievement of social justice. However, Zimmerman is quick to highlight in her work that the current policy environment surrounding South Africa's current land regime, is distinct from the policy options offered by the flexible limits of constitutionally permissible land reform that is provided in subsections 25 (2), 25(3), 25(4), 25(5) and 25(8). For Zimmerman, "the flexible limits of constitutionally permissible land reform form the normative basis upon which the property clause can facilitate a substantive period of resource redistribution".⁷³ For Zimmerman the most significant aspect of section 25 is its flexibility in managing a fluid balance between the protection of private property interests, and the special constitutional priority of the promotion of land reform in the interest of the public. Zimmerman asserts that the language of subsections 25(2) and 25(3), both on their own and in synergy with section 25(4)(a), section 25(5) and section 25(8), can be construed to suggest that a substantial form of resource redistribution is possible through the adoption of progressive and innovative expropriation measures for the purposes of land reform. In other words, she asserts that the textual synergy could be understood as providing a springboard for a more substantial form of resource redistribution.

Zimmerman makes a good case that the proponents of the transformative constitutionalism project (concurring with Klare) as undertaken by section 25, are to be understood as regulating rather than obstructing the expropriation process.⁷⁴ According to Zimmerman this will "enable landless people and the civil society organizations the ability to claim the constitutional high ground in negotiating with government, questions of land reform and the subsequent enforcement of land reform through expropriation".⁷⁵ Accordingly, the transformative agenda embedded in the constitutional text of section 25 empowers the Constitutional Court to safeguard the interests and rights of all people,

⁷² Jill Zimmerman (note 44) at 383.

⁷³ *Ibid.*

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

particularly the vulnerable groups, to an equitable system of land rights. Zimmerman envisages that this will occur through the Constitutional Court exercising its authority in the implementation of constitutional interpretation, as a mechanism for ensuring that any enactment by the legislature and policies developed by the executive adhere to the Constitution's desired transformative ambitions through the legal culture of justification.⁷⁶

It is important to enquire how section 25(2), 25(3), 25(4), 25(5) and 25(8) can be made effective to bring about its transformative ambitions. It is at this juncture that Zimmerman takes a step further than Klare in arguing that the transformative ambitions of section 25(2), 25(3), 25(5) and 25(8) are capable of being interpreted by the Constitutional Court as characterising appropriate mechanisms for expropriation (for purposes of land redistribution), as of special constitutional priority thereby justifying the state to compensate at well below the rates ordinarily attaching to expropriations for less urgent public purposes.⁷⁷ I intend to use this assertion by Zimmerman to address the lack of progressive expropriation and land redistribution programmes focused on transforming the present land law regime, in order to accommodate the standardized, transnational property rights discourse emphasizing the centrality of market value compensation by the state. This invariably discourages the state from taking necessary steps to affect transformation and the achievement of social justice as envisaged by the Constitution. Zimmerman's interpretation on section 25 which takes into account the underlying transformative ideals and the achievement of social justice, is particularly useful when considering the role the judiciary plays in interpreting the constitutional text as a regulator and not an obstructor of expropriation for the purposes of land reform.⁷⁸ Drawing from Zimmerman's piece enables one to highlight the importance that constitutional interpretation plays in placing the Constitution in its best light, thus ensuring that legislation or policies enacted by the Legislature and developed by the Executive, give greater impetus to section 25's fundamental transformative constitutional values.

Hanri Mostert's⁷⁹ piece on land restitution, social justice and development in South Africa takes a look at how the unfortunate history of ownership and property rights of the apartheid land law regime and the present disparity of wealth in society, have created the

⁷⁶Ibid.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Hanri Mostert (note 27) at 400.

urgent need for progressive land reform.⁸⁰ According to Mostert that need for reform of the South African land law system inherited from the past apartheid land regime, is reflected by the transformative ideals embedded in section 25 of the final Constitution.⁸¹ She presents her inquiry on the progress of land reform by critically evaluating the endeavours of the legislature in their constitutional enactment of land restitution programmes furthering land reform, and the endeavours of the judiciary in their constitutional interpretation of section 25 in furthering land reform. It is through this evaluation that a clearer perspective on whether the Constitution itself, particularly section 25, provides for a normative framework conducive to the establishment of a restitution programme which seeks to provide for a more just social order through the transformation of South Africa's land law regime so as to affect socio-economic development.⁸² Mostert's inquiry is different to my inquiry in that she explores the progress of land reform through the constitutional enactment of one of the broad land reform projects, land restitution (section 25(7)). My inquiry is concerned with the issue of expropriation for the purposes of achieving land reform through the land redistribution project. My inquiry specifically looks at whether expropriation can substantially advance land reform as entrenched in section 25(5), to the extent that it fosters the necessary conditions that will enable equal access to land.

Again, Mostert like Zimmerman seems to consider how the Constitution, which envisages transformation and the achievement of social justice, can be made more effective in realizing these transformative ideals. She approaches this question by considering how section 25 envisages the process of land law reform and whether this process resolves to give effect to the establishment and maintenance of a more just distribution of property and of greater access to land and security of land tenure. According to Mostert, the concepts of social justice and development reinforce the Bill of Rights underlying value framework. This becomes apparent when these concepts drive the transformative processes of the levelling off of all inequalities, systematically reconciling diverse social interests and facilitating meaningful improvement of the socio-economic conditions of vulnerable groups. These transformative processes, reinforced by the concepts of social justice and development, become key elements to socio economic reconstruction in the context of the treatment of access to and ownership of land ownership.⁸³

⁸⁰ Ibid at 402

⁸¹ Ibid.

⁸² Hanri Mostert (note 27) at 400.

⁸³ Ibid at 404.

Mostert makes a good case on how political, economic and socio-cultural factors often shape the development process and establishment of social justice, which may often result in the development of extensive land reform programmes that are either aimed at thoroughly rectifying inequalities in existing land distribution patterns, or that are restricted to just providing financial or other support services.⁸⁴ Mostert highlights in her work that section 25 sets out a broad land reform programme which is comprised of three separate but interconnected elements namely (i) restitution, (ii) redistribution of land, and (iii) land tenure reform. She focuses on the general responsibility of the legislature, working alongside the executive, to promulgate legislation in relation to the broad land reform programmes in order to give effect to the broad constitutional objectives of land reform.⁸⁵

According to AJ van der Walt⁸⁶, the prevailing land law system that predated the interim and final Constitution was responsible for creating and institutionalising a framework of land rights that guaranteed apartheid's segregationist aspirations, with regard to the physical security and economic power derived from owning and holding land. He argues that together with the ideological policies of apartheid and the Roman Dutch private law view of property, the definition, maintenance and protection of land rights in a spatialized framework emphasized the exclusivity of individual and race group holdings.⁸⁷ Van der Walt draws attention to the fact that the Roman Dutch private property law regime⁸⁸ (which he describes as "a system of mutually demarcated and exclusive rights, backed up by a system of remedies that are aimed at preventing interference, reclaiming property following dispossession and compensation for loss caused by unlawful interference") reinforced the ideological, conceptual and systematic codes of apartheid land law and the common law of that time.⁸⁹ However, at the turn of democracy and the transitional shift from apartheid to constitutional democracy, a reform of the prior land regime was needed in order to realign it with the Constitution's transformative ideals of social justice and development.

⁸⁴ Department of Land Affairs *White Paper on South African Land Policy* (1997) available at www.ruraldevelopment.gov.za/white-papers/whitepaperlandreform.pdf, accessed on the 04.01.2017.

⁸⁵ AJ van der Walt "Property rights and hierarchies of power: A critical evaluation of land reform policy in South Africa" (1999) 64 *Koers* at 69.

⁸⁶ AJ Van der Walt (note 1) at 258.

⁸⁷ *Ibid* at 271.

⁸⁸ Van der Walt's interpretation of the apartheid land law is premised on the principles of the Roman Dutch private property law, which he describes 'as a system of mutually demarcated and exclusive rights, backed up by a system of remedies that are aimed at preventing interference, reclaiming property following dispossession and compensation for loss caused by unlawful interference' at 271.

⁸⁹ *Ibid*.

For Van der Walt the merit of South Africa's land reform depends on how far it succeeds in breaking away from the ideological language, conceptual and systematic codes of apartheid land law and the common law.⁹⁰ He argues that although the turn of constitutional democracy has brought about the proliferation of transformative constitutionalism, in the form of land reform, the transformative jurisprudence remains locked in a struggle against the conceptual codes which continue to recognise the hierarchical, exclusionary Roman Dutch law view of property and property rights, as reflected in section 25(1). I put forward the argument that Van der Walt's article draws one to consider the possibility that the state's current outlook of section 25(1) and section 25(5), 25(7), and 25(8), does not sufficiently take into consideration the Constitution's transformative ambition. This is to the extent that the state is unable to break from the Roman Dutch conceptual rhetoric of hierarchical individual exclusive land rights, thereby giving effect to the explicit provisions of land reform.

4.2 CONCLUSION

Having outlined the various positions held by a number of academics in the debate surrounding the most suitable, and effective approach to the issue of land reform in section 25, I will now analyse the Constitutional's Courts approach to interpreting section 25 in light of explicit provisions authorising the implementation of land reform programmes. From this point, I will consider the various layers of context that inform the Court's constitutional interpretation of section 25.⁹¹ This will assist me in analysing and discussing the Constitution's fundamental values as identified by the Court, and the tensions raised between individual property rights and social justice aspirations whenever the Court employs a purposive mode of interpretation. Next, I will address the Court's approach to property rights and the land reform clauses in section 25(2), 25(3), 25(5) and 25(8) and how this relates to the general limitations clause.

5. ANALYSIS OF SECTION 25 OF THE CONSTITUTION

5.1. DISCUSSION AND ANALYSIS OF THE INTERPRETATION OF SECTION 25 OF THE FINAL CONSTITUTION IN LIGHT OF THE CONSTITUTIONAL COURT'S PURPOSIVE APPROACH TO INTERPRETATION

⁹⁰ AJ van der Walt (note 1) at 283.

⁹¹ Jill Zimmerman (note 44) at 388.

The jurisprudence of the Constitutional Court⁹² has confirmed Klare's post liberal reading⁹³ and Gloppen's social justice model⁹⁴ that the Constitution is committed to transformation and, the achievement of social justice. This was reflected in its first in depth consideration of the property clause in *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC). The court referring to van der Walt stated ' When considering the purpose and content of the property clause it is necessary to move away from a static, typically private-law conceptualist view of the Constitution as a guarantee of the status quo to a dynamic, typically public-law view of the Constitution as an instrument for social change and transformation under the auspices of entrenched constitutional values'.⁹⁵ The Constitutional Court's conception of the Constitution as an instrument for social change and transformation enabled the court to develop a purposive approach to constitutional interpretation, that would anchor its role as the 'legitimater' of the post-apartheid socio-economic transformation project.

Upon reflection the Court's purposive approach to constitutional interpretation requires the Court to follow an interpretative framework taking into account foundational and guiding values of the Constitution's transformative agenda/ambition, whenever the Court considers the provisions of the Bill of Rights.⁹⁶ How the Constitutional Court has approached the interpretation of the property clause with respect to state-led land redistribution initiatives, cannot be fully appreciated without critically examining the Constitutional Court's jurisprudence in relation to the state facilitating the achievement of a more egalitarian society.

5.1.1 FOUNDATIONAL DEMOCRATIC VALUES AND THE PURPOSIVE MODE OF INTERPRETATION:

⁹² *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) at 794. The Court quoting AJ van der Walt in *The Constitutional Property Clause: A Comparative Analysis of Section 25 of the South African Constitution of 1996* (1997) 11.

⁹³ K Klare (note 3) at 153.

⁹⁴ Siri Gloppen *South Africa: The Battle Over the Constitution* (1997) at 235-6. Siri Gloppen was of the opinion that 'the final Constitution modelled itself after the justice model, focusing on two concerns: the one being the need to facilitate a strong state that can become a powerful agent of social change and the other one being, the need to safeguard the fundamental rights and liberties of individuals'. Gloppen was mindful to argue that the first concern of the achievement of change through the commitment to social justice, is to some extent given precedence in the sense that the Constitution takes care to limit the use of the Bill of Rights as a means of protecting minority privilege.

⁹⁵ *First National Bank of SA Ltd* (note 59) at 794.

⁹⁶ *Ibid.*

The commitment to the transformation of society and social justice in the new constitutional democracy, were ideals that became embedded in the fabric of the Constitution once they were guaranteed in a cluster of provisions in the Bill of Rights. This was further echoed in *Soobramoney*⁹⁷ where the Constitutional Court expressed its sentiment that ‘transformation’ and ‘social justice’, were commitments for which the Constitution aspired to achieve in “transforming our society into one which human dignity, freedom and equality were realised”.⁹⁸ According to the court in *Soobramoney* the commitment towards transformation of society through the employment of social justice mechanisms, remains at the core of the new constitutional order.⁹⁹

When examining the property clause, it is clear that in its normative framework existing property holdings are not only secured against improper state interference.¹⁰⁰ Special provisions also manifest the calls to transformation and social justice, which lie at the heart of the Constitution; including provisions for regulatory deprivation and expropriation of property for the purposes of land reform.¹⁰¹

Some commentators of the Constitution have argued that the Constitution’s progressive potential is exhibited from the text, which articulates the drafter’s aspirations for transformation and societal development.¹⁰² The Constitutional Court in the case of *Makwanyane*¹⁰³ sought to tap into this progressive potential by developing its own distinct interpretative style. This style of interpretation was to provide the Court with a sufficient basis upon which to form its own understanding of the Constitution’s primary goals of providing for an effective transition to democracy, and creating development opportunities for all.¹⁰⁴ The Constitutional Court seemingly engaged with the text of the interim constitution drawing from it the idea that ‘democracy’, in the new democratic constitutional order, was underscored by the goals of development and social justice. In engaging with the text in this manner, the court seemingly read an egalitarian and ‘transformational component’

⁹⁷ *Soobramoney v Minister of Health* 1998 (1) SA 765 (CC) at 770I-771A.

⁹⁸ Ibid, also cited with approval in *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at 62F-G.

⁹⁹ Ibid.

¹⁰⁰ Section 25 (1) reads: No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

¹⁰¹ The land reform provisions of the 1996 Constitution form part of the ‘property clause’ of the Bill of Rights. This includes section 25 (5), section 25(6), section 25 (7) and section 25 (8).

¹⁰² AJ van der Walt (note 1) at 258; P de Vos ‘A Bridge Too Far? History as Context in the Interpretation of South African Constitution’ (2001) 17 *South African Journal of Human Rights* 1.

¹⁰³ *S v Makwanyane* 1995 (3) SA 391 (CC).

¹⁰⁴ Ibid at 442C.

of ‘development’ and ‘social justice’ into the notion of the South African constitutional democracy itself.¹⁰⁵ In doing so, the court began developing an interpretative style that would draw from its core understanding and reading of South Africa’s constitutional dispensation, that of a democracy concerned with transforming society through ‘development opportunities for all’. This active core of the court’s reading and understanding of the Constitution’s underlying values of transformation and development, underpin the interpretative lens through which the provisions of the Bill of Rights are best interpreted.

Purposive interpretation is described as a process in which the court considers the underlying connections that exist between constitutional provisions, the Constitution and its historical context in order to extrapolate clear directions and meanings from the constitutional text.¹⁰⁶ These connections act as sign posts displaying the foundational democratic values guiding and informing the court’s analysis of the text, whenever it embarks on context-based line reasoning. Purposive interpretation has enabled the Court to often recognize the foundational values hidden away in various rights in the Bill of Rights and to articulate those various rights in a manner that is consistent to the Constitution’s goal of ushering in an effective transition to democracy and creating equal ‘development opportunities for all’.¹⁰⁷

Often how the court treats a right, that draws its content from the foundational values underpinning the Constitution and its subsequent interpretation, is linked to its textual formulation.¹⁰⁸ Bearing in mind that section 1 of the Constitution declares that South Africa is a democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, purposive interpretation enables the court to look at the land reform provisions of section 25 in their historical contexts. The text of s 25(5) – (8) makes it clear that the final Constitution is devoted to achieving land reform by providing a constitutional framework that; redresses the wrongs of spatial apartheid through the restoration of land to people forcibly dispossessed; redistribution of land in order to provide those without land access to land so as to improve their economic well-being; and to provide those who do have access to land, but whose continued access is precarious because they do not enjoy rights in the land, with security of tenure.¹⁰⁹ Land reform is envisaged by the Constitution to be relatively insulated from constitutional attack. The provisions that

¹⁰⁵ A reading of the constitutional text in this manner finds support in the Postamble to the interim Constitution.

¹⁰⁶ Jill Zimmerman (note 44) at 390.

¹⁰⁷ *AJ van der Walt* (note 1) at 258; *S v Makwayane* (note 103).

¹⁰⁸ Jill Zimmerman (note 44) at 390.

¹⁰⁹ Department of Land Affairs, South African Land Policy (note 84) at Chapter 2.

specifically insulate land reform from constitutional attack are section 25(4)(a) (“the public interest includes the nations commitment to land reform, and to reforms to bring about equitable access”) and section 25(8) (“ no provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the previous section is in accordance with the provisions of section 36(1)’’). This insulation is necessary in order to ensure that the structuring of land reform programmes and the mandating of the enactment of statutes, remain undeterred by political and legal culture influence.

The realisation of land reform hinges on more than the installation of a land reform framework that develops programmes capable of readdressing the wrongs of the spatial apartheid land law system. Its realisation requires the adoption of the Constitution’s clearly articulated vision of land reform, as expressed in section 25 (5), 25(6), 25(7) and 25(8), in order to co-ordinate the linking of the three land reform projects as they each relate to broader land redistribution reform, poverty alleviation and development.¹¹⁰ This, it is argued, is the substantive aspect of the land reform provisions in section 25 which constitutionally mandate transformation and development through the advancement of social justice.

The text of the section 25, more specifically the major portions dealing with land reform, carefully guides the Constitutional Court in its interpretation and reading of the values and principles that lie at the core of the substantive aspects of the property clause. The inclusion of the substantive aspects of land reform as enshrined in sections 25 (5) – (8) ensure that any interpretation of the property clause should be done holistically, taking into account the values and principles which mandate the insulation of land reform from constitutional attack. The text lends further normative weight to the purposive interpretations of the property clause as sympathetic to the advancement of land reform.¹¹¹ In referring to the constitutional text, the historical context in which the Constitution was drafted and the Constitution itself the Court becomes empowered to adopt a purposive interpretation that enables it to construe private property rights in such a way so as to not impair the constitutional commitment to land reform as set out in section 25 (5) to 25(8).¹¹²

¹¹⁰ Lahiff E & Rugege S, “A critical assessment of land redistribution policy in the light of the Grootboom judgment” (2002), 6, *Law, Democracy and Development* at 279-302.

¹¹¹ Budlender “ The Constitutional Protection of Property Rights” in Budlender, Latsky and Roux *Juta’s New Land Law* 1998 at 1-70.

¹¹² Jill Zimmerman (note 44) at 392.

I put forward the argument that whenever the court engages with purposive interpretation (that is the act of considering the underlying connections that exist between constitutional provisions, the Constitution and its historical context) the court better understands the essence of what the preamble to the Constitution characterised as ‘the Constitution playing a central role in the social and economic transformation of society’. In better understanding this role, I put forward the argument that the court becomes compelled to adopt the best constitutional interpretation that is capable of ensuring that the essence of what is characterised in the preamble of the Constitution is legitimated by the Court’s constitutional interpretation.

Having considered the relation between the foundational values in the Constitution and purposive interpretation, it is worth considering how purposive approach to the interpretation of individual rights conflicts with the ideals of social transformation

5.1.2. A CONSIDERATION OF THE CONFLICTS BETWEEN A GENEROUS PURPOSIVE APPROACH TO INDIVIDUAL PROPERTY RIGHTS AND THE IDEAL OF SOCIAL TRANSFORMATION

On numerous occasions the Court has had to deal sensitively with how it ought to treat the rights of individual private property holders, and the majority’s social rights to land. The earliest instances in which the Court insightfully dealt with the purposive approach to constitutional interpretation demonstrated its affinity towards considering rights as being constructed generously, and securing a full measure of protection for individuals.¹¹³ In the cases of *Zuma*¹¹⁴ and *Makwanyane*¹¹⁵ the court developed a two-stage approach to the interpretation of the Bill of Rights. The first stage entailed ‘a broad rather than a narrow interpretation to be given to the fundamental rights’ and, at the second stage, ‘limitations have to be justified through the application of section 33 of the interim Constitution’.¹¹⁶

The Court in *Ferreira*¹¹⁷ once again dealt with rising tensions between individual rights and the collective social empowerment rights to social and economic reform. Ackermann J, writing only for himself, expressed that ‘a broad and generous interpretation of freedom does not deny or preclude the constitutionally valid, and indeed essential role of state intervention

¹¹³ *S v Zuma* 1995 (2) SA 642 (CC) at 651B, quoting Lord Wilberforce of the *Minister v Home Affairs (Bermuda) v Fisher* (1980) AC 319 (PC) at 328-9. Also, cited with approval in *S v Makwanyane* (note 103) at 403H-404A.

¹¹⁴ *S v Zuma* (note 110).

¹¹⁵ *S v Makwanyane* (note 103).

¹¹⁶ *Ibid* at 435D.

¹¹⁷ *Ferreira v Levin NO* 1996 (1) SA 984 (CC)

in the economic as well as the civil and political spheres'.¹¹⁸ This laid the foundation for the collective view of the Court, that irrespective of whether or not the generous two stage analysis is followed in any given case, 'individual rights should not be interpreted in such a way as to prevent the state from being an active agent of change'.¹¹⁹ Following from this thread of reasoning further, the Constitutional Court's decisions had to approach the 'generous' method of interpretation with more caution, especially in particular instances where the Court was forced to confront conflict between private individual rights and socio-economic rights.

In *Soobramoney*¹²⁰ the court, having been confronted with the claimant's private individual right of section 27(3), had to confront the conflict that existed between this particular right and the collective social empowerment rights of section 27(1) and (2). The court considered cautiously its position in terms of whether the circumstances and the context permitted a broad and generous interpretation of the claimant's right in his favour. The court, quoting O' Reagan J in *Makwanyane*, reasoned that context may require that the court adopt a "narrower or specific meaning" in order to give effect to the purpose of the particular provision.¹²¹ In adopting this reasoning the court awakened itself to the possibility that a broad and generous interpretation of *Soobramoney's* claim to section 27(3), may impact on the greater good of the constitutionally mandated redistribution of resources for everyone. The court in trying to manage and resolve the conflict that arises between individual and collective social empowerment rights, considered that the context and the purpose of a particular provision may dictate that individual rights will have to be construed narrower. This is to ensure that these individual rights do not remain as obstacles, giving way for the state to take suitable steps towards realising the constitutionally mandated redistribution of resources. It is at this point that the court established precedence for the constitutionality of a reading requiring individual rights to give way to the greater project of economic and social redistribution.¹²²

In the case of the land reform measures it is likely that the state will encounter a conflict between the rights of existing property holders (section 25(1), (2) and (3)), and the collective social empowerment rights of the landless (section 25(5) to 25(8)). I put forward the argument that the state ought to adopt a holistic construction of section 25 that encapsulates

¹¹⁸ Ibid at 1017H.

¹¹⁹ Ibid.

¹²⁰ *Soobramoney v Minister of Health* (note 97).

¹²¹ *Soobramoney v Minister of Health* (note 97) at para 17, quoting O' Reagan J in *Makwanyane* (note 19) at para 325.

¹²² Jill Zimmerman (note 44) at 397.

the ideas of the property clause representing a ‘property and land rights’ clause, inclusive of rights of existing property holders and the collective social empowerment rights of the landless. The state, it is argued, ought to follow the court’s lead in *Soobramoney*, and follow a reading of the property clause that is cognisant of the constitutionality of individual rights giving way to the greater projects of social and economic redistribution of resources.¹²³ I put forward the argument that this reading is consistent and in keeping with the Constitution’s underlying ethos of transformation, social justice and development.

5.1.3 PURPOSIVE INTERPRETATION AND THE INTERRELATIONSHIP OF SOCIO- ECONOMIC RIGHTS

Following from the discussion of the Constitutional Court’s use of purposive interpretation to further the Constitution’s underlying transformative agenda, the apparent fluidity at which the court is able to integrate its interpretation of a particular right with other socio economic rights is useful in keeping a holistic understanding of the Constitution, as a ‘unitary’ and ‘purposeful document’ that envisions the establishment of a new society premised on socio-economic transformation, social justice and development’.¹²⁴ The Court has in some instances construed section 25 together with other socioeconomic rights protected in the Bill of Rights, such as section 26 the right to housing and section 27 the right to food, water and health care.¹²⁵ In a couple of cases the Constitutional Court had to interpret meaningfully specific rights in the Bill of Rights for the purposes of determining how those rights were to be enforced by the state. It was in these cases where the relevant socioeconomic right with which a particular fundamental right could be associated with, was considered together by the Court.¹²⁶

The Court has often viewed different socio-economic rights as complementing and giving meaning to one another in regards to the attainment of socio-economic reform. In *Grootboom*¹²⁷ the court examined the interrelationship between section 25 and section 26,

¹²³ Ibid.

¹²⁴ Jill Zimmerman (note 44) at 396; The Preamble of the Final Constitution Act 108 of 1996 Constitution.

¹²⁵ *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC) at 62 C-D; *First National Bank* (note 59) at 794.

¹²⁶ *Grootboom* (note 100), *First National Bank* (note 59).

¹²⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC).

and construed them as mutually supporting the imperative of socio economic reform.¹²⁸ This was exhibited when the court considered its interpretation of section 25(5) as complementing and giving meaning to a similarly worded provision in section 26 (2).¹²⁹ Upon reflection of section 25(5), the court construed section 26(2) to mean:

*“the state is obliged to achieve the intended result of the constitutional directive in s 26. The legislative measures will invariably have to be supported by appropriate, well directed policies and programmes that must be reasonable in both their conception and their implementation. The formulation of a programme is only the first stage in meeting the state’s obligation. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations.”*¹³⁰

Both section 25 (5) and section 26 (2) mutually support the constitutional directive imposed upon the state to initiate socio-economic reform, and to support such reform through reasonable legislation, policies and programmes.¹³¹ Both provisions as understood by the court also articulate an obligation to formulate legislation, policies and programmes that reasonably carry out the type of reconstruction of the land holdings and housing dilemmas that section 25(5) and section 26(2) envision.¹³² Both provisions arguably articulate an obligation placed on the state to constantly assess and engage with its reform policies, in order to enable it to effectively verify whether such reform policies and programmes remain reasonably compliant with the entrenched constitutional directives of land reform and the right to housing.

The inextricable link between section 25(5) and section 26(2) arguably lend to my argument that the state is constitutionally empowered to strategically develop effective policies and programmes that provide access to land and housing on an equitable basis. The desired effect of the transformation of existing land holdings in order to advance the notion of equitable access will not materialise, if state policies and programmes have the effect of unreasonably excluding a significant segment of the African society. This is supported by the *dicta* in *Grootboom* which held that in the context of section 26(2), a programme that

¹²⁸ *Grootboom* (note 102) at 62 B.

¹²⁹ *Ibid* at para 42.

¹³⁰ *Ibid*.

¹³¹ Section 25 (5) and section 26 (2) of the final Constitution of the Republic of South Africa.

¹³² *Grootboom* (note 102) at para 42.

excludes a significant segment of the African society cannot be said to be reasonable.¹³³ Due to the similarity in wording between section 26(2) and section 25(5), the application of this line of reasoning to the interpretation of section 25(5) opens up interesting possibilities that are worth mentioning.

Consider for example an instance where the state had constructed policies which upon implementation had negative consequences for the rural poor. In June 2000 the Ministry of Agriculture and Land Affairs announced that it had reconstructed its redistribution policy, in order to achieve a different objective.¹³⁴ Commentators of the policy implemented by the Ministry of Agriculture and Land affairs, stated that the reconstruction of the redistribution policy shifted its focus away from the rural poor and had the effect of unreasonably excluding a significant segment of the society (the rural poor) from gaining equitable access to land.¹³⁵ The reconstructed policy contemplated that some funding, previously set aside for the development of the rural poor, would be redirected to the segment of society that was more economically advanced.¹³⁶

In light of the Constitutional Court's approach to construing section 26(2) as complementing and giving meaning to section 25(5), I put forward the argument that such a shift in the development and implementation of a new policy may be considered as unreasonable, and could be understood as a violation of the state's obligations in section 25(5).¹³⁷

I am however aware of the challenge presented by the separation of powers, and the Constitutional Court's position on deference. According to Budlender at the very least, the legislature and the executive could be compelled to enact and implement legislation and policy that is consistent with the constitution's underlying objectives of socio-economic reform, as entrenched in section 25(5), (6), (7) and (8).¹³⁸ However, once the legislation is enacted and the policies implemented Budlender argues that the legislature and the executive enjoy constitutional protection against challenge due to the court's stance on deference.¹³⁹

¹³³ Ibid at para 43.

¹³⁴ See Ministry of Agriculture and Land Affairs Integrated Programme of Land Redistribution and Agricultural Development in South Africa: Final Draft Document Version 1, 8 June 2000.

¹³⁵ See Theunis Roux and Dennis Davis in chapter 20, "Property" of *South African Constitutional Law: The Bill of Rights* (2007) at 20-27.

¹³⁶ See Ministry of Agriculture and Land Affairs (note 134); Theunis Roux (note 135) at 20-26.

¹³⁷ *Grootboom* (note 102) at para 93.

¹³⁸ Budlender (note 111) at 1-70.

¹³⁹ Ibid.

However, *Grootboom* arguably provides an avenue in which this challenge could be overcome through the court's adoption of the principle of 'reasonableness'. Policies and legislation that may on the face of it appear to be reasonably enacted and developed can still be attacked, if implementation of the same policies and legislation are characterised as 'unreasonable'. Arguably this will enable land reform beneficiaries to challenge the state on the basis that the work being done, does not go far enough in achieving the objectives of transformation, social justice and development in the context of land reform.

In today's circumstances the state is encumbered with issues surrounding equitable access to land and access to adequate housing. A significant segment of society cannot seem to access these rights as enshrined in the Bill of Rights. Despite these prevailing issues the socio-economic right to land coupled with the right to housing, call upon the state to commit to constructing programmes and policies that do not have the effect of excluding a significant segment of the African society from equitable access. The state must be aware of the manner in which it implements these policies and programmes. How the state chooses to implement its policies and programmes on land reform and access to housing will have a direct impact on its ability to comply with its constitutional obligations, and achieve the intended results of section 25 (5) and section 26 (2) respectively.

The court in *Grootboom* established a synergy between the socio-economic right to land and the socio-economic right to housing. This synergy lends to the socio-economic right to land being of special urgency within the Constitution's textual design as a whole.¹⁴⁰ In light of *Grootboom* the court arguably explicitly linked the right to housing in the urban context to the constitutional imperative of land reform and land restructuring.¹⁴¹ By adopting and implementing policies such as expropriation and land redistribution that fervently enforce and promote access to equitable land, the right to access to housing inadvertently becomes promoted and enforced. The concomitant result is the development of socio-economic viable solutions that address issues of poverty as a result of lack of access to land, and severe housing shortages.

The concerns for addressing severe housing shortages, poverty alleviation in rural and urban areas and access to equitable land for the landless segment of society, are to be found in the fundamental rights of section 25(5), (6), (7), (8) and section 26(1) and (2). In order to address the issues of severe housing shortages and immense poverty in both urban and rural

¹⁴⁰ Jill Zimmerman (note 44) at 397.

¹⁴¹ *Ibid.*

areas, the court ought to consider property rights and the socio-economic right to land contained in section 25 in light of a purposive method of interpretation.¹⁴² This will enable the court to extrapolate clear and concise constitutional directives which once articulated, sufficiently direct the state as to how it ought to give effect to its duties to promote and fulfil its obligation to land reform.

Having considered the tensions that arise between a generous purposive approach to the interpretation of individual land rights and the socioeconomic right to land within the property clause, a discussion will now follow on how the state, since the adoption of the final Constitution, has attempted to deal with the tensions that arise from the limitation of property rights, and the advancement of the socioeconomic right to land as secured by land reform provisions.

5.2. DISCUSSION OF THE LEGISLATIVE HISTORY POST 1996, DEALING WITH THE PARAMETERS OF INDIVIDUAL PRIVATE PROPERTY RIGHTS AS OUTLINED IN SECTION 25 vs THE LIMITATION OF THOSE RIGHTS IN RELATION TO THE ADVANCEMENT OF LAND REFORM PROJECTS THROUGH POLICIES OF EXPROPRIATION AND LAND REDISTRIBUTION.

5.2.1 HOLISTIC VIEW OF THE PROPERTY CLAUSE: PROPERTY AND MEASURES THAT ADVANCE THE SOCIO-ECONOMIC RIGHT TO LAND

When the final Constitution came into effect in 1996, it made provision for a ‘property and land rights clause’ that not only secured existing property holdings against improper state interference, but also made explicit provision for land reform, including provision for regulatory deprivation and for the expropriation of property for the sake of land reform.¹⁴³ In *First National Bank* when unpacking section 25 the court expressed its holistic view of section 25 as not only concerning itself about property rights, but also concerning

¹⁴² Ibid.

¹⁴³ Section 25(3) read with section 25(4) of the final Constitution: “Property may be expropriated for the sake of land reform, and when property is expropriated for that purpose the amount of compensation will reflect the history of the acquisition and use of the land and the purpose of the expropriation”; Section 25(5): “The state must take reasonable legislative and other measures, within its available resources, to foster conditions which will enable citizens to gain access to land on an equitable basis”; Section 25(7): “Persons and communities dispossessed of property after 13 June 1913 as a result of past racially discriminatory laws and practices are entitled to restitution as provided for in legislation or to comparable redress”; Section 25(8): “And no provision of section 25 may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of section 25 is in accordance with the general limitation provision in s 36(1)”.

itself with land rights. Section 25 was inherently designed to not only oversee the protection of property rights from unreasonable interference by either private parties or the state, but it was also designed in part to oversee and guide the constitutionally mandated attempt to reconstruct society through social and economic land reform measures.¹⁴⁴

When construing section 25 holistically the court further elaborated that property rights enshrined in section 25(1), (2) and (3) ‘must not be construed so as to be enforced in isolation, but in the context of ss (4) to (9) and their historical context’.¹⁴⁵ Section 25(1), (2) and (3) must further be construed in the context of the Constitution as a unitary document that aims to transform the enduring legacies of apartheid, in order to achieve a democracy founded on the principles of equality, freedom and dignity.

The constitutional drafters of subsections (4) to (9) intended to insert these provisions in order to emphasise that under the final Constitution, the protection of property as an individual right was not to be an absolute right but a right that was to be justifiably limited by societal considerations such as the public interest.¹⁴⁶ Subsections (4) to (9) articulate the Constitution’s underlying transformative agenda for the need and aim of the Constitution to redress one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South Africa.¹⁴⁷ I submit that this is to be constructively addressed through a progressive land reform programme that expropriates land, and redistributes it in order to address the remnants of the grossly unequal distribution patterns of land.

Upon reflecting the court’s approach to understanding section 25 holistically in *First National Bank*, I submit that section 25 outlines how the process of mediation between individual and societal interests in the distribution of land and property is to occur within the context of transformation and social justice. It is clear from how the court construes the individual protections afforded by subsections (1) to (3), that in light of the historical context of subsections (4) to (9)¹⁴⁸ the state ought to progressively engage with its constitutional mandate to arrange land reform programmes that serve and protect the public interest. In effect the constitutional interpretation of the property clause by the court in *First National*

¹⁴⁴ *First National Bank* (note 59) at 794C.

¹⁴⁵ *Ibid* at 793C-E. (My emphasis).

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*.

¹⁴⁸ See Jill Zimmerman (note 44) at 402-403; See also *First National Bank* (note 59) at 793C-E and 794C. My emphasis.

Bank arguably acknowledges that section 25 is pro transformation, in that it entrenches and mandates government to give effect to land reform measures that serve the broad public interest and not the interests of the unilateral protection of individual property rights.

5.2.2 STRUCTURAL FRAMEWORK OF SECTION 25: SECTION 25 (1) TO (3) “THE RIGHT TO PROPERTY” AND SECTION 25 (4) TO (9) “THE SOCIO-ECONOMIC RIGHT TO LAND”

The court in *First National Bank* laid out its structural approach to section 25 which for the purposes of the thesis is worth considering whenever section 25 is constitutionally analysed. When a challenge under section 25 for the infringement of property rights arises, the section that is implicated is section 25 (1).¹⁴⁹ This is the starting point for constitutional analysis.¹⁵⁰ Any form of deprivation must abide by terms of laws of general application, and ought not to be arbitrary to the extent that the deprivation is not procedurally unfair or does not provide sufficient reason for the particular deprivation.¹⁵¹ Expropriation for the purposes of advancing land reform would be considered as a form of deprivation according to the wording of section 25(1).

Expropriation led reform measures that are conducted according to fair procedures and which are authorized by ‘laws of general application’, will pass muster without having to undergo a section 36 limitations analysis.¹⁵² This was confirmed by the court’s reading of section 25(1) in *First National Bank* whereby it decided that instances where a deprivation meets the criteria in section 25(1), no subsequent section 36 analysis is required thereafter.¹⁵³ Following from meeting the criteria in section 25(1), ‘the deprivation (expropriation) must then undergo a section 25(2) analysis which entails the consideration by the court of whether the deprivation can be seen as an expropriation that does not serve a public purpose or a public interest.¹⁵⁴ Should the court be satisfied that the deprivation (expropriation) does not amount to one that is not for a public purpose nor in the public interest, the inquiry then proceeds to section 25(2) and (3).¹⁵⁵

¹⁴⁹ *First National Bank* (note 59) at 797C.

¹⁵⁰ *Ibid.*

¹⁵¹ Section 25 (1) Act 108 of 1996 Constitution of the Republic of South Africa.

¹⁵² *First National Bank* (note 59) at 801C.

¹⁵³ The court in *First National Bank* supra (note 59) at 801C held that deprivations do need to meet both the requirements of section 25 and those of s 36 in order to be valid.

¹⁵⁴ *First National Bank* supra (note 59) at 801C; Jill Zimmerman supra (note 44) at 404.

¹⁵⁵ Jill Zimmerman (note 44) at 404.

Expropriation led reform is bolstered by the protection afforded by section 25(2)(a) read with section 25(3), 25(4)(a) and s 25(8) when it is considered as furthering the societal interests of the broad public, and furthering the Constitution's commitment to land reform as a means of providing large marginalised sections of society with equitable access to land. It is submitted that the 'public interest requirement', echoed in these respective provisions, will be met accordingly when the state progressively undertakes to implement expropriation as its primary policy for the purposes of land redistribution.

5.2.3 EVALUATION AND COMMENTARY ON SECTION 25 (1) AND (2) VERSUS THE SOCIO-ECONOMIC RIGHTS TO LAND IN SECTION 25(4) TO (9)

In evaluating the textual structure of section 25, the constitutional entrenchment of existing property rights seems to be counterbalanced by the socio-economic right to land. This reading of the text suggests that whilst the property clause acknowledges the protection afforded to existing property rights, such protection does not apply unilaterally and cannot subvert the constitutional entrenchment and enforcement of the socio-economic rights to land. I would like to emphasise that this line of reasoning is supported by Budlender et al who argued that an interpretation of section 25(8) reveals that in a limitations analysis, section 25(8) will play the role of ensuring that land reform is characterised as a 'specially valued and protected purpose of the Constitution'.¹⁵⁶

It is argued that when the property clause was originally negotiated and agreed upon during the transitional negotiations, the amalgamation of property rights and the socio-economic right to land into one provision ensured that neither individual property rights nor the socio-economic right to land were considered as the 'primary right' entrenched in section 25. However, for the purposes of analysis, it is presumed that the state has adopted a different textual reading of section 25 whereby the existing property rights are considered to be the primary rights that are entrenched in section 25. This presumption finds support in a discussion by Budlender et al in which the authors address the type of compensation formula adopted by the state in the Expropriation Act.¹⁵⁷

In their discussion, they provide an example of what they perceive to be a tendency on the part of the state, to treat property rights as the primary right entrenched in section 25. The

¹⁵⁶ Budlender et al (note 111) at 1-73.

¹⁵⁷ Ibid at 1-66 and 1-69; Expropriation Act 63 of 1975.

example provided is the compensation formula adopted in the Expropriation Act.¹⁵⁸ Budlender et al opine that the current compensation formula contained in the Expropriation Act establishes compensation at or above market value.¹⁵⁹ They argue that the Act's compensation formula is inconsistent with the constitutional formula which is open to compensation being granted below market value, if such compensation can be determined as being 'just and equitable'.

Noting that the current Expropriation Act of 1975 generally provides for compensation at or above market value, is indicative of government's commitment to the demand driven and market based 'willing buyer-willing seller' principle to which government committed itself to in the 1997 white paper.¹⁶⁰ Due to the state's reluctance to progress an expropriation policy that critically engages with the Constitutional formula that is open to compensation being at below market value, interested parties will continue to expect compensation at market value or well above it. It is submitted that this state of affairs invariably attributes the slow pace at which reform through the state's redistribution programme occurs. This does not represent the Constitution's commitment towards the reconstruction of the current land holdings in order to enable equitable access to land for marginalised segments of society, whom the apartheid land law previously discriminated.

According to Chaskalson and Lewis¹⁶¹ the Bill of Rights set minimum standards which the state is obligated to observe.¹⁶² The Constitution however grants allowances for the state to decide whether it is open to extend greater protection to rights, than is required by the Bill of Rights.¹⁶³ It is submitted that for the purposes of analysis, it is presumed that the government's adoption of a compensation formula in the Expropriation Act is indicative of its commitment to the 'willing buyer-willing seller' principle. The adoption of this type of compensation formula arguably has the effect of the state extending greater protection to the property rights entrenched in section 25(1). Arguably the state does so because of its perception of the existing legal culture surrounding property law that is underscored by a belief, that compensation of an amount at market value or higher duly compensates a property owner as envisioned by section 25(1) and (2)(b).

¹⁵⁸ Ibid.

¹⁵⁹ Jill Zimmerman (note 44) at 403.

¹⁶⁰ Expropriation Act 63 of 1975 at section 12; White Paper on Land Policy (note 84).

¹⁶¹ Chaskalson and Lewis 'Property' in Chaskalson M et al (eds) *Constitutional Law of South Africa* at 31-50.

¹⁶² Ibid.

¹⁶³ Ibid.

Having regard to section 25(5), (6) and (7), the government developed three projects that were to encompass its broad land reform programme. These three projects were set out in the *White Paper on South African Policy*¹⁶⁴ detailing the three projects as redistribution, tenure reform and restitution. The general function of section 25(5), (6) and (7) is to provide a constitutional framework and justification for these projects in order to ensure that legislation becomes promulgated. Promulgation of legislation linked to the broad land reform programmes will serve to give effect to the broad constitutional objectives of land reform, and restore legal protection to and commercial value of 'black' land rights.

One of the land reform projects that encompass a component of the broad land reform programme is Land Restitution. Section 25(7) provides the constitutional framework and justification for the development of legislation and policies that pursue the objective of land restitution. The provision however does not provide a detailed outline as to how restitution is to be achieved. Section 25(7) intends to leave open the construction of restitution legislation and policy to the Legislature and the Executive accordingly. The legislature has been assigned the right by the Constitution to determine the content of the right to restitution, subject only to section 25(7). Because section 25(7) does not prescribe the exact nature and content of the rights to restitution, the actual transformation of existing land rights and the creation of new land rights are left to laws concerned with tenure reform and land redistribution.¹⁶⁵

The state implemented its programme of land restitution when it enacted the Restitution of Land Rights Act¹⁶⁶, which sought to determine how restitution was to be addressed and realised. The Act envisioned redress taking the form of the granting of alternate land or an award of final compensation, which was to be determined by either the Commission on Restitution of Land Rights or the Land Claims Court.¹⁶⁷ The Act empowers the Commission to investigate claims and attempt to mediate and settle land disputes.¹⁶⁸ Should those disputes not be resolved, the Commission then refers the dispute to the Land Claims Court.¹⁶⁹ Since the state promulgated the Restitution Act, the Act seemingly took

¹⁶⁴ Department of Land Affairs *White Paper on South African Land Policy 1997* (note 84).

¹⁶⁵ AJ van der Walt 'Property rights and hierarchies of power: A critical evaluation of land-reform policy in South Africa' (1999) *Koers* at 274-275.

¹⁶⁶ Act 22 of 1994 (hereinafter 'Restitution Act') Amended by the Land Restitution and Reform Laws Amendment Act 63 of 1997 and Land Affairs General Amendment Act 11 of 2000

¹⁶⁷ Section 4, Section 22 and Section 35 of the Restitution of Land Rights Act 22 of 1994.

¹⁶⁸ *Ibid* at Section 6 and 13.

¹⁶⁹ Restitution of Land Rights Act 22 of 1994 at Section 14.

centre stage as the government's main response to redressing the past apartheid land laws that preserved control and access to property on the basis of race.

Although the Act aims to break away from the hegemony of the ownership-oriented hierarchy of land rights, none of the provisions in the Act explicitly break away from the structural and dogmatic hegemony of the common-law hierarchy of land rights. It is interesting to point out that the provision of restitution of 'property' in section 25(7) is more expansive, as it could be interpreted to include restitution of real rights and personal rights to property. The Act however seems to interpret the restitution of 'property' as excluding personal rights to property. This is reflected in the Act's inability to break away from the structural and dogmatic hegemony of the common-law hierarchy of land rights, despite the Constitution not explicitly prohibiting the extension of the restitution right to holders of personal rights to the 'property'. Consequently, the timidity in which the Act reinforces the hegemony of the ownership-oriented hierarchy of real rights to land suggests that the Legislature is not restricted by the section 25(7) when defining the content of the right to restitution of 'property', and how the right is given effect to. Arguably section 25(7) leaves enough room for the state to break away from the hegemony of awarding restitution on the basis of the ownership-oriented hierarchy of land rights, in order to develop progressive policies furthering land reform in this particular area.

The second category of the broad land reform programme is the redistribution of land. This process deals with the redistribution of land to persons who have no land or who have had inadequate land as a result of entrenched apartheid land laws. The redistribution of land project embodies the constitutional directive in section 25(5) in terms of creating the constitutional framework that the state is to follow when developing policies regarding the allocation of funds for the development of land, and developing laws and implementing policies that promote wider access to land and housing.¹⁷⁰ The redistribution project operates to extend the concept of individual ownership, to the people and communities previously excluded from it by centuries of colonialism and apartheid land law codes. The redistribution project acknowledges that there still exists an overall imbalance in the current land holdings, and consequently a stand-off between the (black) land less and the current government, in regards to a lack of transformation, still persists. The land redistribution project that is informed by land reform imperatives embedded in section 25(5) helps us understand that the

¹⁷⁰ AJ van der Walt (note 1) at 286.

Constitution envisions a systematically transformed property law that is capable of being harnessed by the state.¹⁷¹ Through the adoption of transformative land reform policies/measures the state is empowered by section 25(5) to facilitate access to land through redistribution. This in turn facilitates the economic growth and development that is necessary to alleviate poverty. Section 25, bolstered by the inclusion of the land reform provisions, was constructed with the above objective in mind, and so I put forward the argument that it is unlikely that section 25 can be interpreted holistically as limiting land reform policies.

The last category of the broad land reform programme outlined in section 25, is tenure reform. Historically tenure reform was intended to address the legal transformation of the apartheid land law system that rendered the land rights of the black population weak and unsuitable, into a more just land law system that secured and strengthened their rights.¹⁷² Through section 25(6), the land reform programme of land tenure operates to restore security and permanence, reinforce the land rights of those neglected under the apartheid land law system and to formalize the land rights of those whose occupation and use of previously dispossessed property justified it.¹⁷³ According to AJ van der Walt, land tenure reform is the most abstract of the other land reform projects represented in the Constitution. The underlying purpose behind this project is to alter and transform the laws that determine the legal form and nature of land rights, rather than the physical handing over of property to people as is envisioned by the land restitution and land redistribution projects.¹⁷⁴ There lies a difficulty however in being able to identifiably measure success in terms of the manifestation of transformation, development and social justice. One argues that in order to accelerate the pace at which transformation of the current land holdings occurs so as to mirror the Constitution's aspiration of transformation, development and social justice, a more robust and comprehensive programme centred on expropriation should be considered and implemented by the state.

These separate but interconnected projects have important consequences for the establishment of social justice, and the development of South Africa's current property holdings and land rights regime.¹⁷⁵

¹⁷¹ WJE Du Plessis (note 62) at 6

¹⁷² Department of Land Affairs *White Paper on South African Land Policy* (note 84) at vi, viii, 9, 10.

¹⁷³ AJ van der Walt (note 1) at 288.

¹⁷⁴ *Ibid.*

¹⁷⁵ Hanri Mostert (note 27) at 405.

This thesis is concerned with the issue of expropriation for the purposes of achieving land reform through redistribution. The thesis is therefore focused on the rights conferred in section 25 (5) and their potential to meaningfully and permanently affect large scale redistribution of property in order to enable those previously discriminated under apartheid land law, access to and ownership of land. Tenure reform and restitution are therefore not the forums in which the thesis seeks to address the alteration of the distribution patterns of land.

Due to the explicit commitment in section 25(1) to protect the private rights of existing property holders, it is conceivable that the provisions mandating land reform would be subjected to constitutional attack from individual property holders who fear their rights are under threat. However it would appear that the constitutional text of section 25 affords a reading that the land reform provisions are capable of being insulated from constitutional attack.¹⁷⁶ According to the interpretations of section 25 (8), Chaskalson and Lewis opined that ‘subsection (8) was seemingly included on the basis that the existing private property rights as protected in section 25(1), would not preclude the state from expropriating land and water for the purposes of redistribution on account of a possible limitation of section 25(1)’.¹⁷⁷ It is argued that this interpretation accords with the general emphasis in section 25 (5) on the significance of land reform, and such emphasis arguably gives the land reform measures stronger protection against constitutional attack by entitling the justification of infringements to private property rights in pursuit of land reform, by the state.

Geoff Budlender offers another interpretation of the relevance of section 25(8) when he suggests that it is ‘plausible to read section 25(8) as signalling that measures in pursuit of “land, water and related reform” serve a “particularly valued purpose”, thereby justifying greater limitations on existing private property rights in the context of land redistribution, restitution and land tenure reform.’¹⁷⁸ It is argued that this interpretation offered by Budlender once again supports the argument that the constitutional significance of land reform, as outlined in the land reform provisions, suitably permits the obligatory limitation of the private property rights of existing property holders whenever the greater project of economic and social redistribution is taken up by the state. Since these land reform provisions are insulated from possible constitutional attack by section 25(4) (a) and section 25(8), the state is better

¹⁷⁶ Section 25(4)(a) (‘the public interest includes the nations commitment to land reform’) and section 25 (8) (‘no provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with s 36(1)).

¹⁷⁷ Chaskalson and Lewis (note 161) at 31-50.

¹⁷⁸ Budlender (note 111) at 1-73.

placed to actively pursue progressive and sustainable land reform measures as is directed by section 25 (5), (6) and (7). Failure to fulfil its obligations in terms of these provisions raises the concern of what reading the state adopts of section 25(1), (2) and (3), whether generous to existing property holders or generous to the landless?¹⁷⁹

I acknowledge that tension may arise in terms of the most suitable interpretation of the property clause, having regard to the entrenchment of provisions protecting private property rights and explicit provisions mandating land reform. Critics of the government's redistribution programme have attributed the slow pace of reform to the government's continued commitment to the demand-driven, market-based 'willing-seller, willing-buyer' principle, which one argues is informed by its generous reading of section 25(1), (2) and (3) in favour of existing property holders.¹⁸⁰

I put forward the argument that it is this preferred interpretation of the constitutional provisions, together with the prevailing legal culture that has condemned the use of expropriation as a last resort mechanism for the advancement of land reform. An interpretation of this nature would not be consistent with the values lying at the core of the Constitution that of; transformation and development through the social justice projects of economic and social redistribution.

However, how the Constitutional Court has attempted to resolve the foreseeable tensions that may arise between a suitable interpretation of individual property rights and a suitable interpretation of land reform provisions, by referring back to the Constitution's core underlying values of transformation, social justice and development, bodes well for developing a jurisprudence that is consistent with the 'minds of the drafters at the time that they drafted the Constitution'.¹⁸¹

5.2.4 Conclusion

This chapter began with the discussion and analysis of the interpretation of section 25 in light of the Constitutional Court's purposive approach to interpretation. The meaning assigned to the purposive interpretation of section 25 by the Constitutional Court, demonstrated that section 25 mirrors the public law view of the Constitution as an instrument

¹⁷⁹ Ibid at 1-55.

¹⁸⁰ Lahiff E & Rugege S, (note 85) at 306-307

¹⁸¹ Dennis Davis 'Transformation: The Constitutional Promise and Reality' (2010) *SAJHR* 26 at 87; *Soobramoney* (note 95) at para 31 where the court stated "The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."

for social change and transformation in the area of land reform. The text of section 25, more specifically the major portions dealing with land reform, have carefully guided the Constitutional Court in its interpretation and reading of the values and principles that lie at the core of the substantive aspects of the property clause.

The chapter demonstrated that whenever the court engages in purposive interpretation of section 25 it does so holistically, thereby enabling the court to construe existing private property rights in such a way so as to not impair the state from giving effect to the land reform provisions outlined in section 25(5) to 25(8). Upon reflection of the court's purposive interpretation of section 25(5) and section 26(2) in *Grootboom*, the chapter demonstrated that how the state interprets these provisions influences its choices in regards to how it implements policies and programmes on land reform and access to housing. This may well have a direct impact on the state's ability to comply with its obligations outlined in section 25 (5) and section 26(2) respectively. It is clear from how the Constitutional Court in *First National Bank* construed section 25(1) to (3), in light of the historical context of section 25(4) to (8), that section 25 is pro transformation in that it entrenches and mandates government to give effect to land reform measures (for example expropriation for the purposes of land redistribution) that serve the broad public interest, and not the interests of a unilateral protection of existing property rights.

An ever-growing fixation with the progress of land reform and concerns that the state is increasingly hesitant to use its expropriation powers for land reform purposes, has cast the apparent conflict between the state's duties to promote land reform (specifically equitable access to land, as provided for in section 25 (5) of the Constitution) and to pay just and equitable compensation for expropriation (section 25(2) and (3) of the Constitution) into the spotlight. The state has come under fire for the lack of speedy land reform in the context of land redistribution, and this has been attributed by some to the state's commitment to the willing-seller/willing buyer principle which has dissuaded the state from invoking its expropriation powers for the public interest. At this juncture, the issues of feasibility constraints and their effect upon the state to take reasonable measures in fostering conditions that enable equitable access to land will be discussed and critiqued in the final chapter. The thesis will then address the state's hesitation to use its expropriation powers extensively for land reform purposes and its unwillingness to speed up land reform, by discussing whether the Constitution empowers the state to expropriate land against compensation at less than market value in order to remove any obstacles to meaningful and effective speedy land

reform. The underlining question to these two areas of concern is whether the state can reconcile its duties to promote land reform, with its obligations to pay ‘just and equitable’ compensation for expropriation.

6 CONFLICT BETWEEN STATES OBLIGATIONS TO PROMOTE LAND REFORM v JUST AND EQUITABLE IN RELATION TO EXPROPRIATION LED REFORM

6.1. FEASIBILITY CONSTRAINT CONCERNS RAISED BY THE STATE IN FULFILLMENT OF THE CONSTITUTION’S PROMISE TOWARDS LAND REFORM.

The issue of feasibility constraints upon the state’s ability to promote and fulfil its obligations in regards to section 25(5), affects the adoption of policies, programmes and legislation that meaningfully, effectively and speedily address land reform. The claims of feasibility constraints arise out of a concern for the availability of resources at the state’s disposal, which are necessary for realising the socio-economic right to land entrenched in section 25(5). The state has on a number of occasions responded to claims of failure on its part to realise socio-economic rights, by claiming that the realisation of a particular socio-economic right was either too costly or not an immediate priority.¹⁸² Despite this, the Constitutional Court has handed down judgements in which it has addressed the issue of feasibility constraints.¹⁸³ A number of principles have been extracted from a number of these cases, and these principles help provide a jurisprudential framework in which the problems of feasibility constraints are to be approached.

Feasibility constraints often limit the achievement of progressive policies and programmes (for example expropriation led land reform) designed to give effect to the socio-economic rights entrenched in the Bill of Rights. It is my contention that appeals to the infeasibility of the advancement of progressive policies and programmes designed to affect transformation of the status quo, must be challenged and interrogated. This is especially necessary in instances where claims of infeasibility seem to justify the conclusion that the status quo does not violate the rights entrenched in the Bill of Rights.¹⁸⁴ The state’s plea of

¹⁸² *Soobramoney* (note 97) at para 11; *Grootboom* (note 102) at para 95.

¹⁸³ See Nick Ferreira ‘Feasibility constraints and the South African Bill of Rights: Fulfilling the Constitution’s promise in conditions of scarce resources’ (2012) 129 *South African Law Journal* at 274. See also Geoff Budlender ‘The Judicial role in cases involving resource allocation’ (2011) April *Advocate* 35.

¹⁸⁴ Nick Ferreira (note 183) at 275.

the infeasibility of adopting a progressive policy of expropriation that meaningfully and permanently redistributes land, thus transforming the status quo, masks the lack of political will on its part to comply with section 25(5) due to its commitment to the willing-seller/willing buyer principle. Although the courts have attempted to address the problems of appeals of infeasibility by the state, they have not yet developed a unified basis for approaching these types of pleas.¹⁸⁵

Since the dawn of a constitutional democracy in 1994, the Constitutional Court has largely deferred from encroaching upon areas of governmental competence in regards to socio-economic policies.¹⁸⁶ It has been cautious in its assessment of the concerns of the availability of resources at the state's disposal, for the advancement of socio-economic policies centred on transformation, social justice and development. The Constitutional Court has however been prepared to scrutinise pleas of infeasibility sceptically, and enforce compliance with the constitutional obligations of provisions dealing with socio-economic rights.¹⁸⁷ A number of principles that have been affirmed by the Constitutional Court in addressing claims of infeasibility assist in understanding the court's approach towards the state, and its obligations to adhere to the Constitution's desired transformative ambitions.

6.1.1 PRINCIPLES EXTRACTED FROM THE CASES

One of the principles that the court encountered was the reality that limited resources impact on the fulfilment of socio economic rights by the state.¹⁸⁸ It is in this context that the court has resolved to develop a 'reasonableness' assessment of the state's constitutional obligations, in order to review whether the state has taken reasonable steps to adhere to the Constitution's desired transformative ambitions.¹⁸⁹ The reasonableness assessment, as was referred to and understood in *Grootboom*, is particularly helpful when assessing the steps taken by the state in fulfilment of obligations in s 25(5).¹⁹⁰ It is argued that although the state may raise a plea of the infeasibility of adopting an extensive expropriation policy that is capable of fostering the necessary conditions for equitable access to land, the preferred

¹⁸⁵ Ibid.

¹⁸⁶ Ibid.

¹⁸⁷ Nick Ferreira (note 183) at 276.

¹⁸⁸ *Ferreira v Levin NO & others; Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC) at 133.

¹⁸⁹ *Rail Commuters Action Group & others v Transnet Ltd t/a Metrorail & others* 2005 (2) SA 359 (CC) at para 88; *Grootboom* (note 102) at para 42.

¹⁹⁰ *Grootboom* (note 102) at para 42.

commitment to the expropriation of land based on the willing-seller/willing buyer principle could be determined as unreasonable.¹⁹¹ This is because the commitment to the willing-seller/willing-buyer principle only seems to benefit the select rights of the individual property owners, as a result of the purchase or expropriation of the required amount of land at or above market value. This process invariably becomes too expensive, and given the limited state resources and the government's range of other socio-economic obligations, effective and meaningful land reform could fail to materialise and address the socio-economic realities of a significant segment of society formally discriminated against. In effect, the socio-economic rights to land for a large marginalised segment of society could be hindered as a result of the government's commitment to the demand driven, market based willing-seller/willing buyer principle.¹⁹²

This follows onto the next principle that 'any programme for the progressive realisation of a socio-economic right which fails to make appropriate resources available is unreasonable'.¹⁹³ This *dictum* suggests that a challenge to a programme on the basis that it fails to make appropriate resources available is wholly permissible.¹⁹⁴ The central question that the court considers when assessing reasonableness in the context of the positive duties imposed on the state, is whether the means chosen by the state are reasonably capable of facilitating the realisation of the right?¹⁹⁵ Yacoob J held that 'reasonableness' requires, at the very least, a social programme that is comprehensive, balanced and flexible in design in order to give effect to a socio-economic right.¹⁹⁶ Furthermore, Yacoob J held that the social programme must be reasonably conceived and implemented.¹⁹⁷

Reflecting on this *dictum* requires one to question whether the state's land redistribution policy has 'reasonably' facilitated the realisation of the socio-economic right to land entrenched in section 25(5)? I consider firstly whether the prevailing redistribution policy of government has been comprehensive in its land reform capacity? Due regard must be had of the government's reluctance to exercise its powers of expropriation as its primary instrument in facilitating its redistribution programme, and not a mechanism of last resort.¹⁹⁸

¹⁹¹ Lahiff E & Rugege S (note 110) at 306-307.

¹⁹² Ibid.

¹⁹³ Grootboom (note 100) at para 39.

¹⁹⁴ Nick Ferreira (note 183) at 278.

¹⁹⁵ *Grootboom* (note 102) at para 41.

¹⁹⁶ Ibid at paras 40-43.

¹⁹⁷ Ibid.

¹⁹⁸ Lahiff E & Rugege S (note 110) at 306-307.

An argument could be advanced that the government's redistribution policy could meet the 'reasonableness' criteria expressed in *Grootboom* if it were to adopt a flexible approach to expropriation that was open to compensation at a lower rate than market value, where consideration of the factors enumerated in section 25(3) indicated that such lower rates were just and equitable.¹⁹⁹ This would ensure that an expropriation led redistribution policy would reflect an equitable balance between the public interest and the interests of those affected by the expropriation, by leaving open the possibility that the scales will be tipped in favour of either sets of interests when it was just and equitable to do so.²⁰⁰ Current practice however implies that market value is the predominant or determinative factor when calculating compensation for the purposes of expropriation.²⁰¹ Arguably the current practice affects the state's capacity to facilitate greater land reform in the area of redistribution, to the extent that it neglects the very delicate and carefully calibrated balance established in section 25(3). A preoccupation with establishing market value first and then determining whether it should be reduced in view of other factors in section 25(3), may arguably tip the scales unfairly in favour of the interests of those affected by the expropriation rather than the public interests. Current practice suggests that the government's redistribution programme lacks a reasonably comprehensive, balanced and flexible solution to the realisation of the socio-economic right to land entrenched in section 25(5).

The next principle that the court has explored in its assessment of the credibility of infeasibility claims is 'all who are subject to duties in terms of the Bill of Rights must purposefully and creatively take all reasonable measures to ensure maximum possible compliance'.²⁰² The court has been sceptical to accept complacency in the face of pleas of the scarcity of resources. In *Jaipal*²⁰³, the Constitutional Court warned that creative solutions would be required to ensure compliance with the Constitution in conditions of scarce resources.²⁰⁴ An argument can be advanced to the extent that it would be creative and legitimate for the legislature to set down a general land reform discount for compensation in land reform expropriations, provided that such discount is based on the considerations of section 25(3).²⁰⁵ Such legislation, as is argued by Zimmerman and AJ van der Walt, is not

¹⁹⁹ AJ van der Walt (note 57) at 39.

²⁰⁰ *Ibid* at 40.

²⁰¹ See *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at para 28.

²⁰² *S v Jaipal* 2005 (4) SA 581 (CC) at para 56.

²⁰³ *Ibid*.

²⁰⁴ 'Responsible, careful and creative measures, born out of a consciousness of the values and requirements of our Constitution, could go a long way to avoid undesirable situations' extract from *S v Jaipal* at para 56.

²⁰⁵ Argument advanced by AJ van der Walt (note 57) at 39.

only creatively feasible but it is also desirable as a mechanism that can comprehensively speed up and facilitate land reform thereby giving effect to section 25(5).²⁰⁶ Such creativity on the part of the legislature and the government could ensure compliance with the Constitution's transformative agenda in section 25(5) within conditions of scarce resources.

6.1.2. EXPROPRIATION: A MATTER OF BALANCING LAND REFORM INTERESTS AND THE INDIVIDUAL INTERESTS OF THOSE AFFECTED BY THE EXPROPRIATION

The constitutional principle of compensation finds itself at the heart of the contestation between the development of an effective, speedy and meaningful programme of redistribution of land by way of expropriation on the one hand, and the protection of existing property rights through 'just compensation' on the other. It is my contention that this arises out of the incorporation of the concept of 'market value' and the 'willing-seller/willing buyer' principle into the Expropriation Act.²⁰⁷ It would appear that the principle forms the basis of the calculation of market value in cases dealing with expropriation.²⁰⁸ The resultant effect is that expropriations that are defined according to an award of compensation calculated at market value or above, as 'just compensation', may contribute to the unwillingness on the part of government to advance programmes centred on section 25(5) because they may prove to be simply too expensive.²⁰⁹ It is my contention that where there is a shortage in resources and the state must manage its resources carefully, an interpretation of section 25 (3) that is linked to compensation at market value based on the 'willing-seller/willing buyer' principle is unhelpful for the purposes of advancing expropriation led land reform. This will unfortunately result in the burden of infeasibility falling upon the landless. This is so because of the continued unqualified support of the constitutional protection of the existing property rights by government, through its commitment to the willing-seller/willing buyer principle in the 1997 White Paper on Land Policy and the Expropriation Act of 1975. The continued unqualified constitutional protection of existing property rights coupled with a 'just compensation clause' which is reinforced by the

²⁰⁶ Ibid.

²⁰⁷ See s 12 of the Expropriation Act 63 of 1973.

²⁰⁸ Ibid.

²⁰⁹ Geoff Budlender 'The right to equitable access to land' 1992 8 *South African Journal of Human Rights* 295 at 303.

government's commitment to the willing-seller/willing buyer principle, will likely derail any reasonable attempt at achieving substantial redistribution of land. According to Budlender this will invariably result in the socio-economic right to land for the landless, entrenched in section 25(5), being undermined.²¹⁰

Because of its constitutional importance, the issue of compensation must be carefully negotiated and dealt with in a constructive manner reflecting the flexibility at which compensation can be determined in accordance with values and principles enshrined in section 25(3). This will invariably impact on position to be taken by the government in terms of its formulation and implementation of progressive, meaningful and speedy measures for the advancement of land reform.

6.1.3. DEFINING 'JUST AND EQUITABLE' FOR THE PURPOSES OF RECONCILING THE STATE'S DUTIES TO PROMOTE LAND REFORM AND TO PAY JUST AND EQUITABLE COMPENSATION FOR EXPROPRIATION

Section 25(3) stipulates that compensation should be determined in a just and equitable manner that is reflective of a carefully constructed equitable balance between the public interest, and the interests of those affected by the expropriation.²¹¹ In order to maintain this careful balance between the opposing interests the determination of compensation requires a flexible approach that is sensitive to the need for land reform to occur within budgetary constraints, whilst not unfairly jeopardizing the protection afforded to existing property rights.²¹² It is my contention that the language of section 25(3) in synergy with section 25(2) (b), section 25(4)(a), section 25(5) and section 25(8), suggests that the determination of compensation must be flexible in striking an equitable balance between the competing interests having particular regard for the historical context of the injustice of the apartheid land law system, as well as the guiding constitutional value system laden with principles of social justice and transformation.²¹³

²¹⁰ Ibid at 304.

²¹¹ S 25(3) of the Constitution of the Republic of South Africa.

²¹² Jill Zimmerman (note 44) at 406.

²¹³ *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) at paras 8-23; *Zondi v Member of the Executive Council for Traditional and Local Government Affairs* 2005 (3) SA 589 at paras 38-42.

When it comes to the calculation of compensation, section 25(3) makes provision for the determination of ‘just and equitable’ compensation according to a consideration of **all** the relevant circumstances outlined in subsections (a)-(e). The language of section 25(3) does not articulate nor indicate that market value is sufficient on its own to determine the necessity or amount of compensation.²¹⁴ Section 25(3) instead articulates that all relevant circumstances outlined in subsections(a)-(e) should be **considered together** in determining when it would be just and equitable for the state to pay below the market value, specifically in instances where it seeks to expropriate land for the purposes of advancing its redistribution programmes.²¹⁵ Section 25(3) arguably makes it clear that compensation at a lower rate than market value is constitutionally permissible, where a lower rate than market value is found to be ‘just and equitable’ and reflective of an equitable balance between the public interest and the interests of those affected by the expropriation.²¹⁶ Such an interpretation invariably tries to reconcile the state’s duties to promote land reform, and its duty to pay just and equitable compensation especially in instances where the state is inclined to pursue measures that progressively, speedily and meaningfully advance land reform.

Considering the focus of section 25(3) on the importance of determining what is ‘just and equitable’ compensation as well as the need to maintain an equitable balance of the competing interests, it is argued that section 25(3) empowers the state, with sufficient flexibility, to adopt a compensation formula that is sensitive to the constitutional need of the advancement of expropriation led land reform within budgetary constraints.²¹⁷ This may arguably present the government with the most effective means of reconciling its duties to promote land reform on the one hand, and its duty to pay just and equitable compensation on the other.

The constitutional reality of expropriation and compensation outlined in section 25(3) is contrastingly different from the government’s current approach to expropriation led land reform for the purposes of advancing land redistribution. In some areas of the Expropriation Act, for example, it is unclear how these provisions complement the Constitution in relation to the issue of expropriation and compensation.²¹⁸ The Constitution’s position on expropriation and compensation seems to be different to the Expropriation Act’s position.

²¹⁴ A J van der Walt (note 57) at 38.

²¹⁵ Ibid.

²¹⁶ AJ van der Walt (note 57) at 39.

²¹⁷ Jill Zimmerman (note 44) at 407.

²¹⁸ Expropriation Act 63 of 1975 s 12.

Section 25(3) sets the standard for constitutional compensation: ‘it must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected’, market value being one of the factors taken into account.²¹⁹ This is different to the Act, which prescribes the calculation of compensation according to market value which is informed by the market based willing seller/willing buyer principle.²²⁰

This difference is manifested in how the Constitution firstly envisions the state to take reasonable legislative measures to foster conditions which enable citizens to gain access to land on an equitable basis, and how the government actually perceives this duty.²²¹ Arguably the Constitution envisions the adoption of a flexible approach towards determining compensation against an expropriation based on what may be just and equitable in the instance. What may be just and equitable in some reasonable instances, is compensation at a lower rate than market value. This preferred outcome may reasonably assist the government in minimizing the expense and delay of formulating and implementing a meaningful, speedy and effective programme of redistribution of land by way of expropriation.

Contrastingly, current practice suggests that the Expropriation Act envisions that market value still plays a large role in determining and quantifying compensation.²²² This is clear from the current practice of first establishing market value and then determining whether market value should be reduced in view of the other factors in section 25(3).²²³ It is my contention that this may curtail the state from formulating and implementing a meaningful, speedy and effective programme of redistribution, due to a preoccupation with determining adequate compensation that the state believes adequately and fairly protects the interests of those affected by the expropriation. It is my contention that this has the potential to not reflect a just and equitable balance between the public interest and the interests of those affected. It may also hinder the state in being able to reasonably reconcile its duties to promote land reform, and to pay just and equitable compensation. This will invariably have the effect of instilling reluctance on the part of government to earnestly pursue measures that meaningfully, speedily and effectively resolve the lack of transformation in the land holding

²¹⁹ S 25(3) of the Final Constitution of the Republic of South Africa Act 108 of 1996.

²²⁰ Expropriation Act 63 of 1975 s 12.

²²¹ S 25(5) of the Final Constitution of the Republic of South Africa Act 108 of 1996.

²²² AJ van der Walt (note 57) at 39.

²²³ See *Du Toit v Minister of Transport* 2006 (1) SA 297 (CC) at 25-28; *Khumalo and Kookfontein and Baphiring Community v Uys and Others* 2007 (5) at para 23.

structures of South Africa. It is argued that it is this reality, that sums up the lack of progression in land reform.

CONCLUSION

The dissertation set out to investigate whether section 25 has hindered or imposed any constraints on the state to develop, and adopt progressive land reform policies focused on land redistribution. This involved an assessment of the constitutional text and language of section 25 as well as the constitutional jurisprudence, in order to ascertain whether the property clause, as some critics of the constitution have expressed, can be considered as the reason for the conservative pace at which the state has approached its constitutional obligation of advancing land reform. The dissertation set out to demonstrate that section 25 is not ‘anti-transformation’, and that rather the state’s interpretation of section 25 as well as the prevailing legal culture have seemingly contributed towards the state premising its redistribution program on the willing seller-willing buyer policy, which has hindered the state from advancing speedy and meaningful land reform in the area of land redistribution.

This chapter aims to outline the most important observations made in the preceding chapters, in order to provide for a progressive and transformative interpretation of section 25 and its land reform provisions.

The dissertation considered firstly the meaning of South Africa’s transformative constitutional agenda within the context of land reform. The dissertation established that South Africa’s transformative constitutional agenda is informed by the Constitution’s underlying desire to commit the state to transforming society, into one in which citizens have access to social and economic resources that ensure a realization their self-worth and dignity. The Constitution outlines an overriding and ever-present commitment towards realizing substantive (redistributive) equality and justice and not just formal equality and justice. In the context of land reform, the Constitution’s transformative agenda intends to overcome the socio-economic legacy of apartheid through the adoption of reasonable legislation that assures access to socio-economic welfare in the areas of access to land, which is to be facilitated through progressive land reform. South Africa’s transformative constitutional

agenda in the context of land reform, has been translated into the provisions of s 25(4) – (8) which articulate the constitution’s commitment towards achieving substantive (redistributive) equality through the implementation of reasonable laws, policies and programs designed to ameliorate the conditions of those previously dispossessed of their rights to property.

A discussion of the influence of legal culture strongly highlighted how this has influenced the interpretation, the application and enforcement of section 25, and how section 25 and its underlying values and principles influence the socio-economic development in the area of land reform. Despite the tendency of the current legal culture to revert to a conservative and formalistic approach to the constitutional interpretation, enactment and enforcement of section 25, the Constitution establishes the necessary normative institutional framework through which egalitarian socio-economic transformation is capable of being infused into the current legal culture.

The dissertation then proceeded to consider the legislative history of the property rights prior to the adoption of the Constitution, and the impact that the constitution has had on property rights and land reform. The constitution, together with its property clause, is a product of intense negotiation between the apartheid government and the African National Congress. The constitution intrinsically embodies a compromise between the negotiating parties. None more so than in the case of the compromise reached between the apartheid government, and the African National Congress with regards to the property clause. Compromise is represented by the National Party securing existing rights in land, within section 25, through the right not to be deprived of such rights without market value compensation, and the African National Congress securing an inclusion of a provision for land reform within section 25. The compromise entailed drafting a clause which in essence protected existing rights in land, but also protected the advancement of land reform and the redistribution of land. What has emerged from the history of the intense negotiation around the issue of land is a property clause that contains an inherent tension between the protections of existing property rights on the one hand, and the constitutional commitment to the redistribution of property within the reasonable parameters of the constitution on the other.²²⁴ Included in this is the adoption of expropriation of land as a mechanism for land reform purposes, provided compensation is made available.²²⁵ The second chapter of the dissertation established that despite a divergence of views of the ideal constructed version of the property

²²⁴ WJE Du Plessis (note 63) at 276.

²²⁵ Ibid.

clause that is entrenched in the final constitution, it is commonly accepted that section 25 was constructed with the foresight that it would facilitate rather than frustrate land reform. The dissertation has demonstrated in chapter two that the constitution, particularly section 25, creates a sufficient framework in which government is capable of invoking its powers of expropriation to promote and facilitate effective land reform for the purposes of advancing the redistribution of land.

The dissertation proceeds to outline the academic discourse surrounding the inquiry of whether the law, specifically section 25, has stood in the way of government in unfolding a program of land reform that is consistent with the objectives of section 25(5). The chapter considered the application of innovative and progressive ways of reading, interpreting and thinking about property, property rights and the constitutional protection of property in view of the constitutional obligation to promote land reform. The chapter sought to demonstrate that the critical examination of section 25 by influential academics in the area of the constitution and land has indicated that a progressive land redistribution policy can be implemented in a strategic manner if the state can observe the constitutional parameters in section 25(2) to 25(8). These constitutional provisions enable the state to overcome the challenge of protecting vested property interests, whilst at the same time broadening access to land through land reform. A discussion of the critical observations of the jurisprudence of section 25 by different academic experts highlighted that section 25 fundamentally provides guidelines (through section 25(2) and (3)) on how the state is to manage the tension between protecting vested property interests, and at the same time broadening access to land through land reform measures such as expropriation for the purposes of land redistribution. In formulating a comprehensive land reform policy, the government must overcome the challenge of broadening access to land to the most vulnerable and needy, whilst at the same time maintaining confidence in the land market. The chapter highlights how this challenge can overcome by the state in light of the language of subsections 25(2) and s 25(3), both on their own and in synergy with section 25(4)(a), section 25(5) and section 25(8). It was shown in the chapter that the textual synergy between these provisions could be construed as providing constitutional justification for the adoption of an expropriation policy, focused on providing for a substantial form of resource redistribution.

The dissertation explained how the constitutional property clause is interpreted in light of the Constitutional Court's *First National Bank* and *Grootboom* decisions. The

transformative Constitution brought with it a new interpretative framework that envisioned a construction of the property clause in a manner promoting the underlying transformative values of an open and democratic society. This new interpretative framework required the use of purposive interpretation as a means of promoting the underlying values entrenched in section 25. The chapter went onto discussing what purposive interpretation entailed in light of the Constitution's commitment to fostering conditions which enable citizens to gain access to land, in order to create equal development opportunities for all. The discussion on the application of purposive interpretation by the Constitutional Court in the decisions of *First National Bank* and less so in *Grootboom*, raises the question of whether section 25 creates an interpretative framework in which the state is capable of invoking its powers of expropriation to promote and facilitate effective land reform for the purposes of advancing the redistribution of land. This was answered in the affirmative, as the reasoning in *First National Bank* indicated that purposive interpretation of section 25 revealed that the clause (holistically) did indeed create a sufficient framework for government to invoke its powers of expropriation, in order to promote and facilitate effective land reform. In this regard one of the main criticisms leveled against the state in chapter four, is its failure to progressively unfold a programme of land reform as result of its misguided interpretation of section 25 as an obstacle to progressive land reform progress. The argument is that this misguided interpretation, which has been informed by a decision to adopt the willing seller-willing buyer policy, has contributed to the state's inability to advance land reform policies that ensure that there is an equitable distribution of land.

The dissertation goes onto to explaining that the substantive aspects of land reform as enshrined in section 25(4) – (8), lend further normative weight to the purposive interpretations of the property clause as sympathetic to the advancement of land reform. If the state follows the reasoning of the Constitutional Court regarding the interpretative framework of section 25, and adopts a purposive interpretation of the property clause as sympathetic to the advancement of land reform it will be able to construe the protection of existing property rights in such a way so as to not impair the constitutional commitment to land reform. Following from the reasoning of the court in *First National Bank*, section 25(1), (2) and (3) must not be construed so as to be enforced in isolation but having due regard to subsections (4) to (9). Subsections (4) to (9) articulate the Constitution's underlying transformative agenda for the need and aim of the Constitution to redress one of the most enduring legacies of racial discrimination in the past, namely the grossly unequal distribution of land in South

Africa. The willing seller-willing buyer principle that the state seems to commit itself to in regards to its land reform policy, seems to fully protect the interests of existing land owners by neither compelling them to sell against their will nor at a price which they are not fully satisfied.²²⁶ This is despite the fact that the constitutional drafters of subsections (4) to (9) inserted these provisions to emphasise that the protection of an existing property right was not absolute, but a right that was to be justifiably limited by societal considerations such as the public interest. The argument goes that the willing seller-willing buyer principle has the effect of favouring landowners, and essentially entrenches the consequences of the apartheid regime in a post-apartheid society.²²⁷ The dissertation thereafter questions whether such a policy can legitimately satisfy the need to protect existing rights to property on the one hand, and the constitutional commitment to ensure that meaningful and effective land reform measures realize equitable distribution of land.

The last chapter of the dissertation sought to establish how feasibility constraint concerns have impacted the development and adoption of legislation, policies and programs that are capable of meaningfully, effectively and speedily addressing land reform. In the last chapter, the impact of feasibility constraints was assessed and it was shown how the state's preoccupation with the willing seller-willing buyer policy (as the central part of its land reform policy), has made it difficult for the state to move away from the idea that fiscal constraints prevent the state from paying market value for compensation arising out of an expropriation. In essence the chapter highlights the shortcomings of the state's failure to move away from the idea, that market value is central to the determination of compensation for expropriation.²²⁸ This only results in the reinforcement of the willing seller-willing buyer policy which not only hinders the state from using its available resources to adopt an interventionist approach to land reform (through the mechanism of state expropriation), but also provides extensive discretionary power to existing land owners who are empowered to influence the pace and direction in which land reform progresses.²²⁹

It is argued that the state is empowered by the Constitution to adopt a more interventionist approach to land reform, through a state led expropriation policy for the

²²⁶ Simphiwe Dlamini 'Taking land reform seriously: From willing seller-willing buyer to expropriation' LLM (University of Cape Town) 2014 available at www.publiclaw.uct.ac.za/usr/public_law/LLMPapers/dlamini.pdf (accessed on the 3 of March 2017) at 68-70

²²⁷ Ibid.

²²⁸ WJE Du Plessis (note 62) at 274-276.

²²⁹ Simphiwe Dlamini (note 223) at 68-70.

purposes of land redistribution. Section 25(2), section 25(3) and section 25(5) endorse this type of approach, especially where compensation is determined in a ‘just and equitable’ manner considerate of the need to ensure that existing property rights are not unfairly infringed whilst at the same time ensuring that protection of existing property rights does not hinder redistribution. It is therefore recommended that all institutions should be guided by such an approach, and adopt it in order to ensure the realisation of effective, speedy and meaningful land reform.

7.1 WHERE TO FROM HERE?

If the state overcomes its feasibility constraint concerns by judiciously developing and implementing a program of state expropriation as endorsed by section 25(2) and section 25(3) and section 25(5), the state will be able to expedite its land reform program and implement its land redistribution policy in such a way as to address the extreme inequality in land holding structures currently. The answer to the question posed of ‘where to from here?’, lies in the application of a generous and purposive interpretation of section 25 in order to give effect to speedy land reform. All institutions responsible for advancing transformative constitutionalism should be aware that the ideal interpretation to be given to section 25 seeks to advance land reform, and requires the state to move expeditiously in this regard. The answer to the question posed ‘where to from here?’ also lies in the abandonment of the willing seller-willing buyer principle as a vital consideration in the issue of compensation. The state is empowered to abandon this policy when invoking its powers to expropriate land for the purposes of land redistribution, because it is not required to determine compensation as a prerequisite for a valid expropriation.²³⁰ It has now been accepted by the highest court²³¹ that the state is empowered by section 25(2) and 25(3) to expropriate property even when the seller is refusing to accept a reasonable offer of compensation, as a result of the removal of the obstacle of determining compensation prior to expropriation.

²³⁰ Iyer, D “Is the Determination of Compensation a Pre-requisite for the Constitutional Validity of Expropriation?” *Haffajee NO and Others v Ethekwinini Municipality and Others* 2011 6 SA 134 (CC), 2012, available at www.saflii.org/za/journals/SPECJU/2012/9.pdf, accessed on the 7th of March 2017.

²³¹ *Haffajee NO and Others v Ethekwinini Municipality and Others* 2011 6 SA 134 (CC) at 143.

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