# Pre-and post-constitutional deprivation of land in South Africa: A human rights perspective

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## Declaration

I, Livhuwani Dollance Maphalaphathwa, hereby state that the LLM proposal titled: "Pre and post constitutional deprivation of land in South Africa: A human rights perspective" submitted herewith in partial fulfilment of an LLM degree in the Module DIS 6200 is my own original work, contains no plagiarism and has, to the best of my knowledge, not previously been submitted by me or any other person to this or any other institution.

Signature of LLM candidate:.....

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Signed in my presence on this ..... day of ..... 2022.

.....
Commissioner of Oaths.

## Dedication

This study is dedicated to my life partner, Adv MS Sikhwari and to my kids, Rolivhuwa, Rofunwa and Ronewa.

**Acknowledgments**

I extend my gratitude to God who gave me wisdom to complete this research.

I would again like to thank my children who endured my divided attention during this study. You guys are my pillar and I am forever indebted to you.

Thank you to my parents (Mr and Mrs Mashau) for raising me to be the person I am today. All your support and guidance was invaluable.

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**Abstract**

The application of apartheid laws and practices in South Africa led to extreme inequalities relating to land ownership and use. The racially discriminating laws legitimised the dispossession of land and placed prohibitions on land ownership for the majority of the population, in particular blacks, coloureds and Indians. Though these laws were finally abolished, a new democratic South Africa faces numerous challenges such as the unequal distribution of land in the country. The first instances of deprivations and dispossessions of land in South Africa can be traced back to the colonial era. Although evidence suggest that deprivations and dispossessions occurred before 1913, there is an anomaly in the current Constitution in Section 25(7) as it only allows equitable redress to those deprived of land after 19 June 1913. The Constitution and subsequent legislation ignore the deprivations and dispossessions that occurred before 1913 and the people affected by such pre-1913 deprivations are left without any equitable redress. Using a doctrinal methodology, this study investigated the pre and post constitutional deprivation of property rights in South Africa from a human rights perspective. The study found that laws and practices that legitimised land deprivations and dispossessions are associated with colonialism as they pre-date 1913. The study further found that Section 25(7) of the South African Constitution does not provide any equitable redress to those deprived or disposed of land before 1913. The protection of those people can, however, be in terms of legislation enacted under the provisions of Section 25(8), but the government has not enacted such legislation. International law now recognises the right to property, and any equitable redress should be in line with international law principles.

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# Chapter 1: Introduction

## 1.1. Background

Before constitutional democracy in South Africa, blacks, coloureds and Indians were deprived and dispossessed of land by various laws and practices which were discriminatory.[1] These laws legalised racial segregation and prevented blacks, coloureds, Indians and other Asians from owning land in urban areas.[2] These land dispossessions started way before 1913.[3] The land dispossessions and deprivations in South Africa were caused by colonialism and they started around 1652 when the white settlers arrived at the Cape.[4] Laws such as the Native Locations Lands and Commonage,[5] the Squatters Act,[6] the Glen Grey Act,[7] Masters and Servants Ordinance,[8] the Volksraad Resolution[9] and the Pretoria Convention[10] were used as legal machinery to dispossess blacks, coloureds, and Indians of land rights. These laws were all enacted before 1913. Even though land dispossessions began at the Cape, they spread to other areas and the government put in place laws or general rules to regulate land ownership by natives.[11]

The enactment of the Natives Land Act[12] in 1913 laid a foundation for apartheid and formalised limitations on black land ownership.[13] The government deprived and dispossessed many black people of their land using these discriminatory legislation and practices.[14] Legislative enactments such as the Natives Land Act[15] and the Group Areas Act[16] were used to deprive blacks, coloureds and Indians of their rights to

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[1] M Weideman "Land reform, equity and growth in South Africa: A comparative analysis" unpublished PhD thesis, University of the Witwatersrand, 2006.
[2] South African History Online "List of Laws on Land Dispossession and Segregation" https://www.sahistory.org.za (accessed 24 March 2022).
[3] M Weideman (note 1 above).
[4] O Badsha "Land: dispossession, resistance and restitution" https://www.sahistory.org.za (accessed 5 July 2021).
[5] Act of 1884.
[6] Act 11 of 1887.
[7] Act 25 of 1894.
[8] Masters and Servants Ordinance, 50 of 1828.
[9] Resolution of 14 August 1884.
[10] Pretoria Convention, 1881.
[11] South African History Online (note 2 above).
[12] Act 27 of 1913.
[13] HJ Kloppers and GJ Pienaar "The historical context of land reform in South Africa and early policies" (2014) 17 (2) *Potchefstroom Electronic Law Journal* 680.
[14] See Kloppers and Pienaar (note 13 above) 690.
[15] Act 27 of 1913.
[16] Act 41 of 1950.

property.[17] Millions of people could not buy or rent property where they wanted as this was prohibited by apartheid laws.[18] Most of these laws were premised on racial segregation.[19] These laws that supported apartheid have since been abolished in South Africa following the introduction of the Constitution.[20]

Notwithstanding transitioning to democracy, South Africa is still faced with various challenges relating to land ownership.[21] Despite Section 25 of the Constitution's unequivocal protection of the right to property, land ownership is still a sensitive topic in South Africa.[22] The right to property as espoused in the Constitution has a status of a fundamental human right.[23] Individuals are protected from the arbitrary deprivation of their property under the provisions of Section 25(1) of the Constitution.[24] Whether or not the right to property should be afforded constitutional protection as a fundamental right has always been an issue of contention since the multi-party negotiations.[25] Despite the right to property being guaranteed by the Constitution, people and communities who lost their land before 19 June 1913 are not protected by the law in terms of their property rights.[26]

This is made clear by the provisions of Section 25(7) of the Constitution which only entitles a person or community to land redistribution only if dispossessions occurred after 19 June 1913 because of past racial discriminatory laws or practices.[27] This means that those dispossessed of land prior to 1913 are left without any remedy. It is this constitutional exclusion that causes an anomaly in the South African constitutional property law. Although studies associate dispossessions with the enactment of the Natives Land Act,[28] there is enough evidence suggesting that land dispossessions and deprivations in South Africa started before 1913.[29] When it comes to land restitution

[17] South African History Online (note 2 above).
[18] AJ van der Walt and GJ Pienaar *Introduction to the law of property* 7th edition (2016) 337.
[19] AJ Van der Walt "Towards the development of post-apartheid land law: An exploratory survey" (1990) 23 (1) *De Jure* 1.
[20] HP Binswanger and K Deininger "South African Land Policy: The Legacy of History and Current Options" (1993) 21 (9) *World Development* 1451.
[21] Kloppers and Peinaar (note 13 above) 678.
[22] Constitution of the Republic of South Africa, 1996.
[23] Van der Walt and Pienaar (note 18 above) 345.
[24] Section 25(1) of the Constitution states: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".
[25] Van der Walt and Pienaar (note 18 above) 345.
[26] Section 25(7) of the Constitution.
[27] Section 25(7) of the Constitution.
[28] Act 26 of 1913.
[29] Weideman (note 1 above).

and redistribution, the Constitution and enabling laws completely ignore the period prior to 1913. Whether or not the right to property ought to be afforded constitutional protection as a human right is a contentious issue.[30] This issue was settled when the human right perspective of the right to property as contained in Section 25 was considered in the case of *Ex Parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa*.[31] In this case, the South Africa apex court was called upon to pronounce on whether the property clause conformed to recognised international human rights standards.[32] It was found that Section 25 of the Constitution is adequately comprehensive to protect property rights according to international standards.[33] This means that the protection of property under the Constitution is on par with international law and standards.

An important principle of international law gives each state sovereignty over its territory.[34] This means that every country has the right and powers to implement its own laws concerning the occupation and use of its territory by private individuals.[35] The laws that each state can make include those relating to property ownership. A state thus has an exclusive entitlement to enact laws that regulate, within its territory, the use and enjoyment of property rights, and in particular land ownership.[36] As a result of state sovereignty, property rights are usually defined under national laws. Traditionally, the impact of international law on property rights was limited.[37] Just like any sovereign state, South Africa enacted various laws relating to property and land ownership in the country over the years. Most of these laws, as already indicated above, were based on racial discrimination and segregated and prevented blacks, coloureds and Indians from owning land in urban areas.[38]

There is no contention that the regulation of private property ordinarily falls within domestic law and is thus outside of the scope of international law. However, issues of property may have vital human rights and international law implications when carried

[30] Van der Walt and Pienaar (note 18 above) 345.
[31] 1996 (4) SA 744 (CC).
[32] *Ex Parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa* (note 31 above) para 71.
[33] *Ex Parte Chairman of the Constitutional Assembly: In re: Certification of the Constitution of the Republic of South Africa* (note 31 above) para 73.
[34] JG Sprankling "The Global Right to Property" (2014) 4 *Columbia Journal of Transnational Law* 464.
[35] Sprankling (note 34 above) 464.
[36] FS Dunn "International Law and Private Property Rights" (1928) 28 (2) *Columbia Law Review* 166.
[37] Sprankling (note 34 above) 464.
[38] South African History Online (note 2 above).

out in an unaccustomed manner.[39] Subsequent to the Second World War, there has been widespread social and political changes which resulted in various states restricting or confiscating private property rights.[40] This study argues from a human rights perspective that the failure to protect those deprived of property before 1913 is a post-constitutional era deprivation in South Africa which ought to be evaluated.

### 1.2. Research Problem

Blacks, coloureds and Indians have suffered because of past discriminatory laws in South Africa, particularly when it came to land ownership. The apartheid government used arbitrary laws to deprive and prevent blacks, coloureds and Indians from enjoying property rights. The Constitution protects everyone's right to property and housing. However, there is an anomaly in Section 25(7) of the Constitution as it only entitles an individual or community to restitution or to equitable redress if they were dispossessed of land rights after 19 June 1913.[41] As already indicated above, land dispossession occurred prior to 1913 and those people deprived of their property rights before 1913 are without any remedy. Moreover, in *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another*[42] the Constitutional Court pronounced that lack of alternative accommodation can be a temporary defence to an eviction. This pronouncement (or flawed interpretation by some courts) has been used to deprive disadvantaged people of their right to property and housing as protected in the Constitution.[43] The owner is unable to exercise his or her right to property due to delays in securing an eviction order while the municipality arranges alternate housing. The interpretation of the ratio in *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* by some courts is flawed as it disregards the Constitutional Court's warning that using the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act[44] as a tool to expropriate the rights of landowners in favour of unlawful occupiers is not appropriate.[45] There has,

[39] Dunn (note 36 above) 166.
[40] Dunn (note 36 above) 166.
[41] Section 25(7) of the Constitution states: "A person or community dispossessed of property after 19 June 1913 because 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".
[42] 2017 (5) SA 346 (CC).
[43] A Starosta "The Equivocal Issue of Onus in Evictions - Whose Problem is it Anyway? A critical commentary of Occupiers, Berea v De Wet NO 2017 (5) SA 346 (CC)" (2019) 2 *Tydskrif vir die Suid-Afrikaanse Reg* 392.
[44] Act 19 of 1998.
[45] *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* (note 42 above) para 80.

therefore, been deprivation of property rights pre- and post-constitutional era in South Africa, and this needs to be addressed.

## 1.3. Research questions, aim and objectives

### 1.3.1. Research Questions

The key research question that the study answered is whether it is justified for the South African Constitution to exclude the period before 19 June 1913 for purposes of land restitution to achieve equitable redress of land dispossessions? To progressively answer the main question, the specific questions listed below were addressed:

1.3.1.1. Was there no land dispossession or deprivation in South Africa before 1913?

1.3.1.2. What laws justified land deprivations between 1913 and 1993?

1.3.1.3. What laws perpetuate land deprivations in South Africa after 1993?

1.3.1.4. To what extent does South Africa adhere to its international obligations in preserving property rights?

### 1.3.2. Aim

The study investigated laws enacted before 1913, between 1913 and 1993 period and the post-1993 era that either justified or perpetuated deprivation of land rights in South Africa from a human rights perspective.

### 1.3.3. Objectives

(a) To analyse pre-1913 laws that justified land deprivation in South Africa.

(b) To examine laws between 1913 and 1993 that perpetuated land deprivation in South Africa.

(c) To review post-1993 laws that perpetuate land deprivation in South Africa.

(d) To evaluate the extent to which South Africa complies with its international obligations in protecting the right to property, particularly the rights of the historically disadvantaged individuals and communities.

## 1.4. Hypothesis

Although Section 25 (7) of the Constitution only recognises land dispossession that occurred after 19 June 1913 because of racially discriminatory laws or practices for purposes of land restitution and other equitable redress, dispossession of land in South Africa occurred before this period. Consequently, the South African

Constitution, through enabling legislation, should include the period before 19 June 1913 for land restitution and other equitable redress. This inclusion is constitutionally justified considering the provisions of Section 25(8) of the Constitution which empowers the state to take various measures, including enacting relevant laws to achieve land reform that addresses the injustices caused by past discriminatory laws and practice.

## 1.5. Research Methodology and Chapter Outline

### 1.5.1 Research methodology

The doctrinal or desk-based research methodology was employed in this study. This is the primary legal methodology employed in most legal research and it has its basis in common law.[46] Through the doctrinal research method, this study reviewed various primary and secondary sources of law. The primary sources include the Constitution, legislation and case law and international instruments and secondary sources included journal articles, textbooks, internet and other related sources.

### 1.5.2. Chapter Outline

This dissertation consists of five (5) chapters. This introductory chapter provides an outline of the study and provides a general background to the study. The research problem, research questions, and study's goals and objectives are also outlined in this chapter. Chapter 2 reviews racial discriminatory laws and practices that deprived blacks, coloureds and Indians the right to own land in certain areas of South Africa. The chapter examines the deprivations and dispossessions that took place in South Africa during the colonial and apartheid eras. Chapter 3 reviews the deprivation of property in the post-constitutional era in South Africa. The chapter examines the current land laws and their impact in depriving people of their right to land ownership. Chapter 4 describes international and regional legal instruments that protect property rights. Numerous international legal instruments, both at the international and regional levels, are discussed to gauge how well South Africa complies with its international commitments. The chapter discusses a human rights perspective to property ownership and the impact of deprivation on human rights. Chapter 5 provides

[46] T Hutchinson and N Duncan "Defining and describing what we do: Doctrinal legal research" (2012) 17 (1) *Deaklin Law Review* 83.

conclusions drawn from substantive chapters of this dissertation and offers study recommendations.

## Chapter 2: Racial Discriminatory Laws and Practices that Deprived Blacks, Coloureds and Indians the right to Own Land in Certain Areas of South Africa

### 2.1. Introduction

In South Africa, the subject of land ownership has been and remains a sensitive one.[47] The deprivation of land ownership was based on various racially motivated laws and practices, a foundation of which was laid for almost three centuries and which resulted in conflicts over land between various racial groups.[48] This chapter discusses past racially discriminatory laws and practices and their impact in depriving blacks, coloureds and Indians of their immovable property rights. It is important to understand the current South African land ownership situation through the evaluation of past discriminatory laws which were at the core of deprivation of natives' land ownership. The chapter discusses erstwhile laws in order to set a backdrop for future legal development. The chapter also evaluates deprivation and dispossessions that occurred prior to the advent of democracy in South Africa. Two main eras are discussed, namely the colonial era and the apartheid era.

### 2.2. The colonial era

Though most discussions around the issue of land dispossession in South Africa start in 1913, particularly with the enactment of the Natives Land Act,[49] there is evidence that dispossession started way before this period.[50] The first acts of land dispossession occurred around 1652 when white settlers arrived in the Cape[51] and this continued for about three centuries.[52] According to Weideman, land dispossession in South Africa was longer than it occurred anywhere else in the world.[53]

During 1658, Jan van Riebeeck began the first formalised deprivation of land from the Khoikhoi and later the San communities as a way of increasing grazing pastures for the Dutch livestock.[54] These communities were informed that they can no longer live

[47] HM Feinberg "South Africa and land ownership: what's in a deed?' (1995) 22 *History in Africa* 439.
[48] S Saunders 'Land reform in South Africa: An analysis of the land claim process" unpublished Masters dissertation, Potchefstroom University, 2003.
[49] Act 27 of 1913.
[50] Weideman (note 1 above) 8.
[51] Badsha (note 4 above) 1.
[52] Weideman (note 1 above) 8.
[53] Weideman (note 1 above) 8.
[54] Badsha (note 4 above) 1.

in certain parts of the country, thereby forcing relocation.[55] Conflicts arose as a result of these dispossessions, and the Dutch used the military to defeat the Khoikhoi which resulted in military conquest being used as a standard form of deprivation.[56] Similarly in the Eastern Cape aggression was relied upon to dispossess land in the 1800s.[57] Though the use of force was the primary way of dispossession, legislation did also play a role in depriving indigenous people of their land. South African History Online suggests that

> [w]hile the initial part of land dispossession began with annexation and division of territory, over time proclamations were made and laws were enacted by both the Afrikaners and the British to dislodge African people from their land while consolidating areas of White settlement.[58]

Over the years, legislation became one of the most favoured and powerful methods to deprive blacks, coloureds and Indians of land ownership rights.[59] With the development of the agricultural sector, a need to have more black labourers led to the increased taxing of those black tenants who were independent tenants in farms, thereby forcing them to become wage labourers, in particular during 1860.[60]

#### 2.2.1. Pre-Union colonial era laws

The earlier pieces of legislation used to deprive natives of land included the Native Locations Lands and Commonage[61] in the Cape Colony and the Squatters Act[62] in the Transvaal. Promulgation of the latter Act regulated squatting in white-owned land and only allowed a maximum of five black people to stay in a farm.[63] This position was repeated with the enactment of the Squatters Law Act.[64] Weideman states that these pieces of legislation were followed by the prohibition of Indians from owning and occupying land in the Free State from 1891 as well as preventing them from crossing provincial borders.[65] Blacks, coloureds, Indians and other people of Asian descent

[55] Weideman (note 1 above) 9; RM Levin "Land Restitution, the Chieftancy and Territoriality: The case of the Mmaboi Land Claim in South Africa's Northern Province" *Centre for African Studies*, March 1996.
[56] Badsha (note 4 above) 1; Weideman (note 1 above) 9.
[57] Weideman (note 1 above) 9.
[58] South African History Online (note 2 above).
[59] Weideman (note 1 above) 9.
[60] Weideman (note 1 above) 9.
[61] Act of 1884.
[62] Act 11 of 1887.
[63] South African History Online (note 2 above).
[64] Act 21 of 1895.
[65] Weideman (note 1 above) 9.

were segregated and banned from owning land in certain urban areas, especially those falling within the Afrikaner Republics.[66] In the Free State, the government discouraged the settlement of Indians by prohibiting them from owning land except in areas that were specifically designated for Indians.[67]

At the time the Natives Land Act was promulgated, South Africa was already moving towards spatial segregation by way of land dispossession.[68] This was accomplished through a variety of laws that established the framework for a spatially separated South Africa. One of the key laws used to achieve this purpose was the Glen Grey Act.[69] The Glen Grey Act was primarily enacted looking at what individual tenure could bring to the agricultural interest of the Cape.[70] The objective of this Act was to eliminate communal tenure which is typical in black societies, and to replace it with individual tenure.[71] This Act consequently ensured a continuous supply of black labours to white farmers.[72] After the enactment of the Masters and Servants Ordinance,[73] dispossessions increased as the Ordinance was used as justification to forcefully remove and evict black people from their occupied lands as they did not enjoy any legal protection.[74] Later, the Masters and Servants Act was passed to replace this Ordinance.[75] Though the Act kept most of the provisions of the Ordinance, it was "far more ruthless than its predecessors in the range of offences and the severity of the penalties prescribed for servants".[76] The Act criminalised certain acts of breach of contract, indiscipline and injury to property.[77] Moreover, the Act justified arbitrary dismissals, making it easy to remove black people from land as employment was a basis for their continued occupation of land.[78] Without employment, there was no

[66] South African History Online (note 2 above).
[67] South African History Online (note 2 above).
[68] South African History Online (note 2 above).
[69] Act 25 of 1894; Weideman (note 1 above) 9; South African History Online (note 2 above).
[70] R Edgecombe "The Glen Grey Act: local origins of an abortive 'Bill for Africa" in J.A. Benyon *et al*. (eds) Studies in local history: Essays in honour of Professor Winifred Maxwell (1976) 90.
[71] RJ Thompson and BM Nicholls "The Glen Grey Act: Forgotten dimensions in an old theme" (1993) 8 (2) *South African Journal of Economic History* 58.
[72] Thompson and Nicholls (note 71 above) 58.
[73] Masters and Servants Ordinance, 50 of 1828.
[74] Weideman (note 1 above) 9.
[75] Act 15 of 1856.
[76] HJ Simons and RE Simons *Class and Colour in South Africa 1850-1950* (1969) 23.
[77] Simons and Simons (note 76 above) 24.
[78] C Merrett "Masters and servants: African trade unionism in Pietermaritzburg and the Natal Midlands before the early 1980s" (2018) 48 *Natalia* 15.

reason for blacks to occupy or to continue occupying land and these consequently justified their removal from the lands.

In 1902, the Native Reserve Location Act[79] was promulgated by the Cape Colony government. The government was empowered under the provisions of this Act to forcibly remove black people from cities and other urban areas and were moved to Ndabeni (formely known as Uitvlugt).[80] To enforce this law, police were given powers to forcibly remove black people from urban areas.[81] Before 1905, the law and practice were that a black person could not have ownership of land registered in his or her name.[82] A justification of this was found in two legal instruments, namely the Volksraad Resolution[83] and the Pretoria Convention.[84] In particular, under the provisions of Article 13 of the Pretoria Convention

> [n]atives will be allowed to acquire land, but the grant or transfer of such land will in every case be made to and registered in the name of the Native Location Commission hereinafter mentioned, in trust for such natives.[85]

The position before 1905 was that even if a black person could buy property, such property could not be registered in his or her name. In 1905, the court in *Tsewu v Registrar of Deeds*[86] changed this position when it found that these instruments do not have any legal force. It was further stated by the court that even though the Pretoria Convention prohibited a black person from becoming a registered owner of immovable property, there was a possibility of obtaining leave to possess land, even though the registration of such land will be in the Commission for Kafir Locations' name for the benefit of such black person.[87] Black people were thus able to buy land without necessarily having the right to be registered as a landowner.[88] However, in 1910, the Union of South Africa was formed which saw the South African Party ruling, and this was described as the beginning of "a new era of vigorous and focussed government

[79] Act 40 of 1902.
[80] South African History Online (note 2 above).
[81] South African History Online (note 2 above).
[82] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* 2010 (6) SA 214 (CC) para 10.
[83] Resolution of 14 August 1884.
[84] Pretoria Convention, 1881.
[85] Article 13 of Pretoria Convention.
[86] 1905 TS 130.
[87] *Tsewu v Registrar of Deeds* (note 86 above) page 132.
[88] HM Feinburg "Pre-apartheid African land ownership and the implications for the current restitution debate in South Africa" (1995) 40 *Historia* 48.

policies to inhibit the growth of the African peasantry".[89] The pre-union colonial era set the foundation for the Natives Land Act. The enactment of the Natives Land Act was therefore just a culmination of the practices and laws that pre-date it.[90]

Though this era had an impact on Indians and coloureds as they were prohibited from owning land in urban areas, black people were severely affected because not only were black people prohibited from owning land but were also dispossessed of land they already occupied. Using laws, the government prevented blacks, coloured and Indians from owning land in certain areas. Using force, the government took land already belonging to black people and forced them to move to other areas designated for them.

#### 2.2.2. Post- Union colonial era laws

The first formal enactment to justify the forceful taking of land from South Africa's black population was through the Natives Land Act.[91] Though this Act is over 100 years old, it commands much attention because its consequences still shape South Africa.[92] Though this Act formalised deprivation of immovable property, the year 1913 was not a starting point for dispossession of natives' land.[93] Bundy argues that the promulgation of the Natives Land Act was not a sudden departure from the already existing deprivations. Rather, Act followed already laid foundation of dispossessions and deprivations based on colonial conquest. Bundy states that the enactment of this Act was a codification and ratification of different racial discriminatory laws, policies and practices in various colonial and Boer Republics.[94] The Act made racial discrimination a part of the new Union of South Africa. A look at how land was acquired in British colonies and Boer republics before the Union shows that white ownership of most of the land pre-dated the promulgation of the Natives Land Act.[95]

The Natives Land Act created socio-economic injustices in South Africa by depriving black people of their land and thus leading to poverty for the majority of the

[89] Weideman (note 1 above) 9.
[90] South African History Online (note 2 above).
[91] Act 27 of 1913.
[92] C Bundy "Casting a long shadow: The Natives Land Act of 1913 and its legacy" (2013) 30 *Amandla* 15.
[93] W Beinart and P Delius "The Historical Context and Legacy of the Natives Land Act of 1913" (2014) 40 (4) *Journal of Southern African Studies* 667; A Dodson "The Natives Land Act of 1913 and its legacy" (2013) *Advocate* 29; R Hall "The legacies of the Natives Land Act of 1913" (2014) 113 (1) *Scriptura* 1.
[94] Bundy (note 92 above) 15.
[95] Bundy (note 92 above) 15.

population.[96] Section 1(1) (a) of the Act prevented black people from purchasing or hiring land or acquiring land in any other form from a person who is not black except where approval was given by the Governor-General.[97] Furthermore, black people were not allowed to enter into a transaction for hiring, purchasing or acquiring land from any other person other than a black person.[98] If people entered into an agreement that is against the provisions of this Act, such agreement would be invalidated.[99]

Apart from preventing black people from purchasing land outside their racial groups, there were also limitations regarding where black people could own land.[100] The Natives Land Act was used to dispossess millions of black South Africans of their land.[101] Furthermore, black South Africans had restricted access to land. This was mostly related to the ideology that black people should not become owners of land.[102] Though this was the case, there are some reports of black people buying immovable property in the Transvaal.[103] As stated in the Beaumont Commission report, black people where occupying most white owned farms and began to squeeze white farmers out of the property market.[104]

Section 2(1) of the Natives Land Act outlawed agreements of sale between blacks and whites in places not otherwise specifically mentioned in the Act, and thus precluding black people from buying or owning land in most parts of South Africa.[105] Discussions on the impact of the Act focus on interpreting the Act in light of subsequent legislation,[106] while other scholars focus on the impact of the Act on various racial groups.[107] These are discussions from a segregation perspective. Other discussions

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[96] L Modise and N Mtshiselwa "The Natives Land Act of 1913 engineered the poverty of Black South Africans: a historico-ecclesiastical perspective" (2013) 2 (39) *Studia Historiae Ecclesiasticae* 259.
[97] Section 1(1)(a) of the Natives Land Act.
[98] Section 1(1)(b) of the Natives Land Act.
[99] Section 1(4) of the Natives Land Act.
[100] Section 2(1) of the Natives Land Act.
[101] G Sauti and M Lo Thiam "The Land-Grabbing Debacle: An Analysis of South Africa and Senegal" (2018) 41 (1) *Ufahamu: A Journal of African Studies* 85; MH Feinberg and A Horn "South African Territorial Segregation: New Data of African Farm Purchases, 1913-1936" (2009) 50 (1) *The Journal of African History* 41.
[102] Weideman (note 1 above) 9.
[103] Weideman (note 1 above) 10.
[104] WH Beaumont *et al* Report of the Natives Land Commission (Volume 2), 1916; See Also Weideman (note 1 above) 10.
[105] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (note 82 above) para 12.
[106] HM Feinberg "The 1913 Natives Land Act in South Africa: Politics, Race, and Segregation in the Early 20th Century" (1993) 26 (1) *The International Journal of African Historical Studies* 66.
[107] HM Feinberg "The Failure of Rural Segregation (Land Policies) in South Africa: Black Land Ownership After the Natives Land Act, 1913-1936" available at https://www.files.ethz.ch (accessed on

focus on the reasons for the enactment of the Act without substantiating their hypotheses.[108] Their discussions do not explain the reasons of the Act in light of contemporary history.[109] Wolpe argues that the Act was a response to the internal and external political pressures,[110] as well as an attempt to prevent the squatting problem existing at that time.[111]

Understanding the impact of the Natives Land Act requires a consideration of the historical context of South Africa. This is important as it contradicts the view that the Act was simply an instrument for dispossessing black people of their land. As discussed above, the historical context reflects that dispossessions did not start in 1913. Even prior to the enactment of the Natives Land Act, dispossession had already occurred, owing to colonial wars during the 1800s.[112] Though the Act did not outrightly prevent black people from buying land, there is no doubt that its impact was deep.[113]

The Natives Land Act was designed primarily to prevent black people from owning land in urban areas. Additionally, it was illegal for black people to hire or purchase land outside areas allocated to their race. A black person could only purchase or sell land to another black person. The Act was further used to dispossess black people of the land they already occupied. During this era, black people suffered the most when it comes to land dispossessions and deprivations.

#### 2.2.3 Pact government era laws

After taking power in 1924, the Pact government sought to prevent the ownership of land by natives.[114] As a result, the government promulgated the Black Administration Act.[115] This Act became one of the primary pieces of legislation used to force the

29 June 2021); A Piotrowski "Colonialism, Apartheid, and Democracy: South Africa's Historical Implications on the Land Reform Debate" (2019) 11 (4) *Journal of Interdisciplinary Undergraduate Research* 58.

[108] Feinberg (note 106 above) 66.

[109] Feinberg (note 106 above) 66.

[110] H Wolpe "Capitalism and cheap labour power in South Africa: From segregation to apartheid" (1972) 1 (4) *Economy and Society* 425.

[111] Feinberg (note 106 above) 66.

[112] NPC Phuhlisani "The role of land tenure and governance in reproducing and transforming spatial inequality" (2017) *Commissioned report for High Level Panel on the assessment of key legislation and the acceleration of fundamental change, an initiative of the Parliament of South Africa* 7.

[113] Phuhlisani (note 112 above) 7.

[114] Weideman (note 1 above) 10.

[115] Act 38 of 1927.

removal of blacks from their land.[116] The removals were justified by the provisions of Section 5(1)(b) of the Act which gave the governor the right to remove any tribe from any place if it is in the interests of the public.[117] This statutory provision became a very powerful tool to remove black people from parts of South Africa reserved for whites into areas demarcated by legislation for black people.[118] The *Western Cape Provincial Government and Others:* In *In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another,*[119] states that "[t]hese removals resulted in untold suffering", adding:[120]

> The forced removals of African people from the land which they occupied to the limited amount of land reserved for them by the apartheid state resulted in the majority of African people being dispossessed of their land. It also left a majority of them without legally secure tenure in land.[121]

Further legislative enactments were passed by the government that prevented blacks, coloureds and Indians from owning land in certain areas. For instance, the Native Trust and Land Act[122] created the South African Native Trust for acquiring and administering of the expanded land. Most of the reserved land was thus registered into the name of the Trust. Moreover, only 13 percent of the land was set aside for 80 percent of the population.[123] This, however, did not prevent blacks from buying land.[124] If such land had been purchased by a black person, it would still need to be registered in the name of the South African Native Trust.[125] This continued until 1937 when the government passed the Native Laws Amendment Act[126] which removed any existing right for blacks to acquire land in urban areas.

The Native Trust and Land Act criminalised black land tenancy in certain areas demarcated as whites-only areas. Due to this, black people were unable to buy or hire

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[116] Weideman (note 1 above) 10.
[117] Section 5(1)(b) of the Black Administration Act 38 of 1927.
[118] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (note 82 above) para 25.
[119] 2001 (1) SA 500 (CC).
[120] *Western Cape Provincial Government and Others: In In re DVB Behuising (Pty) Ltd v North West Provincial Government and Another* (note 119 above) para 41.
[121] *Tongoane and Others v National Minister for Agriculture and Land Affairs and Others* (note 82 above) para 25.
[122] Act 18 of 1936.
[123] Van der Walt and Pienaar (note 18 above) 360.
[124] Feinberg (note 107 above) 10.
[125] Feinberg (note 107 above) 10.
[126] Act 46 of 1937.

land in certain locations. The implementation of this law in conjunction with the Blacks Administration Act

> gave the executive power to remove blacks from land declared white areas and relocate them to the reserves. This accelerated the limitation of African land ownership and overcrowding and environmental degradation. This trend persisted through the apartheid era and beyond.[127]

#### 2.2.4 Conclusion

It is clear from the above discussions that during colonial era, force was the primary method used to relocate black people. The government then sought to legitimise the relocation of blacks by enacting various laws justifying such relocations. Laws such as the Native Locations Lands and Commonage and the Squatters Act were used as legal tools to justify and formalise deprivations. The Glen Grey Act was a key laws for spatially dividing South Africa. This was escalated with the enactment of the Natives Land Act which still shapes the South African Land laws. After coming into power, the Pact government also legitimised deprivations and dispossessions with the enactment of the Black Administration Act which was used to justify forceful removals. In the colonial era, blacks, coloureds and Indians were prevented from owning land in certain areas and blacks were also forcibly removed from land they already occupied.

### 2.3. The apartheid era

After taking power, the South African apartheid government enacted the Group Areas Act[128] which effectively divided South Africa according to the racial groups.[129] Section 2 of the Act provided for three main racial groups, namely Europeans, Natives, Asians and Coloureds.[130] Europeans were to reside in the Cape of Good Hope and the Natal provinces.[131] Natives and Coloureds were to reside in the Transvaal and while Asians were to reside in the Natal province.[132] This Act criminalised some forms of land use and enjoyment for people falling outside designated racial groups.[133] There were, however, exceptions to this as a person staying on lawfully occupied land or a visitor

[127] Phuhlisani (note 112 above) 8.
[128] Act 41 of 1950.
[129] Weideman (note 1 above) 11.
[130] Section 2 of the Group Areas Act 41 of 1950.
[131] Section 3 of the Group Areas Act 41 of 1950.
[132] Section 3 of the Group Areas Act 41 of 1950.
[133] Section 4 of the Group Areas Act 41 of 1950; See also Van der Walt and Pienaar (note 18 above) 365 – 366.

occupying land for a period not exceeding 90 days were allowed to occupy such land contrary to the prohibitions imposed by Section 4.[134] In order to enforce these laws, the state "created the state machinery" to enforce them.[135] The government was given control over certain areas and it used enforcement agencies to remove blacks from those demarcated areas.[136] The Group Areas Act was further used alongside the Population Registration Act[137] as basis for forced removals and dispossessions especially in Indian communities.[138] The Population Registration Act was used principally for classifying people according to their races. Under this Act, racial classification was compulsory on a national register and documents had to be issued to people based on their designated racial groups. This legislation effectively created the Group Areas Act to justify dispossession.[139] The Act was used to limit the rights of blacks, coloureds and Indians from owning property in certain areas.[140] Those blacks, coloureds and Indians who occupied areas classified for white occupation were forcibly removed.[141]

In addition to the above pieces of legislation, the apartheid government enacted further laws that justified forced removals and dispossessions such as the Natives Resettlement Act,[142] the Natives Laws Amendment Act[143] and the Group Areas Amendment Act.[144] Urban areas had special areas demarcated for blacks, coloureds and Indians.[145] The Natives Resettlement Act allowed the removal of black people from within the Johannesburg magisterial district.[146] Section 25 thereof authorised the board to demand that a black person vacate the premise he or she occupies by way of a notice.[147] Should a person fail to vacate in accordance with the requirements of the notice, a magistrate was authorised to order immediate removal.[148]

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[134] South African History Online "The Group Areas Act of 1950" https://www.sahistory.org.za (accessed 2 August 2022.
[135] Weideman (note 1 above) 13.
[136] South African History Online (note 134 above).
[137] Act 30 of 1950.
[138] Weideman (note 1 above) 12.
[139] Weideman (note 1 above) 12
[140] South African History Online (note 134 above).
[141] The National Party and Apartheid https://www.britannica.com (accessed 2 August 2022).
[142] Act 19 of 1954.
[143] Act 54 of 1952.
[144] Act 36 of 1966.
[145] Group Areas Act 36 of 1966; Van der Walt and Pienaar (note 18 above) 360.
[146] Preamble to the Natives Resettlement Act 19 of 1954.
[147] Section 25 of the Natives Resettlement Act 19 of 1954.
[148] Section 26 of the Natives Resettlement Act 19 of 1954.

There were, however, some temporary rights afforded to non-whites to occupy urban townships. For instance, the Blacks (Urban Areas) Consolidation Act[149] allowed black people to occupy urban townships by way of residential permits. These permits required that any person who occupied urban township should be named in the permit.[150] First, the state used the 30-year lease and blacks were allowed to lease the property from the government.[151] Even though they would have the right to live there, the government still owned the land. The government further promulgated the Regulations Governing Control and Supervision of Urban Black Residential Areas and Related Matters[152] in terms of Section 8 of the Blacks (Urban Areas) Consolidation Act. The Native Laws Amendment Act[153] prohibited black people from owning land in urban areas.

Although the government was dispossessing blacks, Indians, and coloured people from their land and employing the law and enforcement agencies to do so, there were growing political pressures, especially given the rapid rise of the black population.[154] As more and more blacks moved to urban areas, the government sought to find a solution as well as to recognise that blacks were now permanently resident in urban areas. This resulted in a change in attitude by the government towards blacks residing in urban areas.[155] These pressures resulted in the promulgation of the Blacks (Urban Areas) Amendment Act[156] which was an extension on the scope and application of the Blacks (Urban Areas) Consolidation Act. However, instead of the 30-year-old lease, the Blacks (Urban Areas) Amendment Act extended the period of leasehold by introducing the 99-year leasehold tenure.[157] This was seen as a change in government policy.[158] Though this, albeit to a limited extent, provided some rights over property, the permit system did not amount to giving black people land ownership as land still

[149] Act 24 of 1945.
[150] M Bolt and T Masha "Recognising the family house: a problem of urban custom in South Africa" (2019) 35 (2) *South African Journal on Human Rights* 147.
[151] *Hlongwane and Others v Moshoaliba and Others* (A5009/2017) [2018] ZAGPJHC 114 (2 February 2018) para 7.
[152] Regulations Governing Control and Supervision of Urban Black Residential Areas and Related Matters, 1968.
[153] Act 46 of 1937.
[154] HS Jackson "The system of 99-year leasehold in South Africa" (1987) available at http://wiredspace.wits.ac.za (accessed on 1 April 2021).
[155] Jackson (note 154 above) 3.
[156] Act 97 of 1978.
[157] *Hlongwane and Others v Moshoaliba and Others* (note 151 above) para 8.
[158] Jackson (note 154 above) 3.

belonged to the government. A significant and positive transformation brought about by this law and change in policy was that black people could acquire, albeit to a limited extent, property rights in urban areas.[159] Ownership of the property remained with the city while occupiers were mere tenants. The occupation of such council-owned houses was by way of permits which gave occupants no more than occupational rights over the properties they occupy.[160] In return for occupation, occupants were required to pay rent.[161] Failure to pay rent could result in evictions without a requirement of a court order.[162] To carry out the eviction, the Superintendent of the Municipal Council just needed to give the instructions.[163] In other words, tenants were required to pay rent for their continued occupation of the land.

As a result of the permit system, there was an increase in illegal squatting in urban areas.[164] The Prevention of Illegal Squatting Act was implemented by the government to address the issue.[165] In terms of this Act, the powers to remove illegal squatters were premised on either criminal or administrative procedures. One of the main provisions that justified the removal of illegal squatters was Section 1 of the said Act which provided that

> [s]ave under the authority of any law, or in the course of his duty as an employee of the government or of any local authority; no person (a) shall enter upon or into without lawful reason, or remain on or in any land or building without the permission of the owner or lawful occupier of such land or building whether such land is enclosed or not.[166]

Section 5 of the Prevention of Illegal Squatting Act gave magistrates administrative authority to order the eviction of anyone or the demolition of any building.[167] This was, however, subject to a condition that the removal should only be allowed if failure to remove such person would constitute a danger to the "health and safety of the

[159] Van der Walt and Pienaar (note 18 above) 361.
[160] Van der Walt and Pienaar (note 18 above) 361.
[161] SR Dube "The Provision of Full Ownership Rights to Soweto Households as a Government Service Delivery Priority in the New Dispensation" unpublished Master of Public Administration dissertation, University of South Africa, 2017.
[162] Dube (note 161 above) 6.
[163] Dube (note 161 above) 6.
[164] Van der Walt and Pienaar (note 18 above) 361.
[165] Act 52 of 1951.
[166] Section 1 of the Prevention of Illegal Squatting Act 52 of 1951.
[167] Section 5(1)(a) of the Prevention of Illegal Squatting Act 52 of 1951.

public".[168] The Prevention of Illegal Squatting Act is regarded as the "most draconian of all apartheid laws".[169]

During the 1980s, uprising by black people in urban areas made townships ungovernable as communities used various forms of resistance such as rent boycotts and civic disobedience to achieve their objectives.[170] The government sought to stabilise the situation by initiating some form of tenure reform which allowed black people, albeit to a limited extent, to hold some rights in land.[171] These took the form of residential permits and long-term leases, but the state still retained ownership of the property.[172]

The 99-year leasehold registration failed, thus the legislature passed the Black Communities Development Act as a result.[173] Due to this, certain black people began to have full ownership rights in certain urban areas starting in 1986.[174] However, such ownership was limited to certain urban areas demarcated as "black communities outside the national state".[175] During this time, the permit system was still being used. The permit and the 99-year lease system were abolished with the promulgation of the Conversion of Certain Rights into Leasehold or Ownership Act.[176] This Act allowed for the conversion of leasehold rights into ownership after an inquiry in terms of Section 2.[177]

It is clear from the above discussion that the apartheid era through its discriminatory legislative practices furthered the land dispossession agenda. During the apartheid regime, the dispossession of land did not only affect black South Africans but also Indians and coloureds. The Group Areas Act together with the Population Registration Act were central to the forceful removals, of blacks, Indians and coloureds from certain communities. Moreover, apartheid laws were used to prevent ownership of land by blacks, Indians and coloureds in urban areas. The divide and rule system of the government was enforced through the Group Areas Act which was used to designate

[168] Section 5 of the Prevention of Illegal Squatting Act.
[169] Van der Walt and Pienaar (note 18 above) 362.
[170] Dube (note 161 above) 6.
[171] Dube (note 161 above) 52.
[172] Jackson (note 154 above) 15.
[173] Act 4 of 1984.
[174] Dube (note 161 above) 55.
[175] Preamble to the Black Communities Development Act 4 of 1984.
[176] Act 81 of 1988.
[177] Section 2 of the Conversion of Certain Rights into Leasehold or Ownership Act 81 of 1988.

people based on their races. As such, owning land outside the areas designated for that person's race was prohibited. The state used apartheid laws as justification to remove blacks, Indians and coloureds from areas designated for whites. However, the apartheid era, unlike the colonial era, was met with strong political opposition which resulted in some recognition of rights to land for formally excluded ethnic groups. The Conversion of Certain Rights into Leasehold or Ownership Act, which cleared the path for the acknowledgment of complete ownership rights to land across all races, was only passed in 1988 due to a change in policy.

### 2.4. Conclusion

The first instances of deprivation of land in South Africa are associated with colonialism through the use of force as primary method by settlers to deprive natives of their land. This was later legitimised by several legislative enactments such as the Native Locations Lands and Commonage and the Squatters Act which gave powers to the government to dispossess people of their land for various reasons. The Glen Grey Act was further used to justify deprivations in favour of having an endless supply of black labourers to white farmers. Several pre-apartheid era laws were used to deprive and dispossess blacks, coloureds and Indians of their land, even before the formation of the Union of South Africa. The first formal deprivation was through the Natives Land Act promulgated by the Union of South Africa government. This piece of legislation, although enacted over a century ago, has had far reaching consequences. To ensure full control of the land and to force black people to become labourers, the government enacted various statutes that legitimised deprivations and dispossessions of land. After coming into power, the Pact government also justified deprivations and dispossessions of land through the enactment of the Black Administration Act which was at the forefront of forceful removals. These laws were discriminatory and prevented blacks, Indians and coloureds from owning land in certain areas. During the apartheid era, the government enacted the Group Areas Act which was used in conjunction with the Population Registration Act to justify forceful removals, especially in Indian communities. The Population Registration Act was used to classify people according to their races, and documents were issued in accordance with such racial classification. Different races were then demarcated to different provinces as described in the Group Areas Act. This ensured that buying property outside one's designated racial group area was prohibited. In addition to forceful removals, the

government also prevented blacks, Indians and coloureds from owning land in urban areas. The uprising by black people in urban areas made townships ungovernable and this resulted in change of policy. As a result of protests and rent boycotts, the government enacted laws allowing black people to have some limited land rights. The Conversion of Certain Rights into Leasehold or Ownership Act, which opened the door for complete acknowledgment of land rights for all races in South Africa, enhanced ownership rights.

## Chapter 3: Deprivation of Property in the post -constitutional era in South Africa

### 3.1. Introduction

The Constitution started to reign supreme with the advent of democracy in South Africa.[178] The aspirations of the South African Constitution include bringing about a fundamental transformation of society.[179] The property provision in the South African Constitution is a barrier to transformation despite the Constitution's stated goal of moving society away from an era of arbitrary laws.[180] With a Constitution acclaimed to be "the most admirable Constitution in the history of the world",[181] South Africa protects, amongst other rights, the right against unjustified deprivation of property.[182] The Constitution's protection of the right to property accords it the status of a fundamental human right.[183] Including the right of property in the Bill of Rights goes beyond mere protection but also ensures that those deprived or disposed of their property have a constitutional right to some form of redress.[184] The previous chapter reviewed racial discriminatory laws and practices that deprived blacks, coloureds and Indians the right to own land in certain areas of South Africa. This chapter examines the extent to which property deprivation, whether directly or indirectly, is permitted by the Constitution and numerous additional legislation passed after the enactment of the Constitution. The chapter further looks at whether such deprivation is arbitrary or is justifiable in an open and democratic society.

### 3.2. Constitutional protection of property

An examination of post-constitutional era deprivation of property requires one to look at the Constitution. Section 25 of the Constitution expressly protects the right not to be deprived of property if such deprivation is arbitrary.[185] This suggests that deprivation

[178] Section 2 of the Constitution.
[179] G Alexander "The potential of the right to property in achieving social transformation in South Africa" (2007) 8 (2) *Economic and Social Rights in South Africa* 2.
[180] J Dugard "Unpacking section 25: is South Africa's property clause an obstacle or engine for socio-economic transformation?" *CCR Article on the potential and limits of section 25* (May 1, 2018) 3.
[181] CR Sunstein *Designing democracy: What constitutions do* (2001) 261.
[182] Section 25 of the Constitution.
[183] Van der Walt and Pienaar (note 18 above) 306.
[184] AJ van der Walt *Constitutional Property Law* (2017) 101.
[185] Section 25(1) of the Constitution states: "No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property".

for purposes of regulating property is not wrong if it is not arbitrary. Van der Walt and Pienaar write:

> According to general principles, regulation of land use can cause (even substantial) loss of property, but as long as the regulatory action is legitimate and fair, compensation is not payable for the deprivation.[186]

During the multi-party negotiations leading to democracy in South Africa, parties had to discuss whether the right to property can be protected as a fundamental right, a topic which became a contentious one.[187] The right was finally protected as a fundamental right, with the first protection being in terms of Section 28 of the Interim Constitution.[188] The protection under Section 28 was positive since it provided for a right to acquire and own property. The property clause in the Interim Constitution was later replaced by the provisions of Section 25 of the Final Constitution which does not fully protect the right to property.[189]

Dugard describes the property clause as the longest constitutional provision in the Bill of Rights since it has eight (8) subsections.[190] The first three subsections are more defensive while the last five are more reformist.[191] Though Section 25 is transformative in nature and seeks to balance competing interests, namely the rights of those deprived or dispossessed of land and the rights of current landowners, its complexity has created tensions and potential conflicts.[192] This could be explained by the fact that there is no evidence of any effective protection of property rights under the provisions of Section 25.[193] The provisions of Section 25(1) may be contrasted to those of its predecessor, Section 28(1) of the Interim Constitution because under Section 28(1), an individual's right to acquire and hold rights in property is expressly protected.[194] Section 25(1) offers negative protection, while Section 28(1) provides a positive right to property. In other words, Section 25(1) protects owners of property from deprivation which is arbitrary while Section 28(1) protected the right of non-property owners to

[186] AJ van Der Walt "Constitutional Property Law" (2007) *Annual Survey of South African Law* 241.
[187] Van der Walt and Pienaar (note 18 above) 363.
[188] Van der Walt and Pienaar (note 18 above) 363.
[189] Van der Walt and Pienaar (note 18 above) 346, 363.
[190] Dugard (note 180 above) 4.
[191] J Pienaar *Land Reform* (2014) 167; See also Dugard (note 180 above) 4.
[192] Pienaar (note 191 above) 175.
[193] Dugard (note 180 above) 5.
[194] Section 28(1) of the Interim Constitution Act 200 of 1993.

acquire and own property. In *Port Elizabeth Municipality v Various Occupiers*,[195] Sachs J stated that

> the blatant disregard manifested by racist statues for property rights in the past makes it all the more important that property rights be fully respected in the new dispensation, both by the state and private persons. Yet such rights have to be understood in the context of the need for the orderly opening-up or restoration of secure property rights for those denied access to or deprived of them in the past.[196]

Sachs' observations suggest that since land deprivations and dispossessions were justified by various pre-constitutional laws, the new constitutional dispensation had to protect the right to property. Such respect of property rights had to be done by both the government and private individuals. The Constitutional Court indicated the need to restore the property rights of those deprived in the past. The Constitutional Court in *First National Bank SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank SA Limited t/a Wesbank v Minister of Finance*[197] stated that the provisions of Section 25(1) do not provide for any right to acquire, hold and dispose of property, but rather provides a negative protection.[198] However, though not explicit, the protection of the right to property under Section 25(1) is implicit.

Even though the regulatory regime of the government in the post-constitution may amount to what is known as 'non-arbitrary deprivation', Dugard argues that there is no constitutional obligation on the government to compensate those deprived of property in this manner as it does not amount to expropriation.[199] This suggests that the Constitution does not protect against mere deprivation, but only those deprivations which are arbitrary. Put differently, the Constitution only protects arbitrary interference with property rights and not against mere deprivation. The new constitutional order does, however, acknowledge the "social and historical context of property rights",[200] particularly land dispossession associated with the colonial and apartheid era. As a

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[195] 2005 (1) SA 217 (CC).
[196] *Port Elizabeth Municipality v Various Occupiers* (note 195 above) para 15.
[197] 2002 (7) BCLR 702 (CC).
[198] *First National Bank SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank SA Limited t/a Wesbank v Minister of Finance* (note 198 above) para 48.
[199] Dugard (note 180 above) 6.
[200] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* 2012 (2) SA 104 (CC) para 34.

result, provision is made in the Constitution to reform land rights to address previous injustices.[201]

However, despite the right to property being expressly protected in the Bill of Rights, there is an anomaly in Section 25(7) of the Constitution as it only entitles an individual or community to restitution or to equitable redress for dispossessions and deprivations which occurred after 19 June 1913.[202] There is therefore a differentiation between those deprived or dispossessed of land before and after 19 June 1913. Whether or not there is justification for such a differentiation in a democratic society like South Africa is subject to interpretation considering that land dispossession occurred prior to 1913. People deprived of their property rights before 1913 are without a remedy.[203]

Under Section 25(7) of the Constitution, individuals and communities are entitled to land redistribution only if dispossessions occurred after 19 June 1913 particularly were such dispossession was as a result of past racial discriminatory laws or practices.[204] Limiting redress to dispossessions and deprivations that occurred after 1913 means that those dispossessed of land prior to 1913 are left without any remedy. This constitutional exclusion causes an anomaly in the South African constitutional property law. Although studies associate dispossessions with the Natives Land Act,[205] it is evident from above discussions that 19 June 1913 was not a starting point of deprivation.[206] Land deprivations and dispossessions in South Africa began during the colonial era, long before the Natives Land Act was passed in 1913.[207]

Only allowing redress for those individuals or communities deprived or dispossessed of land after 1913 suggests that the period prior to 1913 is, under the Constitution and enabling laws, completely ignored for purposes of land restitution and redistribution and the state should thus provide justification for this exclusion. The Constitution protects individuals against deprivations of property which are arbitrary. As such, any deprivation of property should be scrutinised to see if it passes constitutional muster.

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[201] Sections 25(6)-(9 of the Constitution.
[202] Section 25(7) of the Constitution states: "A person or community dispossessed of property after 19 June 1913 because 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".
[203] Beinart and Delius (note 93 above) 667; Dodson (note 93 above) 29; Hall (note 93 above) 1.
[204] Section 25(7) of the Constitution. This proposition is also clear from the discussion in Chapter 2 above.
[205] Act 26 of 1913.
[206] Beinart and Delius (note 93 above) 667; Dodson (note 93 above) 29; Hall (note 93 above) 1.
[207] Weideman (note 1 above).

If any deprivation cannot be justified, it is arbitrary and should not be allowed in a democratic society.

### 3.3. Legislative protection of the right to property

#### 3.3.1. Legislative enactments for land reform

The legislature is permitted to enact laws implementing land reform in South Africa by the provisions of Section 25.[208] The Restitution of Land Rights Act gives effect to the right to property in the context of land reform[209] and this is one of the first laws passed by South Africa's first democratic government to give effect to land reform. For persons who lost their land due to the Natives Land Act, the Act provides for the restoration of their land rights. Under the Act, only those people who were dispossessed of land after 19 June 1913 may claim restitution of land using the provisions of this Act. The requirement that for one to claim restitution, there should have been dispossession of land after 19 June 1913 due to past racially discriminatory laws or practices mirrors the provisions of Section 25(7) of the Constitution.[210] Section 25(7) is thus reaffirmed by the provisions of the Restitution of Land Rights Act. This is so, even though there is evidence that land deprivations and dispossessions took place as a result of colonialism, which occurred long before the Natives Land Act was passed.[211] This Act aims to, among other things, give those people or communities who lost their land after 19 June1913, the opportunity to reclaim it.[212] Section 2 of this Act provides that those individuals or communities whose land was taken away after 19 June 1913 are entitled to claim their land.[213] The prerequisite is that such a person or community had their land taken away as a result of prior racial discriminatory law or practices after 19 June 1913.[214] Nevertheless, there is an interesting legal development as those dispossessed of land prior to 1913 may find redress under the current Restitution of Land Rights Amendment Bill[215] and this bill has been subject to public discussions.[216] The failure of Section 25(7) of the Constitution to offer remedies for people or

[208] Section 25(9) of the Constitution.
[209] Act 22 of 1994.
[210] Section 25(7) of the Constitution and section 2(1)(d) of the Restitution Act entitle a community dispossessed of a right to land after 19 June 1913 to claim restitution or other equitable redress.
[211] Beinart and Delius (note 93 above) 667; Dodson (note 93 above) 29; Hall (note 93 above) 1.
[212] Preamble to the Restitution of Land Rights Act 22 of 1994.
[213] Section 2(1) of the Restitution of Land Rights Act 22 of 1994.
[214] Section 2(1) of the Restitution of Land Rights Act 22 of 1994.
[215] Bill 35 of 2013.
[216] Parliamentary Monitoring Group "Restitution of Land Rights Amendment Bill [B35-2013]: public hearings Day 1" https://pmg.org.za (accessed 9 April 2022).

communities who were deprived or dispossessed of land before 1913 was a common topic of discussion around this Bill.[217] According to item 2.4 of the Memorandum on the Objects of the Restitution of Land Rights Amendment Bill, the provisions of Section 25(7) of the Constitution do not provide redress to those individuals or communities deprived or dispossessed of land prior to 1913.[218] Currently, however, research is being conducted to determine the scope and quantity of those individuals and communities dispossessed of land before 1913.[219] This research might assist 5 000 families that were forcefully removed from their homes in 1901 from District Six as they were deemed to be carriers of the plague.[220] These families are not eligible for equitable redress under current laws because they lost their land before 1913.[221]

Justifications for 19 June 1913 being the cut-off period is that this it is the year when the Natives Land Act came into effect which laid foundations for deprivations and influenced policies that had devastating impact on black people and their rights over land.[222] As Miller and Pope correctly note, the limitations imposed on claims to restitution was as a result of a pragmatic compromise.[223] As rightfully argued by Ngcukaitobi, the decision to set the cut-off period at 1913 was not a legal decision, but rather a political one.[224] According to Ngucukaitobi, various dates could have been used as cut-off dates to cover the 1910 era when the Union of South Africa was formed or 1894 when the Glen Grey Act was passed.[225] Another reason advanced for setting the cut-off date to only those dispossessions that occurred before 19 June 1913 is that the state believed that it would not be possible to deal with land claims that pre-date 19 June 1913 using a legal process which follows the principles of the Restitution of Land Rights Act or Aboriginal Title Arguments as followed by other jurisdictions such as Canada and Australia.[226] This is based on the view that claims to ancestral land may cause a number of challenges and "legal-political complexities that would be

[217] Parliamentary Monitoring Group (note 216 above).
[218] Item 2.4 of the Memorandum on the Objects of the Restitution of Land Rights Amendment Bill.
[219] Item 2.4 of the Memorandum on the Objects of the Restitution of Land Rights Amendment Bill.
[220] Parliamentary Monitoring Group (note 216 above).
[221] Parliamentary Monitoring Group (note 216 above).
[222] MA Yanou "The 1913 Cut-off Date for Restitution of Dispossessed Land in South Africa: A Critical Appraisal" (2006) 31 (3) *Africa Development* 178.
[223] DLC Miller and A Pope *Land Title in South Africa* (2000) 428.
[224] T Ngcukaitobi *Land Matters: South Africa's Failed Land Reforms and the Road Ahead Part III* (2021) 7.
[225] Ngcukaitobi (note 224 above) 7.
[226] Yanou (note 222 above) 179; Ngcukaitobi (note 224 above) 7.

impossible to unravel".[227] In particular, the government sought to prevent destructive tribal rivalries over land which may arise when members of different kingdoms lay claim to the same land.[228] This is linked with the view that there may be some pieces of land previously occupied by various ethnic and racial groups in succession, which may pose a risk of and regard them as dubious.[229] The complexity of claims should not be the basis for limiting the rights of those disposed prior to 1913 to claim their land as it is not based on the date of dispossession but rather on the quality of available evidence.[230] Yanou contends that setting the cut-off date 19 June 1913 was not the best way forward for a country like South Africa and the government was unrealistic to assume this.[231]

Whether or not a community can claim their land for deprivations prior to 19 June 1913 was an issue for litigation in the case of *Richtersveld Community and Others v Alexkor Ltd and Another*.[232] The matter began at the Land Claims Court where it was found that the law which allowed the government to appropriate the land was passed long before the 1913 cut-off date required by the Restitution of Land Act.[233] It was further found that the dispossession was not racially motivated, and as such it did not fit into the ambit of past discriminatory laws or practices.[234] Even if the law was discriminatory, the court found that it cannot find the land in question was not state land simply because the state acquired such land as a result of the law based on racial discrimination.[235] In reversing the decision of the Land Claims Court, both the Supreme Court of Appeal[236] and the Constitutional Court[237] held that actual dispossession occurred after 1913 and was thus covered under the provisions of Section 25(7) of the Constitution. This was because the actual removal of the community was in terms of mining legislation after 1913. The Court did, however, note

[227] Ngcukaitobi (note 224 above) 8.
[228] Yanou (note 222 above) 178.
[229] Ngcukaitobi (note 224 above) 8.
[230] Ngcukaitobi (note 224 above) 8.
[231] Yanou (note 222 above) 178–179.
[232] 2004 (5) SA 460 (CC).
[233] *Richtersveld and Others v Alexkor Ltd and Another* (LCC151/98) [2001] ZALCC 34 (6 August 2001) para 109.
[234] *Richtersveld and Others v Alexkor Ltd and Another* (note 232 above) para 17.
[235] *Richtersveld and Others v Alexkor Ltd and Another* (note 232 above) para 109.
[236] *Richtersveld Community and Others v Alexkor Ltd and Another* 2 All SA 27 (SCA) para 110.
[237] *Richtersveld Community and Others v Alexkor Ltd and Another* (note 232 above) para 97.

that dispossessions that occurred prior to 1913 were not actionable.[238] However, as noted in *Richtersveld Community and Others v Alexkor Ltd and Another*

> although it is clear that a primary purpose of the Act was to undo some of the damage wreaked by decades of spatial apartheid, and that this constitutes an important purpose relevant to the interpretation of the Act, the Act has a broader scope. In particular, its purpose is to provide redress to those individuals and communities who were dispossessed of their land rights by the Government because of the Government's racially discriminatory policies in respect of those very land rights.[239]

Land dispossession and deprivations that occurred in South Africa were not as a result of a "single flash of misguided brilliance" but were rather as a "result of generations of legal tinkering".[240] Since the dispossessions and deprivations were based on racial discriminatory laws, failure to recognise indigenous land rights is a form of racial discrimination which according to the Court in *Richtersveld* lies

> in the failure to recognise and accord protection to indigenous law ownership while, on the other hand, according protection to registered title. The inevitable impact of this differential treatment was racial discrimination against the Richtersveld Community which caused it to be dispossessed of its land rights. Although it is correct that the Precious Stones Act did not form part of the panoply of legislation giving effect to "spatial apartheid", its inevitable impact was to deprive the Richtersveld Community of its indigenous law rights in land while recognising, to a significant extent, the rights of registered owners.[241]

In addition, the Constitution, which is the highest law, and subsequent legislation, such as the Restitution of Land Act, which implements the Constitution's provisions, failed to recognise the causes of land dispossession which has led to unjust results, and consequently left the victims of land deprivation that occurred prior to 1913 without any legal recourse. For instance, in *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd*,[242] even though the Constitutional Court found

[238] *Richtersveld Community and Others v Alexkor Ltd and Another* (note 232 above) para 40.
[239] *Richtersveld Community and Others v Alexkor Ltd and Another* (note 232 above) para 98.
[240] G Budlender and J Latsky "Unravelling Rights to Land and to Agricultural Activity in Rural Race Zones" (1990) 6 (2) *South African Journal on Human Rights* 155.
[241] *Richtersveld Community and Others v Alexkor Ltd and Another* (note 232 above) para 99.
[242] 2007 (6) SA 199 (CC).

that the Popela Community was dispossessed, the Court stated that land dispossessions before 19 June 1913 were not actionable.[243]

In *Prinsloo and Another v Ndebele-Ndzundza Community and Others*[244] the Constitutional Court as per Cameron JA stated that

> [t]he Act recognises complexities of this kind and attempts to create practical solutions for them in its pursuit of equitable redress. The statute also recognises the significance of registered title. But it does not afford it unblemished primacy. I consider that, in this case, the farm's residents established rights in the land that registered ownership neither extinguished nor precluded from arising.[245]

If the Constitution and subsequent laws are to acknowledge historical injustices and ensure equitable redress, they ought to recognise the colonial roots of such injustices. Moreover, the Constitution in the spirit of equality as contained in Section 9 thereof[246] ought to protect those who were dispossessed prior to 1913 as well. Since the root of deprivation and dispossession was colonialism, then claims for land dispossession must be actionable even if they arose prior to 1913.[247] The requirement under both the Constitution and subsequent legislation is that dispossessions must have been "as a result of past discriminatory laws or practices".[248] This brings about the issue of causation. In the *Minister of Land Affairs of the Republic of South Africa and Another v Slamdien and Others*,[249] the court applied a two-pronged common law test for causation to establish if there was a link between dispossession and laws or practices based on racial discrimination. The court also considered whether there was a connection between previous racial discrimination-based legislation and practices and land dispossession. This test fails to take into account that colonialism was the root cause of dispossessions as focuses of dispossession based on racially discriminatory laws. What the Constitution seeks to promote is legitimate efforts for overcoming and

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[243] *Department of Land Affairs and Others v Goedgelegen Tropical Fruits (Pty) Ltd* (note 242 above) 21.
[244] 2005 (6) SA 144 (SCA).
[245] *Prinsloo and Another v Ndebele-Ndzundza Community and Others* (note 244 above) para 38.
[246] Section 9 (1) of the Constitution states: Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms".
[247] T Ngcukaitobi *The Land Is Ours: South Africa's First Black Lawyers and the Birth of Constitutionalism* (2018) 270.
[248] Section 25(7) of the Constitution and Section 2(1) of the Restitution of Land Act.
[249] (LCC107/98) [1999] ZALCC 6 (10 February 1999).

repairing the injustices of the past.[250] Limiting the claim period to only those dispossessions that occurred before 19 June 1913 is too restrictive. The past did not start on 19 June 1913, and people who can prove deprivations and dispossessions that occurred prior to that date should be allowed to lodge claims.

Section 25(6) of the Constitution offers protection to those whose "tenure of land is insecure as a result of past racially discriminatory laws or practices".[251] This section suggest that only people who already have tenure are protected, provided that it is insecure. The person is, under the provisions of this section, entitled to either tenure which is secure in terms of law or to any other comparable redress.

Section 25(8) of the Constitution appears to provide better protection for persons who were deprived of or dispossessed of land prior to 19 June 1913.[252] Under this section, provisions of Section 25 should not be used to inhibit the state from enacting laws or from taking other measures to redress the impact of past discriminatory law. Since this section does not provide a cut-off date, the legislature can rely on this section to enact legislation that allows redistribution of land for those deprived or dispossessed before 19 June 1913. This should be done in such a manner that departing from the provisions of Section 25 passes the test under the provisions of Section 36(1) of the Constitution. There is, however, no such legislation in South Africa. Until such legislation is enacted, the ramifications of land disposition remain intact as the constitutional land reform mandate would not have been completely fulfilled.

Various legislative enactments give meaning to the right to property as guaranteed by Section 25 of the Constitution because constitutions are framed in an abstract manner and may not necessarily cover all aspects of life. The most relevant enactment for this discussion is the Restitution of Land Rights Act. Just like the Constitution, this Act only allows restitution for dispossessions that occurred before 19 June 1913. This means that both the Constitution and subsequent legislation do not offer any protection to those deprived or disposed of land before 19 June 1913. A section which seems to offer protection to those deprived before 19 June 1913 seems to be Section 25(8), but the government has not enacted any legislation allowing those deprived or

[250] AJ van der Walt and S Viljoen "The constitutional mandate for social welfare – systemic differences and links between property, land rights and housing rights" (2015) 18 (4) *Potchefstroom Electronic Law Journal* 1046.
[251] Section 25(6) of the Constitution.
[252] Section 25(8) of the Constitution.

dispossessed before 19 June 1913 to have any redress. Failing to recognise the right to equitable redress for those deprived and disposed prior to 1913 means the various racial groups, namely blacks, coloureds and Indians as discussed in the previous chapter remain without a remedy to claim their land and this constitutes a post-constitutional deprivation. An examination of this deprivation in light of Section 36 of the Constitution is necessary to determine whether or not it is justified in a free and democratic society. This is because the rights guaranteed by the Bill of Rights may be limited under section 36 to the extent that such limitation is "justifiable in an open and democratic society".[253] Such limitation ought to be reasonable considering the founding principles of the South African democracy based on human dignity, equality and freedom. Equality dictates that there should not be discrimination based on any ground.[254] Denying someone a right to claim their land solely based on the date of deprivation is discrimination. Such a denial may also affect the right to dignity,[255] particularly the dignity of the successors in title of those stripped off their dignity by forceful removals and deprivation of land that occurred prior to 1913.

### 3.4. Constitutional protection of housing rights

The right to housing, as stated in Section 26(1) of the Constitution, is another right that is pertinent to the current discussions. Everyone's right to adequate shelter is guaranteed under this section.[256] According to Section 26(2) of the Constitution, which requires the state to realise the right to housing progressively, the government has a constitutional obligation to ensure that the right receives the protection it deserves, through "legislative and other measures within its available resources".[257] In *Government of the Republic of South Africa and Others v Grootboom and Others*[258] the Constitutional Court authoritatively stated the state's duty to ensure the progressive realisation of the right to housing when it affirmed the state's constitutional

[253] Section 36 of the Constitution states: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including— (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".
[254] Section 9 of the Constitution.
[255] Section 10 of the Constitution states that everyone has a right to inherent dignity which ought to be protected.
[256] Section 26(1) of the Constitution.
[257] Section 26(2) of the Constitution.
[258] 2001 (1) SA (CC).

obligation to put in place a housing policy which responds to the needs of the vulnerable including the provision of temporary shelter.[259]

An eviction without a court order is illegal under Section 26(3) of the Constitution.[260] This provision has been regarded as prohibiting the impairment of people's access to housing.[261] The justiciability of the right to housing was considered and confirmed by the South Africa apex court in the case of *Ex Parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996*[262] where the court found that the enjoyment of socio-economic rights like the right to housing should not be barred by budgetary implications. This is because, at the very minimum, there is a need to protect these rights against invasion, even if such protection is a negative one.[263] As a result, even where the state is unable to positively provide for the realisation of socio-economic rights, there is still an obligation to protect these rights against invasion.

### 3.5. Legislative protection of housing rights

Constitutions are documents that are usually framed in an abstract manner.[264] Even though it is enacted to cover various aspects of life, it cannot explicitly do so. As a result, there are specific pieces of legislation that give effect to certain provisions of the Constitution. The most important and relevant pieces of legislation giving effect to the right to housing are the Land Reform (Labour Tenants) Act,[265] the Interim Protection of Informal Land Rights Act,[266] the Extension of Security of Tenure Act[267] and the Prevention of Illegal Eviction from, and Unlawful Occupation of Land Act.[268]

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[259] *Government of the Republic of South Africa and Others v Grootboom and Others* (note 258 above) para 36.
[260] Section 26(3) of the Constitution.
[261] L Chenwi "Implementation of Housing Rights in South Africa: Approaches and Strategies" (2005) 24 (4) *Journal of Law and Social Policy* 72.
[262] *Ex Parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* (note 31 above) para 78.
[263] *Ex Parte Chairman of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996* (note 31 above) para 78.
[264] K Jackson "The Meaning and Functions of Constitution" available at https://www.academia.edu (accessed on 15 December 2021) Citing H Philips *Constitutional and Administrative Law 7th edition* (1987) 5.
[265] Act 3 of 1996.
[266] Act 31 of 1996.
[267] Act 62 of 1997.
[268] Act 19 of 1998.

Unlike the other three Acts that deal with specific kinds of occupation, the latter Act relates to occupiers who are in unlawful occupation.[269]

The scope of these laws is interpretated by courts.[270] In cases such as *Conradie v Hanekom and Another*[271] and *Klaase and Another v Van der Merwe N.O. and Others*[272] the courts recognised several rights protected by the provisions of the Extension of Security of Tenure Act. These rights include the right of a woman who was still validly employed to remain on the property even though her husband has been dismissed.[273] The husband would, in turn have a right to return to the property by virtue of family life as he is married to her. In *Venter NO v Claasen en Andere*[274] it was found that the Security of Tenure Act does not find application in relation to spouses separately. This is because, a spouse acquires a right to occupy though marriage with an occupier and not through an independent right against the landowner.

In *Nhlabathi and Others v Fick*[275] the respondent, who was the owner of land, argued that the appropriation of a grave deprived him of his right to property. The court found that appropriations were permitted by the provisions of Section 25(1) of the Constitution provided they were done in terms of the law of general application.[276] Since the right to burial was introduced by legislation giving effect to constitutional mandate for security of tenure, the deprivation was not arbitrary. Furthermore, the appropriation was found to be a minor intrusion, and thus did not warrant compensation.[277] Similarly, the court in *Dlamini and Another v Joosten and Others*[278] confirmed that where there is an established practice to allow burials relating to land and not a specific family, the owner of the land is not permitted to unilaterally revoke

[269] S Wilson "Breaking the tie: Evictions from private land, homelessness and a new normality" (2009) 126 (2) *South African Law Journal* 271.
[270] Dugard (note 180 above) 12.
[271] 1999 (4) SA 491 (LCC).
[272] 2016 (6) SA 131 (CC).
[273] *Klaase and Another v Van der Merwe N.O. and Others* (note 272 above) para 81, 92, 117 and 121; *Conradie v Hanekom and Another* (note 272 above) para 21.
[274] 2001(1) SA 720 (LCC).
[275] [2003] 2 All SA 323 (LCC).
[276] *Nhlabathi and Others v Fick* (note 275 above) para 28.
[277] *Nhlabathi and Others v Fick* (note 275 above) para 30.
[278] [2006] 3 All SA 1 (SCA).

the permission.[279] This means that the owner may be deprived of enjoying his or her property based on previously established practices.

The Prevention of Illegal Evictions from and Unlawful Occupation of Land Act[280] deals with those who are occupying residential property unlawfully. Section 1 of this Act defines an unlawful occupier as someone occupying land "without the consent of the owner or person in charge".[281] Strict requirements and procedures need to be followed when evicting unlawful occupiers. Additionally, the Act seeks to prevent further unlawful occupation of residential property.[282] The title of the Act suggests two pieces of legislation, namely the Prevention of Illegal Eviction from Land Act and the Prevention of Unlawful Occupation of Land Act. It is worth stating that the Act was enacted to regulate the evictions of unlawful occupiers and therefore gives effect to the provisions of Section 26(3) of the Constitution which proscribes evictions not authorised by a court order.[283] Courts can only authorise eviction orders after carefully considering all the relevant circumstances and concluding that issuing an eviction order will be just and equitable. It is submitted that the relevant circumstances are not only those of the unlawful occupier but of the landowner as well. This suggests that the court should be compassionate to the landowners in situations where they stand to lose their property due to unlawful occupants, lest prolonging an eviction may result in a loss of property. As rightfully argued by Van der Walt, protecting the right to property in the Constitution has a broader framework to establish and maintain a balance between competing interests of the right to property on the one hand and the interests of the public on the other.[284]

Therefore, the courts must make sure that the conflicting interests of all parties are considered. Even if they do not have any legal right to stay on the property, illegal occupants are still given protection due to their precarious situation and human rights considerations.[285] Though an eviction order would not be easily granted, it is not impossible to obtain it even where the occupiers would be rendered homeless. This is

[279] *Dlamini and Another v Joosten and Others* (note 278 above) para 26.
[280] Act 19 of 1998.
[281] Section 1 of the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998.
[282] Van der Walt and Pienaar (note 18 above) 373.
[283] Section 26(3) states: "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions".
[284] Van der Walt (note 184 above) 102.
[285] Van der Walt and Pienaar (note 18 above) 373.

because the rights of the landowners must also be protected and should it be just and equitable for an eviction order to be granted, the court will do so.[286]

Whether viewed grammatically or contextually, preventing the owner of the property from enjoying all rights, use and benefit from his or her property may constitute deprivation. Though this was stated in *First National Bank SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank SA Limited t/a Wesbank v Minister of Finance*[287] in relation to corporeal movable goods, the same dispossession of rights, use and benefits in immovable property constitutes deprivation. Any law that restricts a person's ability to utilise, enjoy or profit from his or her property "involves some deprivation in respect of the person having title or right to, or in, the property concerned".[288]

The right to property, as already argued above, should be seen from a human rights perspective. As stated in *In re: Certification of the Constitution of the Republic of South Africa*, Section 25 of the Constitution complies with established international human rights standard[289] because the property clause is wide enough to protect property rights according to international standards.[290] The court in *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* found that unlawful occupiers have a right to housing which ought to be taken into consideration before granting an eviction order.[291] Starosta observes that the decision has been used by some courts to deprive previously disadvantaged property owners of their rights to property and housing.[292]

Using the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act as a way of expropriating the "rights of the landowner in favour of unlawful occupiers" should be avoided.[293] However, in *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another*, the landowner ran the risk of losing his investment. This may amount to a deprivation of property as he is unable to use and enjoy his property while unlawful

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[286] Van der Walt and Pienaar (note 18 above) 373.
[287] *First National Bank SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank SA Limited t/a Wesbank v Minister of Finance* (note 197 above) para 61.
[288] *First National Bank SA Limited t/a Wesbank v Commissioner for the South African Revenue Services and Another; First National Bank SA Limited t/a Wesbank v Minister of Finance* (note 197 above) para 57.
[289] *In re: Certification of the Constitution of the Republic of South Africa* (note 31 above) para 71.
[290] *In re: Certification of the Constitution of the Republic of South Africa* (note 31 above) para 73.
[291] *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* (note 42 above) para 81.
[292] Starosta (note 43 above) 383.
[293] *Occupiers of Erven 87 and 88 Berea v De Wet N.O. and Another* (note 42 above) para 80.

occupiers enjoy protection. Whether or not such deprivation is arbitrary warrants an examination.

After establishing that his or her right to property was deprived, the property owner must further establish that the deprivation was arbitrary.[294] In other words, it is not sufficient to prove that there has been deprivation if one cannot prove that such a deprivation was arbitrary. The Constitution, legislation and the courts equalize what was once an oppressive and unequal and relationship between landowners and land occupiers.[295] In such cases where deprivation of property is regulatory, it cannot be challenged on constitutional grounds unless if it is excessive, or disproportionately unfair.[296] The rights to property safeguarded by Section 25 and the right to adequate housing safeguarded by section 26, are now on an equal footing.[297] However, even though both rights are equally competitive, they are not in equilibrium.[298]

Even though property related laws are formally valid and may fall within the ambit of the law of general application, they must not allow arbitrary deprivations.[299] This suggests that the fact that the law properly enacted does not have to be arbitrary. It is also possible for a law of general application to be unconstitutional if it allows arbitrary deprivations of property.[300] Imposing liability for debts incurred by occupiers on the owner is not viewed as arbitrary deprivation since the owner is expected to take action to prevent unauthorised occupation of land.[301] However, evictions are usually delayed, and the owner, though taking steps to prevent illegal occupation, bears the debts incurred by unlawful occupiers. Such a lengthy delay may be arbitrary if the courts only focused on the rights of the unlawful occupier and not all the relevant

[294] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* (note 197 above) paras 24, 61, 65, 66 and 99.
[295] Wilson (note 269 above) 282.
[296] Van der Walt (note 184 above) 241.
[297] Wilson (note 269 above) 282.
[298] Wilson (note 269 above) 282.
[299] AJ Van der Walt "Property and Constitution" (2012) *Pretoria University Law Press* 30.
[300] I Currie and J De Waal *The Bill of Rights Handbook 6th Edition* (2013) 546; *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as amici curiae)* 2005 (1) SA 530 (CC).
[301] Currie and De Waal (note 300 above) 546.

circumstances. The extent of the deprivation may also be decisive. If the deprivation is disproportionate, it would be considered arbitrary.[302]

The courts have consistently held that the owner of the property must be required to be patient while the municipality provide alternative accommodation.[303] Patience and empathy for the dire circumstances of unlawful occupiers may result in arbitrary deprivation. As Wilson puts it, to avoid arbitrariness, the law must provide a principled solution that is not arbitrary and which

> must consist of more than patience and empathy from property owners and the courts. Patience and empathy are inherently subjective and arbitrary, and will lead to a diverse set of results depending on who displays them and at what time.[304]

Legislative enactments such as the the Prevention of Illegal Evictions from and Unlawful Occupation of Land Act and Security of Tenure Act protect an individual's right to housing. These laws give meaning to the right to housing as protected in Section 26 of the Constitution. When protecting the rights of occupiers of land under the provisions of these Acts, the courts have limited the right to property in favour of unlawful occupiers.

#### 3.5.1. Extending security of tenure

The Land Affairs General Amendment Act[305] inserted Section 6(2)(dA) to the Extension of Security of Tenure Act which reads:

> Without prejudice to the generality of the provisions of section 5 and subsection (1), and balanced with the rights of the owner or person in charge, an occupier shall have the right to bury a deceased member of his or her family who, at the time of that person's death, was residing on the land on which the occupier is residing, in accordance with their religion or cultural belief, if an established practice in respect of the land exists.

Parker and Zaal contend that deprivations allowed under the provisions of Section 6(2)(dA) of the Extension of Security of Tenure Act are not arbitrary since they have

[302] *National Regulator v Opperman and Others* 2013 (2) SA 1 (CC) para 70 - 71.
[303] *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another* (note 200 above) para 100; See also Dugard (note 180 above) 6.
[304] Wilson (note 269 above) 282.
[305] Act 51 of 2001.

limitations.[306] In particular, the reading of the Extension of Security of Tenure Act as a whole requires a balancing of competing interests; namely the right to bury and the right of ownership. The court in *Dlamini and Another v Joosten and Others*[307] found the right to bury as constituting a real right. This is because this right is a burden on the land, and is thus capable of registration at the Deeds Registry. The court stated:

> The burial right in s 6(2)(dA) of the Act is an incidence of the right of residence contained in s 6(1), which creates a real right in land. Such a right is in principle registrable in a Deeds Registry because it constitutes a "burden on the land" by reducing the owner's right of ownership of the land and binds successors in title. The burial right is in the nature of a personal servitude which the occupier has over the property on which he possesses a real right of residence at death of a family member who at the time of death was residing on the land.[308]

In *Nortje v Maree*,[309] the court a quo granted a rule *nisi* allowing the burial of the applicant's wife on the land which they had occupied. Both the magistrate and the applicant were unaware that the person against whom the order was sought was neither the owner nor the person in control of the land when the *rule nisi* was granted. The applicant then buried his wife before the return. The fact that the individual against whom the order was sought was neither the owner nor the person in charge of the land was only realised on the return date. As a result, the magistrate refused to confirm the rule *nisi*. The matter was then taken on appeal to the Land Claims Court. The Land Claims Court upheld the appeal although admitting that the order was issued against the incorrect party on the grounds that the magistrate erred in defining the interdict as an interim order. Since the applicant had sought an interdict against the respondent, the magistrate, by granting the order had become *functus officio*.[310] This case reflects that a landowner may be deprived of his or her right to property even though he or she was not a party to the court proceedings that led to the court order allowing burials on his or her land. Such a deprivation should be regarded as being arbitrary as the person with the material interests in the proceedings was not cited.

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[306] J Parker and FN Zaal "Extending Recognition of Indigenous Burial Practices in Selomo v Doman 2014 JDR 0780 (LCC)" (2016) 19 (1) *Potchefstroom Electronic Law Journal* 7.
[307] 2006 3 SA 342 (SCA).
[308] *Dlamini and Another v Joosten and Others* (note 307 above) para 16.
[309] 2013 JDR 1285 (LC).
[310] *Nortje v Maree* (note 309 above) para 36.

Despite being amended, the Extension of Security of Tenure Act still maintains internal limitations which may be relied upon to restrict burials even on established ancestral gravesites.[311] Even though there is a general belief that African culture requires that the deceased be buried closer to their families, this on its own is not a sufficient ground to "grant a continued right of burial on even a well-established ancestral gravesite".[312] This requires a balancing of competing interests which was considered in the case of *Hattingh and Others v Juta*.[313] In this case, it was stated that

> the part of section 6(2) that says: "balanced with the rights of the owner or person in charge" calls for the striking of a balance between the rights of the occupier, on the one side, and those of the owner of the land, on the other. This part enjoins that a just and equitable balance be struck between the rights of the occupier and those of the owner. The effect of this is to infuse justice and equity in the inquiry required by section 6(2)(d). Section 6(2)(d) is not the only provision in which ESTA seeks to infuse justice and equity or fairness. In this regard I draw attention to the requirement in section 6(4) that the landowner's right to impose conditions for the exercise of the right by any person to visit and maintain his or her family graves must be exercised reasonably and the requirement in section 8(1) that the termination of an occupier's right of residence must not only be based on a lawful ground but also that it must be "just and equitable, having regard to all relevant factors".[314]

The deprivations imposed by the provisions of the Extension of Security of Tenure Act are not based on any racial considerations as was the case during the post constitutional era. However, the fact that the deprivation is not based on racial grounds does not mean that it is not arbitrary. There is therefore a need to evaluate whether such deprivation can be justified in an open and democratic society.

#### 3.5.2. Deprivation versus expropriation

There are conceptual differences between the definition deprivation and that of expropriation.[315] This distinction can be drawn in two distinct ways. According to Roux, the first is termed a purely categorical approach and reserves the meaning of expropriation to instances where the state forces the transfer of property to either itself

[311] *Selomo v Doman* 2014 JDR 0780 (LCC).
[312] *Selomo v Doman* (note 311 above) para 35.
[313] 2013 (3) SA 275 (CC).
[314] *Hattingh and Others v Juta* (note 313 above) para 32.
[315] T Roux "The 'Arbitrary Deprivation' Vortex: Constitutional Property Law After FNB" in S Woolman & M Bishop (eds.) *Constitutional Conversations* (2008) 265.

or to a third party.[316] Another approach is less categorical and seeks to develop a test which looks at the circumstances under which the right to property were deprived and the impact of such deprivation.[317] For the latter approach, if the deprivation is severe, there should be a formal justification of such deprivation without which the deprivation will be deemed arbitrary.[318] Regardless of which approach is followed, the law must recognise the need to balance competing public and private interests when limiting one right in favour of the other.[319]

The need to balance public and private interests is clearly reflected by the provisions of Section 25(3) of the Constitution.[320] In order to accomplish this, the courts must establish a "just and fair balance" between conflicting interests using a multi-factor balancing approach.[321] This should include, in addition to the limitations imposed by Section 25, further limitations as imposed by Section 36 of the Constitution. As such, even if the court was to find that the deprivation was arbitrary, there is a further inquiry into whether such a deprivation would otherwise be justified by the limitation clause. This is a combination of the general limitations imposed by the provisions of Section 36 with the internal limitations in Section 25.[322] Roux criticises the case of addressing deprivation and limitations imposed on the constitutional right to property. The author contends that

> the Court in FNB does not tell us why certain types of property are more constitutionally valued than others. Indeed, there is a contradiction between the Court's recognition of land reform as a particularly valued purpose, which suggests a low level of review, and the ownership of land as a particularly valued property right, which suggests a higher level. The FNB Court also does not tell us which incidents of ownership are more

[316] Roux (note 315 above) 268.
[317] Roux (note 315 above) 268.
[318] Roux (note 315 above) 268.
[319] Section 25(3) of the Constitution.
[320] Section 25(3) of the Constitution states: "The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—
(a) the current use of the property;
(b) the history of the acquisition and use of the property;
(c) the market value of the property;
(d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
(e) the purpose of the expropriation".
[321] Roux (note 315 above) 268.
[322] AJ van der Walt *The constitutional property clause: A comparative analysis of section 25 of the South African Constitution of 1996* (1999) 92-100.

> constitutionally valued, or how to analyse cases to distinguish the total deprivation of a conceptually severed stick in the bundle from the partial deprivation of a stick not so severed.[323]

Whether or not constitutional damages can be awarded for limiting the right to property is a question that needs to be explored. If such damages are to be awarded, they would not necessarily be the same as those under Section 25(3) of the Constitution. Instead, such damages as Roux states, should "make good any loss in excess of the loss the claimant might reasonably be expected to bear under the test for arbitrary deprivation".[324] This would only be applicable in cases where the deprivation is arbitrary. The rights in the Bill of Rights may be subjected to reasonable and justifiable limitations in an open and democratic society.[325] The provisions of Section 7(3) suggest that the rights may be limited in terms of Section 36 or by any other section in the Bill of Rights. It has already been indicated above that the right to property is subject to internal limitations. There is, however, another limitation imposed by Section 36.[326] Limiting the rights in the Bill of Rights requires a balancing process. As stated in *S v Makwanyane and Another*[327]

> In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society.[328]

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[323] Roux (note 315 above) 274.
[324] Roux (note 315 above) 274.
[325] Section 7(3) of the Constitution provides that "(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill".
[326] Section 36 of the Constitution provides as follows: "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights".
[327] 1995 (3) SA 391 (CC).
[328] *S v Makwanyane and Another* (note 327 above) para 104.

In South Africa, the issue of land ownership is closely related to poverty, unemployment and inequality.[329] After the Constitution had been drafted, the South African government sought to address the injustices of the past.[330] These attempts, which include the willing buyer willing seller policy, failed because they are viewed as supporting capitalism.[331] This seems to protect the rights of white people who deprived and dispossessed blacks, Indians and coloureds of their land rights more than it protects those deprived of land. South Africa, through its supreme Constitution, seeks to address the injustices of the past, which should include those relating to the deprivation and dispossession of land. When considering constitutional values of an open and democratic society founded on human dignity, the promotion of equality, and freedom, it is important to keep in mind that the right to property is a constitutional right that should not be limited unless if such a limitation is justified.[332] Similarly, the right to property cannot be protected without taking the same values into account.[333] The protection of the right to property and the legitimacy of state interference with this right should thus be understood and weighed against each other in the context of constitutional principles, goals and values.[334]

#### 3.5.3. Deprivations of property by municipalities

The Local Government: Municipal Systems Act is one of the most controversial post-constitutional laws. This piece of legislation makes the municipality a preferent creditor over property for arrear rates and taxes. When viewed in light of the 'patience' expected of property owners when the municipality 'lines up alternative accommodation', a property owner may lose the property to the municipality if rates and taxes are not being paid. This is one of the circumstances the courts seem to overlook when striking a balance between public and private interests. A decision to delay an eviction would thus be arbitrary if this is not taken into consideration as the court would not have considered all the relevant circumstances.

[329] MA Mubecua *et al* "Conflict and corruption: land expropriation without compensation in South Africa" (2020) *African Journal of Peace and Conflict Studies* 62.
[330] Mubecua (note 329 above) 62.
[331] Mubecua (note 329 above) 62.
[332] Van der Walt (note 184) above) 102.
[333] Van der Walt (note 184) above) 102.
[334] Van der Walt (note 184) above) 102.

### 3.5. Conclusion

The South African Constitution is regarded as one of the best in the world because several rights are protected in the Constitution, including the right to property. Post the Constitution, a number of property related laws have been enacted because the Constitution is framed in an abstract manner. For example, the right to property as protected under Section 25 of the Constitution is given meaning by various legislative enactments. One legislation enacted by the first democratic government of South Africa to give meaning to the right to property is the Restitution of Land Rights Act. Just like the Constitution, this Act only entitled those deprived or dispossessed before 19 June 1913 to equitable redress. This means that both the Constitution and subsequent legislation do not offer any protection to those deprived or disposed of land before 19 June 1913. A section in the Constitution which may offer some form of protection to those deprived before 19 June 1913 is Section 25(8), but the government is yet to enact any legislation that allows those deprived or dispossessed before 19 June 1913 to have any equitable redress. The Local Government: Municipal Systems Act which makes the municipality a preferent creditor over property for arrear rates and taxes is a controversial legislation enacted by post South Africa's constitutional democracy. Under this Act, it is possible for a property owner to lose the property to the municipality if rates and taxes are not paid, even though this may be as a result of non-paying unlawful occupiers. Ironically, this might even happen when the property owner is awaiting the finalisation of eviction proceedings while the municipality 'lines up alternative accommodation'. Though the Constitution is regarded to be one of the best in the world, the protection in terms of the Final Constitution can be contrasted to that under the Interim Constitution. Unlike Section 25(1), Section 28(1) protected the right to property in similar ways as Article 17 of the Universal Declaration of Human Rights. Under Section 28, the right to property is protected in a positive way. Section 25, however, is a negative protection of the right to property as it prohibits interference with already existing property rights as opposed to protecting the right to acquire property. Moreover, the property clause has an internal limitation as it can be limited by the law of general application provided that such law is not arbitrary. In other words, the protection is only against arbitrary deprivation. As a result, it is important not only to look at whether there has been deprivation but further that such a deprivation was arbitrary. The fact that the deprivation is in terms of the law of general application does

not mean that the deprivation is not arbitrary. This is in addition to the limitation imposed by Section 36 of the Constitution. In addition to the Constitution, and due to the abstract way constitutions are framed, there are various other pieces of legislation that give effect to constitutional provisions, in particular relating to the right to property and the right to housing. At times, the right to property and the right to housing are at conflict. The courts are thus called upon to strike a balance between competing interests, namely between the right to property and the right to housing. Favouring unlawful occupiers in eviction matters may lead to a deprivation of property in cases where the unlawful occupiers are not paying for their consumption. All the relevant circumstances of both the landowner and unlawful occupier must be taken into consideration. The right to property can also be limited in the interests of the society, which may include the right to housing as protected by Section 26 of the Constitution. Under the provisions of Section 26, no one may be evicted unless if such eviction is on the strength of a court order. When protecting the rights of unlawful occupiers, the courts must balance all competing interests such as the right of property owners and the right of occupiers. Favouring one right above another must be justifiable, lest the limitation would be deemed arbitrary. Such limitations can also be noted when considering whether limitations of rights in favour of expropriation would be justified. This is more so, considering the conceptual differences between deprivation and expropriation.

# Chapter 4: International and Regional Legal Instruments that Protect Property Rights

## 4.1. Introduction

A trite principle of international law is that states have sovereignty over their territory.[335] In other words, the traditional view by several scholars has been that property is a matter of national concern.[336] As a result, international property law was not regarded as a distinct subject.[337] This is because meaningfully writing about property under international law may be a futile exercise, unless if one has significantly limited the subject matter.[338] However, in recent years, there have been some principles of property law, such as non-deprivation of property and just compensation in cases of expropriation, which can be identified within the international law framework.[339] These principles protect against deprivation and dispossession of land and are thus relevant to the issue of deprivation and dispossessions addressed in this study. This has led to arguments that property law ought to be recognised as a separate field within the international legal framework because this will help to develop it.[340] However, from an international law point of view, land rights are usually not regarded to be a human rights issue.[341] The significance of using international law principles to protect various rights cannot be overstated. It is therefore important to discuss international law principles when looking at the protection of rights such as the right to property. The peremptory provisions of the Constitution requiring the courts to consider international law in their interpretation of the Bill of Rights informs this consideration of international law.[342] In addition, courts must take into account international law when interpreting any legislation.[343]

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[335] Dunn (note 2 above) 166.
[336] Dunn (note 2 above) 166; Sprankling (note 1 above) 461; SD Metzger "Property in International Law" (1964) 50 (4) *Virginia Law Review* 594; J Gilbert "Land Rights as Human Rights: The Case for a Specific Right to Land" (2013) 18 *International Journal on Human Rights* 115.
[337] Sprankling (note 1 above) 461.
[338] Metzger (note 336 above) 594.
[339] Sprankling (note 1 above) 463.
[340] Sprankling (note 1 above) 463.
[341] Gilbert (note 336 above) 115.
[342] Section 39(1)(b) of the Constitution.
[343] Section 233 of the Constitution.

### 4.2. Development of international property law

Prior to current developments, the right to property was created and defined by national laws.[344] Because each nation is viewed as sovereign and thus able to adopt its own laws relating to property within its territory.[345] The view is clearly visible in foreign law as described by the United States court in the case of *Johnson v M'Intosh*,[346] where the court stated that "the title to lands, especially, is and must be admitted to depend entirely on the law of the nation in which they lie".[347] This reflects the traditional view that the issue of land rights is a subject matter of national law. However, international law plays an important role in protecting various rights.

After the second world war, the international community, while developing human rights, began to recognise a global right to property. In fact, "the guarantee of property rights in land was one of the central issues that triggered the development of an emergent human rights system".[348] One of the international legal instruments that protect the right to property is the Universal Declaration of Human Rights.[349] According to Article 17, the right to property is elevated to the status of a human right since it ensures that everyone has the freedom to acquire property, whether they do it individually or jointly with others.[350] Moreover, arbitrary deprivation of property is prohibited.[351]

When the right to property was incorporated into the Universal Declaration of Human Rights, there was a great deal of controversy, which resulted in intense discussions and negotiations.[352] The majority of debates focused on whether it was necessary to incorporate the right to property under international law and how far this right should be limited by national laws.[353] When it was crafted, the Universal Declaration of Human Rights was a non-binding instrument with the hope that it would result in a treaty that would impose binding obligations on member states. Consequently, the Universal Declaration of Human Rights led to two treaties, namely the International Covenant on

[344] Sprankling (note 1 above) 463.
[345] Dunn (note 2 above) 171; Sprankling (note 1 above) 464.
[346] 21 U.S. (8 Wheat.) 543 (1823).
[347] *Johnson v M'Intosh* (note 346 above) at 572.
[348] Gilbert (note 336 above) at 117.
[349] Universal Declaration of Human Rights, 1948.
[350] Article 17(1) of the Universal Declaration of Human Rights, 1948.
[351] Article 17(2) of the Universal Declaration of Human Rights, 1948.
[352] Gilbert (note 336 above) 118.
[353] Gilbert (note 336 above) 118.

Civil and Political Rights[354] and the International Covenant on Economic, Social and Cultural Rights.[355] The Universal Declaration of Human Rights has the status of customary international law despite not being intended to be a legally binding document under international law.[356] Since property rights are safeguarded under this instrument, it is clear that the right is recognised under law.[357]

The obligation to draft treaties was imposed on the United Nations Commission on Human Rights. In drafting treaties, the Commission struggled to "develop an acceptable formulation of the right to property".[358] Though there was general consensus regarding the right to property, there were different opinions when it come to the role and function of property rights under international law as well as the restrictions to be imposed on the property owner.[359] Some countries such as South Africa, Brazil, Mexico, Malaysia, Indonesia, and the Philippines have equated land rights to human rights and used human rights as a common denominator to movements relating to land.[360] These countries have used the issues of land to protect and promote key social issues relating to

> the recognition that local people do have a right to use, own and control the developments undertaken on their own lands. Land rights are not only directly impacting individual property rights, but are also at the heart of social justice.[361]

Even though property rights are central to the issue of social justice and equality, they have been, to a large extent, excluded from the international human rights framework.[362] This led to various calls to recognise land rights within the international legal framework.[363] Though the right to property is recognised in several human rights conventions and treaties, such protection is missing under the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights as these instruments do not recognise land rights as a core human

[354] International Covenant on Civil and Political Rights, 1966.
[355] International Covenant on Economic, Social and Cultural Rights, 1976.
[356] Indigenous Land Rights available at https://www.hrw.org (accessed on 16 December 2021).
[357] Indigenous Land Rights (note 356 above).
[358] Sprankling (note 1 above) at 466.
[359] Sprankling (note 1 above) 466.
[360] Gilbert (note 336 above) 116.
[361] Gilbert (note 336 above) at 116.
[362] Gilbert (note 336 above) 116.
[363] R Plant "Land Rights in Human Rights and Development: Introducing a New ICJ Initiative" (1993) 51 *International Commission of Jurists Review* 10.

rights issue.[364] Nevertheless, even though there is no clear reference to land rights as a core right protected by international law, "there has been an increased focus within international jurisprudence on land rights as a human rights issue".[365]

As a result of state sovereignty, the protection of property rights was always seen as a matter of national laws. It was only after the Second World War that the right to property was recognised within the international legal framework. The first recognition of property rights under international law was in terms of the Universal Declaration of Human Rights, though such recognition was not without controversy. Instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights do not, however, have express provisions protecting or guaranteeing the right to property.

### 4.3. International law instruments for the protection of property rights

The General Recommendation by the United Nations Committee on the Elimination of Racial Discrimination obliges state parties to

> recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.[366]

The issue of land is important to indigenous people for both use and habitation, and legal implications of this importance is developed by International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries.[367] This Convention mandates state parties to respect the cultural and spiritual importance of land to indigenous people.[368] Such a protection is informed by the view that indigenous

[364] EJ Alvarez "The Human Right of Property" (2018) 72 *University of Miami Law Review* 580.
[365] Gilbert (note 336 above) 116.
[366] Committee on the Elimination of Racial Discrimination, General Recommendation 36 on Indigenous Peoples, (1997) U.N. Doc. A/52/18, annex V.
[367] International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169).
[368] Article 13(1) of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169).

people have a right to a "continuing relationship with their land and its resources".[369] The cultural and spiritual importance of land to indigenous people thus suggests that deprivation of land should not easily be permitted.

Article 14 states:

> The rights of ownership and possession of [indigenous peoples] over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.[370]

The above makes it clear that the right to land is not only limited to the land which indigenous people occupy. In addition, international law protects the right to use land they do not exclusively occupy but land to which they are historically connected to for subsistence and traditional activities. To ensure this protection, state parties are obliged to such steps as may be necessary for the identification of the land belonging to indigenous peoples as well as guaranteeing effective protection of their rights of land ownership and possession. There should further be consultations with indigenous communities for any plan to develop their land.[371] This is so to ensure that the right to participate in developments that may have an impact on their lives, beliefs, associations and spiritual wellness.[372]

Though the right to occupy land is guaranteed, relocations may still be possible in certain instances. However, this should only be done when it is absolutely necessary and "as an exceptional measure".[373] Even so, such relocation should only be done with the informed consent of the people involved, or where it is not possible to obtain such consent, after procedures and processes established by national laws have been

[369] SJ Anaya and RA Williams "The protection of indigenous peoples' rights over Lands and natural resources under the Inter-American Human Rights system" (2001) 14 *Harvard Human Rights Journal* 33.
[370] Article 14 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169).
[371] Article 14 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169).
[372] Article 7(1) of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169).
[373] Article 16(2) of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169).

followed. In such processes, the people affected by such relocation should be represented.[374]

Any loss or injury as a result of the relocation should be compensated. Moreover, once the grounds that justified the relocation have ceased to exist, the people should be allowed to return to the land they previously occupied. Where returning is not feasible, those people should be given land equal in status and quality with the land they previously occupied, or be compensated.[375]

The right to property is also protected by the International Convention on the Elimination of All Forms of Racial Discrimination[376] which requires that state parties eliminate all forms of racial discrimination and adopt measures that would guarantee "the right to own property alone as well as in association with others".[377] This reflects a situation similar to the South African one where the deprivation of land was as a result of racial discriminatory laws. In eliminating racial discriminations, state parties must ensure that those who were previously prevented from owning property are now allowed to own it alone or with others.

Another instrument dealing with discrimination is the Convention on the Elimination of All Forms of Discrimination against Women[378] which recognises the rights of women to own property. Provisions of Article 16 mandate state parties to ensure that both spouses have similar rights to own, acquire, manage, administer, enjoy and dispose of property "whether free of charge or for a valuable consideration".[379]

The Human Rights Committee has acknowledged the link between land rights and the right to culture when it interprets the provisions of Article 27 of the International Covenant on Civil and Political Rights, which concerns cultural rights for minorities.[380] However, Article 27 deals with cultural and religious rights and does not mention any

[374] Article 16 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169).
[375] Article 16 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169).
[376] International Convention on the Elimination of All Forms of Racial Discrimination, 1965.
[377] Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination, 1965.
[378] Convention on the Elimination of All Forms of Discrimination against Women, 1979.
[379] Article 16 of the Convention on the Elimination of All Forms of Discrimination against Women, 1979.
[380] Gilbert (note 336 above) 119.

right to property. The Human Rights Committee in a general comments on Article 27 of the International Covenant on Civil and Political Rights stating that

> [w]ith regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of Indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law.[381]

The lack of express protection of property rights in the International Covenant on Civil and Political Rights has made it difficult for the Human Rights Committee to decide property related disputes at international level. This is seen in cases such as *Oló Bahamonde v Equatorial Guinea,*[382] *Kéténguéré Ackla v Togo*[383] and *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia*[384] where it was found that the right to property was not protected under the International Covenant on Civil and Political Rights[385] and that communities could not rely on the provisions of International Covenant on Civil and Political Rights to support their claim for "exclusive use of the pastoral lands in question".[386] Innovative interpretations were, however, used in cases such as *Josef Frank Adam v. The Czech Republic*,[387] *Miroslav Blazek, George A. Hartman and George Krizek v The Czech Republic*[388] and *Mr. Bohumir Marik v Czech Republic*[389] where the Human Rights Court found that the citizenship and residency requirements for restitution of property were discriminatory.

There are various international instruments that protect the right to property, especially those dealing with the prohibition of discrimination on various grounds. Even though there is no express mention of the right to property under the International Covenant on Civil and Political Rights, the Human Rights Committee has noted the link between the right to land and culture in its interpretation of Section 27 of the International

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[381] Human Rights Committee, General Comment 23, Article 27 (Fiftieth session, 1994), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 38 (1994) at paragraph 7.
[382] Communication No 468/1991, UN Doc CCPR/C/49/D/468/1991 (1993).
[383] Communication No. 505/1992, U.N. Doc. CCPR/C/51/D/505/1992 (1996).
[384] Communication No. 760/1997, U.N. Doc. CCPR/C/69/D/760/1997 (2000).
[385] *Kéténguéré Ackla v Togo* (note 383 above) para 6.3.
[386] *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia* (note 384 above) para 10.6.
[387] Communication No. 586/1994, U.N. Doc. CCPR/C/57/D/586/1994 (1996).
[388] Communication No. 857/1999, U.N. Doc. CCPR/C/72/D/857/1999 (2001).
[389] Communication No. 945/2000, U.N. Doc. CCPR/C/84/D/945/2000 (2005).

Covenant on Civil and Political Rights. This means that failure to recognise the rights of those deprived of land prior to 1913 not only violates their right to property but their right to culture as well. It does not appear as if the government of South Africa considered the link between the right to property and the right to culture when setting 1913 as the cut-off period.

### 4.4. Regional instruments for the protection of property rights

At regional level, the right to property is protected by various instruments in Africa, Inter-America and Europe. South Africa is a signatory to various regional instruments within the African continent falling within the jurisdiction of the African Commission on Human and Peoples' Rights. Earlier decisions by the African Court on Human and Peoples' Rights did not recognise the right to property at international level.[390]

However, there is a shift in the role on international law in protecting the right to property. Property related rights, like the right to cultural integrity, have been a subject of litigation in Africa. One such case is *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*[391] which was about forced displacement of the Endorois community from their ancestral land. The community contended that their displacement denied them access to their ancestral territory which they regarded as sacred and connected to "the cultural integrity of the community and its traditional way of life".[392] The Court found that the displacement was a violation of the community's cultural integrity as it was against their rights to freedom of religion,[393] culture[394] and access to natural resources.[395]

Article 14 of the African Charter on Human and Peoples' Rights guarantees the right to property.[396] The right should only be limited if such limitation is in the interests of public need or if such limitation is for the benefit of the community.[397] Furthermore, this

[390] *Oló Bahamonde v Equatorial Guinea* (note 382 above); *Kéténguéré Ackla v Togo* (note 383 above); *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v Namibia* (note 384 above).
[391] Communication no. 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010.
[392] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (note 391 above) at para 16.
[393] Article 8 of the African Charter on Human and Peoples' Rights, 1981.
[394] Article 17 of the African Charter on Human and Peoples' Rights, 1981.
[395] Article 21 of the African Charter on Human and Peoples' Rights, 1981.
[396] Article 14 of the African Charter on Human and Peoples' Rights, 1981.
[397] Article 14 of the African Charter on Human and Peoples' Rights, 1981.

limitation must be in accordance with the provisions of appropriate laws.[398] Though the limitations imposed on the right to claim equitable redress may be justified by the provisions of Section 36 of the Constitution and by the internal limitations in Section 25, it does not appear to be in the interests of the public or to the benefit of the community. If such a limitation is not in the interests of the public or for the benefit of the community, it is therefore contrary to the obligation imposed by international law. Those dispossessed of land have a right to claim their land lawfully, and in certain circumstances, to be adequately compensated.[399] Since the wording of Article 21 do not seem to suggest any limitations, everyone that has been dispossessed of property should be allowed to recover such land.

The development of the African continent depends mainly on how states deal with rapid increase in populations and conflicts over land as well as displacement of people from their land in growing numbers.[400] As reflected in international law and various national constitutions, the right to property is regarded as a fundamental right in many democratic societies.[401] Different states have different ways in which they deal with issues relating to land reform. Home argues that addressing the issue of land reform in African is a daunting task as it not only raises legal issues but political issues as well, in particular when attempting to redress historic inequalities in land ownership.[402] The author further states:

> In Africa, the so-called land question usually refers to the exclusion of much of the African population from access to land, whether by a white settler minority, postcolonial elites, or foreign investors. Systems of control and exclusion, often legacies of colonial rule, allow powerful vested interests to maintain extreme inequalities of land ownerships.[403]

In *Mbiankeu Genevieve v Cameroon*,[404] the African Court was called upon to decide a case of a citizen who, although having lawfully purchased land, was prevented from building. The land was further transferred fraudulently to a new owner. The Court

[398] Article 14 of the African Charter on Human and Peoples' Rights, 1981.
[399] Article 21(2) of the African Charter on Human and Peoples' Rights, 1981.
[400] R Home "Land, Property, and Human Rights in AU Law and Policy" in Olufemi Amao, Michèle Olivier, and Konstantinos D. Magliveras (eds) *The Emergent African Union Law: Conceptualization, Delimitation, and Application* (2022) 289.
[401] Home (note 400 above) 289.
[402] Home (note 400 above) 292.
[403] Home (note 400 above) 292.
[404] African Commission on Human and People's Rights Communication No 389/10 (2015).

found that there was a violation of Article 14 of the African Charter on Human and People's Rights.[405] In *Amnesty International v Zambia*,[406] the Court found that forced removals and dispersal of families was a violation of family rights protected under Article 18 of the African Charter on Human and People's Rights.[407] Though the case did not deal with forced removals as was the case in South Africa, it may be used to argue that the forced removals of people from their homes constituted a violation of international law. The right to a community to own land was considered in *Front for Liberation of the State of Cabinda v Republic of Angola*,[408] where it was found that a community can own land just like individuals if there are able to prove a strong traditional attachment to their land.[409] In this case, it was found that the community has not established a strong traditional attachment to their land.[410] The African Union Commission's report states:

> The land alienation and dispossession and dismissal of their customary rights to land and other natural resources has led to an undermining of the knowledge systems through which indigenous peoples have sustained life for centuries and it has led to a negation of their livelihood systems and deprivation of their means. This is seriously threatening the continued existence of indigenous peoples and is rapidly turning them into the most destitute and poverty stricken. This is a serious violation of the African Charter (Article 20, 21 and 22), which states clearly that all peoples have the right to existence, the right to their natural resources and property, and the right to their economic, social and cultural development.[411]

This report suggests that there is a direct relationship between land dispossession and poverty. Therefore, to alleviate poverty, there is a need on African governments to ensure that those deprived or dispossessed of land are given equitable redress. Since dispossessions and deprivations constitute a violation of rights protected under international law, South African is under international obligation to ensure that the rights of those deprived and dispossessed of land are protected. This should include even the rights of those deprived or dispossessed of land prior to 19 June 1913.

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[405] *Mbiankeu Genevieve v Cameroon* (note 404 above) para 128.
[406] African Commission on Human and People's Rights Communication No 212/98 (1999) ACHPR 1, 5 May 1999.
[407] *Amnesty International v Zambia* (note 406 above) para 51.
[408] African Commission on Human and People's Rights Commission Communication No 328/06 (2013).
[409] *Front for Liberation of the State of Cabinda v Republic of Angola* (note 408 above) para 104.
[410] *Front for Liberation of the State of Cabinda v Republic of Angola* (note 408 above) para 107.
[411] Report of Working Group of Experts on Indigenous Populations/Communities (AUC, 2005) 108.

Although there are some decided cases by the African Court on Human and Peoples' Rights, one may also look at the decisions from other jurisdictions for guidance. Decisions from other regions such as Inter-America and Europe, though not binding on South Africa, provide guidance in the interpretation of property rights. Furthermore, they may have persuasive force in developing the jurisprudence on property law at international level. In Europe, the right to property is protected under the provisions of Article 1 of the European Commission on Human Rights which protects the right of everyone to enjoy his or her possessions.[412] Though the wording of the Article refers to possessions, its heading suggests that it is aimed at the protection of property. An express reading of the Article, however, reflects that the right protected is that of enjoying those properties which are in the person's possession as opposed to ownership over the property. Deprivation of possessions is further prohibited save where it is done in the interests of the public. Moreover, the deprivation must be "subject to the conditions provided for by law and by the general principles of international law".[413] Though the right is protected, it is subject to internal limitations allowing the state to interfere with property in certain circumstances such as "securing payment of taxes, other contributions or penalties".[414]

In *Howard v United Kingdom*[415] it was found that the rights of property owners and the interests of the community should be balanced fairly. This balance should look at a number of factors including whether there was compensation proportionate with the value of the property.[416] Most cases decided by the European Court of Human Rights (the European Court) involving the right to property are centred on deprivation, compensation and expropriation.[417] There have been a few cases dealing with the failure by governments to enforce judgments establishing property rights.[418] In *Chassagnou and Others v France*[419] the European Court found that the limitation to property rights was not justified and awarded compensation.

[412] Article 1 of the European Commission on Human Rights First Protocol, 1952.
[413] Article 1 of the European Commission on Human Rights First Protocol, 1952.
[414] Article 1 of the European Commission on Human Rights First Protocol, 1952.
[415] Application no. 10825/84 ECHR, 16 July 1987.
[416] *Howard v United Kingdom* (note 415 above) para 55, 56 and 67.
[417] *Avellar Cordeiro Zagallo v Portugal* Application no. 30844/05) ECHR, 6 June 2010; *Korkmaz and Others v Turkey* Application no. 35935/10 ECHR, 13 October 2020.
[418] *Kulikov v Ukraine* Application no. 36367/04), ECHR 19 April 2007; *Lapinskaya v Ukraine* Application no. 10722/03 ECHR, 18 January 2007.
[419] Applications no. 25088/94, 28331/95 and 28443/95 ECHR, 29 April 1999.

Guidance may also be sought from the protection of property rights from the Inter-American regional jurisdiction. Though it is also not a binding source of South African law, the decisions by the Inter-American Court on Human Rights may be persuasive and provide guidance on how the right to property should be interpreted. The Inter-American Court of Human Rights has linked the issue of land rights with cultural rights. As was stated in the case of *Mayagna (Sumo) Awas Tingni Community v Nicaragua*[420]

> [i]ndigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

Following this judgment, the Inter-American Court of Human Rights has developed the right to property under international law by integrating it with various other rights such as the right to life and right to health.[421] The jurisprudence introduced the concept of cultural integrity which encompasses the right to culture, subsistence, livelihood, religion and heritage. The protection of these rights supports the protection of land rights.[422]

Gilbert claims that one of the most advanced recognitions of land rights from a human rights perspective is the willingness of regional courts like the African Court on Human and Peoples' Rights, the Inter-American Court of Human Rights, and the European Court on Human Rights to enforce property rights. Gilbert states that the willingness by various human rights bodies at regional level is a clear acknowledgment that protecting rights to land has become a fundamental human rights issue, in particular for those indigenous communities as it reflects the interconnectedness of various rights including property rights, cultural rights, and social rights.[423] This is a progressive realisation that the right to land has become a fundamental human rights issue.

[420] Petition No. 11577 IACHR, 31 August 2001.
[421] Anaya and Williams (note 369 above) 33.
[422] Gilbert (note 336 above) 120.
[423] Gilbert (note 336 above) 120.

Since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples,[424] the right to property has been elevated to the status of human rights under international law.[425] This is made clear by the provision of Article 25 which stipulates that

> [i]ndigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.[426]

The right to land is further expressly protected by Article 26 which provides that indigenous peoples have the right to the land they occupy, own, use or acquire.[427] State parties are obliged to legally recognise and protect the right to property.[428] This means that there is an international obligation to recognise and protect the right to land.

Though there are few cases that came before the African Court relating to the right to property, the court has shown willingness to enforce property rights. This willingness can be seen in the case of *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria*[429] where the court relied on the right to psychological and bodily health, the right to property, and the protection conferred on families to find that the demolition of houses was a violation of human rights. A similar view was expressed in *Malawi African Association, Amnesty International, Ms. Sarr Diop, Union Interafricaine des Droits de l'Homme and RADDHO, Collectif des Veuves et Ayants-droit and Association Mauritanienne des Droits de l'Homme v Mauritania*[430] where it was found that expropriation or destruction of land and houses violated the right to property.

The protection of property rights is also found at regional level. Several regional instruments in Africa, America and Europe recognise the right to property. Though the

[424] United Nations Declaration on the Rights of Indigenous Peoples, 2007.
[425] J Gilbert and C Doyle "A new dawn over the Land: Shedding Light on Indigenous Peoples" Land Rights' in S Allen and A Xanthaki (eds) Reflections on the UN Declaration on the Rights of Indigenous Peoples (2011).
[426] Article 25 of the United Nations Declaration on the Rights of Indigenous Peoples, 2007.
[427] Article 26(1) of the United Nations Declaration on the Rights of Indigenous Peoples, 2007.
[428] Article 26(3) of the United Nations Declaration on the Rights of Indigenous Peoples, 2007.
[429] Communication No. 155/96, African Commission on Human and People's Rights, 27 May 2002.
[430] Communications 54/91, 61/91, 98/93, 164/97 -196/97 and 210/98, African Commission on Human and People's Rights, 27 April to 11 May 2000.

regional jurisprudence in Inter-America and Europe may not be binding on South Africa, it has persuasive force. It may also provide guidance on the interpretation of international regional instruments on the right to property. Moreover, there has been willingness on the parts of regional courts to enforce property rights. From the international law perspective, this recognition affords an advanced protection of the right to property. This may give persons who were deprived of their property before 1913 legal standing to seek redress in international courts.

### 4.5. Conclusion

Over and above the protection the right to property enjoys under national law, the right is also protected under international law. Although the right to property is acknowledged in the Universal Declaration of Human Rights, its inclusion was not without debate. The inclusion is a progressive step in the realisation of the right to property within the framework of international law. However, neither the International Covenant on Civil and Political Rights nor the International Covenant on Economic, Social, and Cultural Rights expressly protect property rights. The right to property is protected by several international agreements, including the African Charter on Human and Peoples' Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries, and the United Nations Declaration on the Rights of Indigenous Peoples. The Human Rights Committee, the African Commission on Human and Peoples' Rights, the Inter-American Court of Human Rights and the European Court of Human Rights have all expressed a willingness to uphold the right to property at both international and regional levels. Some courts have found innovative ways to enforce property rights by interpreting provisions of various Conventions and treaties to include property rights. At African continental level, there has been a few cases on the protection of culture under international law. Earlier cases did not view international law as having any role in the protection of property. However, recent cases have acknowledged the role played by international law in protecting property rights. There are comparative lessons to explore the protection of property rights from other jurisdictions such as Europe and the Inter-America region. Though not binding on South Africa, the decisions of these foreign jurisdictions may provide guidance in the interpretation of property rights and

protect the rights of those deprived of property prior to 1913. This may entitle those deprived of property rights to challenge the decision of the South African government to set the cut-off period to start from 1913.

# Chapter 5: Conclusion, Summary of Findings and Recommendations

## 5.1. Introduction

This concluding chapter summarises the study findings and makes recommendations based on the findings. The first section summarises the findings in light of research questions, aims and objectives and the last section makes recommendations for reform of property law in South Africa.

## 5.2. Summary of findings

This study investigated South Africa's pre- and post-constitutional land deprivations. Chapter 1 reviewed available literature as well as presented the research questions, methodology, aims and objections as well as hypothesis of the study.

The first study objective was to discuss various pre-constitutional laws that justified deprivation of land in South Africa. These laws were discussed in Chapter Two where it was found that land dispossessions and deprivations before constitutional democracy in South Africa was founded on legislation. The government used various pieces of legislation to justify dispossessions and deprivations of property. These laws were discriminatory and prevented blacks, Indians and coloureds from owning land in certain areas. Though the first formal deprivation of land is a consequence of the Natives Land Act enacted after the union of South Africa, deprivation and dispossessions occurred years before the enactment of this statute. Laws such as the Native Locations Lands and Commonage, the Cape Colony and the Squatters Act, the Glen Grey Act, Masters and Servants Ordinance, the Masters and Servants Act, the Volksraad Resolution and the Pretoria Convention were enacted in the 1800s and were used to justify dispossessions and deprivations of land, in particular when it related to blacks, coloureds and Indians. Thus, though studies usually refer to the Natives Land Act as a point of formalised deprivations and dispossessions, this is not accurate.

Chapter Three discussed various laws post the Constitution that justify deprivation of land in South Africa. The chapter stated that the South African Constitution is regarded as one of the most progressive constitutions in the world. The right to housing and other enforceable rights are among those that are protected by the Constitution. These rights were specifically incorporated in the Constitution to address the injustices of the

past and ensure security of tenure. The Interim Constitution, which safeguarded the right to acquire and own property, provided South Africa with the first explicit protection of property rights. The protection provided by Section 28(1) of the Interim Constitution was explicit and similar in many respects to the protection in Article 17 of the Universal Declaration of Human Rights. This means that under the Interim Constitution, the right to property was protected in line with international standards. Under Section 25, however, the protection is a negative one and seems to protect only property owners. Section 25(1) seems to prohibit any interference with already existing property rights. Furthermore, the property clause does not seem to guarantee any absolute right to property. In addition to the limitations imposed by Section 36 of the Constitution, the right to property has further limitations within the section. This internal limitation means that the property clause is subject to a double limitation. Since the Constitution is crafted in an abstract manner, there are different legislative enactments that give meaning to the rights in the Bill of Rights. Though the right to property and the right to housing are capable to be in harmony with each other, there are times when the two rights are in conflict. When a dispute involving the two arises, especially during evictions, the courts are required to strike a balance between the conflicting rights. On the one hand, the court should protect the right of the landowner to use and enjoy his or her property, while also ensuring the protection of the unlawful occupiers on the other hand. Favouring illegal occupants' rights over the landowner's rights could result in the landowner losing his or her property. This is especially true given that the property owner is responsible for paying rates and taxes even though he or she is not the one using the services rendered by the municipality. Municipalities are preferent creditors for debts owing on the property and may execute against property owners. This may lead to deprivation of property.

Chapter Four assessed the degree to which South Africa complies with its commitments under international law to protect the right to property. The chapter concluded that the right to property has advanced from a time when it was only recognised and protected by domestic laws to recognition and protection by international law. When it comes to the right to property, several international legal principles are relevant. There are also international treaties and conventions such as the African Charter on Human and Peoples' Rights, the Convention on the Elimination of All Forms of Discrimination against Women, the International Convention on the

Elimination of All Forms of Racial Discrimination, the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries, the United Nations Declaration on the Rights of Indigenous Peoples and the Universal Declaration of Human Rights that protect the right to property. This elevates the status of property right to human rights. Enacting provisions protecting property rights is meaningless if there are no enforcement mechanisms. Several international and regional courts, including the Human Rights Court, the African Court on Human and Peoples' Rights, the Inter-American Court of Human Rights, and the European Court of Human Rights, have made it possible to uphold the right to property at both the international and regional levels. Innovative ways have been used in the form of purposively interpreting various international instruments to protect the right to property. This is true even when a treaty or convention does not expressly guarantee the protection of the right to property. The express protection of property rights by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights is what is still missing from international law.

### 5.3. Recommendations

In view of the above, it is recommended that the South African parliament should consider amending Section 25 of the Constitution to include a positive protection of the right to property. Section 25 should be amended to include a clause that is analogous to Section 28(1) of the Interim Constitution.[431] This would ensure that South Africa complies with its international obligation to protect the right to property in line with international standards. This would ensure that the right is protected in a manner that imposes an obligation on the state in both positive and negative terms. Having both negative and positive obligations would result in an adequate protection of the right to property.

It is further recommended that restitution of land should not only be restricted to those that were deprived of land after 19 June 1913. The period prior to the enactment of the Natives Land Act should be included as well. The Restitution of Land Act should be amended to include those deprived and dispossessed of land before 1913. This

[431] The current parliamentary process of amending Section 25 of the Constitution to provide for expropriation of land without compensation should incorporate an amendment of the cut-off period. The cut-off period could either be removed completely or be set at 1652 when the settlers first arrived in South Africa.

should be so because provisions of Section 25(8) do not provide for a cut-off period. Legislation to this effect should allow everyone deprived of property to claim their land regardless of when such deprivation occurred.

The study further recommends that the courts should not put the rights of unlawful occupiers above those of property owners. Unlawful occupiers have no right to occupy the property and it is not the duty of a private landowner to provide accommodation. What is required of the courts is to consider all relevant circumstances including those of property owners who are not always rich property owners but also some indigent people trying to earn a living through their properties. The courts should show willingness to order municipalities to give emergency alternative accommodation.

Furthermore, the study recommends that property owners should not be held liable for debts incurred by unlawful owners, especially where eviction proceedings have already been instituted. Since municipalities are part of eviction proceedings, all debts incurred after the institution of eviction proceeding should be borne by the municipality. This would ensure that municipalities act quickly in affording unlawful occupiers' alternative accommodation. Municipalities, to this effect must be ordered to pay property owners occupational rent for the duration that unlawful occupiers are in occupation of the property after the institution of legal proceedings for the ejectment of unlawful occupiers.

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