DOES GERMAN LAW STILL MATTER? *A Few Remarks about the Relevance of Foreign Law in General and German Law in Particular in South African Legal Development with Regard to the Issue of Constructive Expropriation*

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A. Introduction [1] Ever since its enactment, Sec. 39 para. 1 of the South African Constitution has fascinated lawyers with an inclination for comparative law. Subsections (b) and (c) of this provision compels the South African judiciary to consider international law and enables it to consider foreign law in the interpretation of any of the fundamental rights espoused by the Constitution. (1) Sec. 35 para. 1 of the Transitional (Interim) Constitution, which preceded the 1996 Constitution, contained a similar provision. Meanwhile, it has become a feature of the South African Constitutional Court's decision-making process to work comparatively in the solution of many of the issues brought before it. (2) Thus, the new Constitution, apart from introducing a new constitutional and political order in South Africa, gave rise to renewed interest in comparative law and the reception of foreign legal principles. [2] It would be interesting to identify the trends of legal reception that have resulted from the judiciary's application of the constitutional guidelines for interpretation. This is, however, a task too wide in ambit for this particular contribution. Instead, I will provide a brief overview of the importance of German law, as opposed to the law of other jurisdictions for comparative purposes, in the constitutionally induced process of legal reception in South Africa, with a view to assessing in particular the South African judiciary's stance on reception of the doctrine of constructive expropriation (or regulatory taking). **B. Foreign law and the New Constitutional Order in South Africa** [3] In South Africa before 1990, most comparative focus fell on issues of private law and legal history, the substantive South African law (being descended from the Roman law as practiced in Western Europe at the time of initial colonisation and influenced considerably by English Law in the second phase of colonisation) rendering itself well comparable with the legal systems of Western Europe and England. (3) After apartheid - and with it the old, discriminating constitutional order - was dismantled, new horizons opened up for South African comparativists, not only as far as comparative constitutional law and human rights were concerned, but also with regard to private law within the new constitutional order. Moreover, with the advent of the new political and constitutional order in South Africa, during the drafting phase of the transitional Constitution, South African scholars gained renewed interest in German law. [4] From existing documentation on the drafting process of the transitional Constitution, as well as from the scholarly publications (4) of that time, it is apparent that German law featured first and foremost as comparative agent. (5) From the eventual content and wording of the Interim Constitution's property clause, Sec. 28, the influence of the German constitutional property clause (art 14 GG) (6) is particularly clear. A positive property guarantee was included in the chapter on Fundamental Rights of the Interim Constitution, whilst the mandate for land reform and restitution was placed outside the chapter on fundamental rights. (7) Sec. 28 IC, while entrenching the right to acquire, hold and dispose of rights in property, also provided for the protection of existing rights in property and for expropriation against payment of compensation. (8) As such, it not only represents a remarkable political compromise, but also reflects the intricacies of developing law in one jurisdiction through partial reception of foreign legal traditions. [5] With the second round of negotiations in the drafting of the ("final") Constitution of 1996, it seemed as if the preference of comparative lawyers as far as the systems for comparison had shifted and diversified. As a result, the property clause (9) underwent a metamorphosis in the course of the second drafting process. (10) The description of the protective ambit of the property clause was changed in that the reference to "rights in property" was replaced with mere reference to "property," which is not limited to land only. (11) The public purposes requirement in the context of expropriation was expanded to "public interest" and it is confirmed that an expropriation can take place "in terms of law." (12) The property clause in the bill of rights was eventually phrased more widely so as to include the objectives of access to land, provision of legally secure land tenure, land restitution and land reform. (13) Various foreign legal systems tended to be important role models at different stages of the second drafting process. In particular, the initial orientation upon and gradual move away from Art.14 GG is noticeable: the original working drafts of the property clause presented to the Constitutional Assembly (14) to some extent attempted to give way to an even stronger influence from Art.14 GG as was the case in Sec. 28 IC. This was, however, not completely acceptable to some of the parties involved in the second drafting process. (15) Moreover, the criticism of Sec. 28 IC from academic (16) and judicial (17) quarters, led the Constitutional Assembly to decide that a positive formulation of the property clause (and the resultant institutional guarantee which was translated from German legal culture into Sec. 28 IC) could be difficult to reconcile with the chosen regulation and expropriation provisions of Sec. 25 FC. The reservations about introducing a stronger German-oriented property clause were most probably strengthened by the "language barrier," (18) the availability of up-to-date German literature - or rather lack thereof - in South Africa (19) and what Van der Walt describes as "cultural and affective differences." (20) The politics behind decisions to allow reception of certain foreign legal elements and to disregard others were probably as decisive as considerations of practicality. Furthermore, the German model of strong property protection tempered by the possibility of state interference with

private property for the sake of the public interest was not supported by some political factions within the constitutional assembly that wanted to secure the strictest possible protection of property for private individuals. (21) The German example of property protection could have been an appropriate model for the social reconstruction programmes, the reform and distribution of access to land and land rights, as well as the affirmative action and reconstruction programmes related to housing and agricultural development envisaged in South Africa. (22) Instead, the constitutional drafters settled for a compromised version, giving way to a greater focus on Anglo-American law. Hence, the new property clause requires that public interest be taken into account in the context of expropriation, but also affords a broad meaning to the notion of public interest, so as to include the objectives of land reform and social reconstruction. (23) In this manner, Sec. 25 FC became an example of how certain legal principles were extracted from more than one, often diverging and contradictory foreign legal cultures and adapted to suit the needs of the South African society. The exercise in reception of foreign law in the second drafting process of the constitutional property clause in particular is so advanced that it may be debatable whether it constitutes legal reception - as opposed to legal production - at all. For present purposes I will assume that the second drafting process did result in a process of legal reception, albeit probably a more complex kind of reception than that which is usually envisaged by comparative lawyers. [6] Keeping in mind that the present contribution sets out to determine the role of foreign law, in particular German law, in constitutional development in present-day South Africa, I now turn to an analysis of constructive expropriation within the context of the South African constitutional property clause. The focus of this contribution being the relevance of legal comparison for the development of constitutional property theory in South Africa, the following paragraphs provide an overview of the considerations relating to constructive expropriation that define the experience with this notion in American and German law, before considering the possible significance thereof for the South African context. **C. Constructive expropriation** [7] The issue of constructive expropriation could typically arise where the state's regulatory powers are employed to regulate private property to protect the rights of others or the public interest (e.g. to protect public safety of health), where there has been no formal expropriation, but an affected property owner claims that the impact of the regulatory action is so excessive or unfair that the action should be treated as an expropriation. (24) This argument may be invoked either to enforce payment of compensation subsequent to an imposition on property, or to invalidate a particular regulatory action. Consideration of the excessiveness of a specific regulation of property will necessarily overlap with an inquiry into the proportionality of a specific imposition on property. In this sense, proportionality does not refer merely to a limitation analysis test of the constitutionality of a specific infringement on property, but rather represents a broader, more encompassing concept. [8] In most jurisdictions, constitutional property protection distinguishes between impositions on property requiring the payment of compensation, and those that do not. (25) The former are usually described as expropriations, whereas a variety of terms are used for the latter, such as regulations of property, deprivations of property, and regulatory limitations on property. In some jurisdictions, furthermore, provision is made for compensating impositions on property which are not formally intended to constitute expropriations by the legislature or administration, but which effectively amount to expropriations because of the severity of the infringements in particular instances. Use of concepts such as "regulatory taking," "indirect expropriation" "inverse condemnation" or "constructive expropriation" refers to impositions of this kind on property, (26) and stands for the idea that the state is expected to compensate property owners for loss caused by the exercise of the state's powers of regulation (police powers) over private property. (27) Treatment of constructive expropriation vary from one jurisdiction to another, however, depending on the type of property protection afforded by a specific legal system, and the possible role of a constitutional clause protecting and regulating property. (28) The scope of this comment does not allow extensive analyses of the treatment and existence of constructive expropriation in all jurisdictions that might be relevant to the South African context. (29) Instead, brief overviews of the US and German traditions relating to excessive impositions on property will have to suffice, even though this will not do justice to the complexities surrounding the issue of excessive impositions on property in both systems. **I. Regulatory takings in US law** [9] The Fifth Amendment (30) to the US Constitution specifically deals with takings by the federal government and provides that private property shall not be taken for public use without just compensation. The states are bound to provide compensation for takings of private property pursuant to the just compensation clause of the Fifth Amendment as made applicable to the States through the due process clause of the Fourteenth Amendment (31). [10] In US law, "expropriation" refers to the permanent taking of full title to property, but property can be "taken" from somebody without being acquired by government, e.g. by legislation prohibiting the only profitable use of property. (32) Compensation is, however, envisaged for both the narrower and broader categories of interferences with private property. Compensation is required as soon as a balancing of private and public interests results in the finding that the public at large, rather than a single owner, must bear the burden of an exercise of state power. (33) In one sense, therefore, the US constitution's takings clause aims at preventing government from forcing some individuals to bear a burden meant to be shared by the public as a whole. (34) [11] In the United States, (35) government's police power allows it to restrict the use of private property, provided that such a regulation of property is justified by a rational and legitimate public purpose. (36) Regulatory exercises of the state's police power may be attacked on the basis of their invalidity, targeting the legitimacy of the legislative purpose or procedure followed. The US courts are, however, cautious of interfering with a legislative decision to regulate the use of property in the public interest. (37) Most substantive attacks on state interferences with private property are based on the compensation guarantee in the takings clause, (38) with the aim of extracting compensation for the loss caused by the regulation. (39) [12] In cases where public

health and safety are not threatened directly, an exercise of the police power requires compensation under the takings clause if it "goes too far", placing a too heavy burden on the property owner. (40) This approach led to a somewhat troubled distinction between "pure" exercises of police power and regulatory takings, complicating adjudication of regulation of private property. (41) The US Supreme Court identified three categories of *per se* takings, namely those involving a permanent physical invasion or occupation of the property, (42) those destroying or denying all economically viable use of the property (43) and those destroying a core property right. (44) Where the regulation does not fall into one of these categories, a three-factor test is applied to determine whether the regulation nevertheless "goes as far". Under these circumstances, regard is had to the nature of the government action, the diminution of value that results from the regulation and the extent to which the regulation interferes with reasonable investment-backed expectations of the property holder. (45) **II. "Entschädigung" and "Ausgleich" in German law** [13] In terms of Art. 14 of the German Basic Law, the protection of private property rights is balanced against state interference and the justification of limitations imposed on the exercise of property rights in the public interest. The balance is established by securing an area of personal liberty in which a property owner can develop and organise his/her life, within the confines of larger social demands. (46) Impositions on property can be legitimate either as (duly compensated) expropriations, or as valid legislative regulation (47) (i.e. determination of the contents and limits of private property undertaken or authorised by legislature, which does not amount to regulatory excess (48)). Regulation of property *(Inhalts- und Schrankenbestimmung)* in principle does not require the payment of compensation, but owner(s) affected by legislative regulations that lead to excessive inroads on specific property rights, may sometimes be entitled to monetary reimbursement. (49) Valid legislative regulation requires that compelling reasons must exist for the removal of a whole category of property from the private sphere, (50) and that an equitable balance must be struck between the interests of the individual and society. This entails that potentially dangerous or socially harmful use of private property may be subject to rigorous control, or may be removed from the private sphere completely; (51) but regulatory measures which disturb the equitable balance between individual and social interests will invalidate itself for being disproportionate. (52) [14] Apart from the requirement (that applies to both legislative regulation and expropriation of property) that an infringement should be undertaken by or pursuant to a law, additional requirements (53) determine the justifiability of an expropriation in German law. These are that (i) the legislation must provide for compensation, and the type and extent of compensation must be stipulated; (ii) the expropriation must be for the public weal; (54) and (iii) the determination of the amount of compensation must follow from a fair balancing of interests of the society as a whole on the one hand and of the affected individuals on the other. Expropriation *(Enteignung)* is a more intensive infringement on property rights, as it does not merely limit the property rights but removes them completely or partially from the holder's sphere of influence. (55) Art.14 III of the Basic Law provides for compensation proper, subsequent to expropriations in terms of the same provision. As such, the German constitutional property clause constitutes a *Wertgarantie*, enabling the individual to receive compensation upon the expropriation of his or her right to property by the state. (56) [15] Legislative regulation of the contents and limits of property and expropriation are mechanisms through which *intended* infringements on property rights can be justified. German law acknowledges, however, that actions of state can affect the right holder's freedom and property rights unintentionally. (57) If a measure directly (58) and sufficiently (59) intrudes upon the ownership of the affected individual to such an extent that he or she is expected to make a special sacrifice, an expropriatory infringement *(enteignende Eingriff)* is said to have taken place. This is probably the most a-typical, unintended and unexpected side effect of a legitimate administrative action, and gives rise to a claim for compensation. (60) On the contrary, had the administration acted illegally or had it omitted to act where a legal duty existed, and had an infringement arisen as result of this action or omission, a quasi-expropriatory infringement *(enteignungsgleiche Eingriff)* occurred. (61) For instance, reparation work to roads and streets can bring about severe infringements on the rights of businesses in areas where the reparation work is being done. If the infringements result from the fact that the maintenance authority has not announced, prepared and executed the intended maintenance properly and in the least harmful way, the infringement would be illegal and therefore quasi-expropriatory. If the relevant authority, however, did everything within its power to reduce the effects of such an infringement, and the consequences are still harsh, the infringement would nevertheless be legal and therefore expropriatory. (62) [16] Within the structure of Art. 14 GG unintended restrictions upon protected property rights can be problematic. The requirement that provision must be made for compensation and that the type and extent of such compensation must be stipulated represents the so-called *Junktimklausel* (linking-clause provision), which obliges the state to compensate owners whose special rights and privileges are forcibly sacrificed for the common good. The authorising statute must determine the nature and measure (or amount) of compensation specifically, (63) else the expropriation is unconstitutional and void. (64) The *Junktimklausel* has a two-pronged warning function. For the individual owner it must ensure that expropriation takes place only once the compensation question has been cleared by the democratically elected legislature. Furthermore, it must protect the public (or more specifically the national budget) from being burdened with expenses not foreseen by the legislature. (65) Therefore, the *Junktimklausel* cannot be impliedly incorporated into a statute, but it has to be expressly stipulated. (66) This provision ultimately excludes the incorporation of a theory of inverse condemnation or constructive expropriation into German constitutional law. The famous *Naßauskiesungsbeschluß* (wet gravel extraction decision) (67) of the Federal Constitutional Court in 1981, for instance, placed in question the award of compensation for regulations with expropriatory effect *(enteignungsgleiche Eingriffe)* , (68) on the basis that no explicit legislative provision is made for such regulations. [17] Nevertheless, some branches of the German judiciary

provide for the effects of situations similar to those that constitute regulatory takings or inverse condemnations in other jurisdictions. Particularly severe regulatory controls in terms of Art. 14 I 2 of the Basic Law may give rise to a so-called *Ausgleichspflicht* (duty to undertake equalisation payment) on the state to make good the consequences of a particular infringement. Some form of compensation is also envisaged for illegal impositions on property that are in effect expropriatory *(enteignungsgleiche Eingriffe)*, and for the dubious category of impositions on private property which arise from valid legislative regulations, but have expropriatory side-effects as a result of the manner in which the regulations are applied administratively *(enteignende Eingriffe)*. (69) The specialised functions of the various branches of the German judiciary complicate the issue of compensation, since the Constitutional Court, Federal Court of Justice as well as the Administrative Courts are able to pronounce on various aspects of compensation, and employ different considerations in adjudicating this issue. [18] Due to the approach of the Federal Court of Justice, it is still accepted in German law that a claim for compensation does exist for situations qualifying as *enteignungsgleiche Eingriffe*, albeit to a somewhat more limited and modified extent. (70) The affected property holder can under these circumstances only expect to be remunerated if an invalidation of the particular action is impossible, or not plausible. The German courts do not regard remuneration under such conditions as compensation for expropriation (71) *(Enteignungsentschädigung)* , although the principles for calculation of such compensation may be employed to determine the extent of the remuneration afforded to the affected property holder. [19] As far as *enteignende Eingriffe* are concerned, the legal position is less clear. For one, some authors question the distinction made in German law between such impositions on property, and legislative regulations which are *Ausgleichpflichtig* (i.e. which compel the state to reimburse individuals to make good the consequences of a particular infringement in terms of Art.14 I 2 of the Basic Law). (72) The latter category was developed mainly by the administrative courts and Federal Court of Justice (73) to temper the strict division between (uncompensable) legislative regulation of property on the one hand, and (compensable) expropriation of property on the other, to reach a compromise between limitation of property rights in the public interest, and the detrimental consequences that such limitation might entail for a single individual or small, exceptional group of property holders in a particular case. This approach, originally based in civil law, permits compensation for an individual because of the extraordinary sacrifice that is required of him/her in a specific instance of legislative regulation of property. (74) Typically, this type of remuneration could feature where legislation is enacted to protect national monuments or for nature conservation. However, an award for equalisation payment strictly speaking does not qualify as compensation for expropriation, (75) because the requirements of Art. 14 III for compensation are not met. Instead, the equalisation payment is meant to soften the impact of a particular regulatory measure, for a particular (group of) individual(s). (76) Hence it has been said that equalisation payment resembles private law compensation for delictual damages (77) rather than constitutional compensation for expropriation and therefore, is fundamentally different from expropriatory compensation for regulatory takings in US law. [20] It is uncertain whether the notion of *enteignende Eingriffe* will survive the latest trend in the decisions of the German courts to afford monetary rewards to property holders who, by way of exception, are affected by legislative regulation as envisaged by Art.14 I 2 of the Basic Law. (78) German scholars are not in agreement about the legitimacy and applicability of the distinction. (79) This uncertainty necessarily impairs legal comparison and possibly eventual reception of German law on this topic. **III. South African Law** [21] It has been uncertain for some time whether the South African judiciary would endorse the idea of constructive expropriation. In view of the increased interest in Anglo-American law during the second drafting process, the eventual reception of such a doctrine could certainly not be excluded completely. It was clear, however, that the acknowledgement of constructive expropriation in South Africa would depend to a considerable degree on the manner in which the difference between deprivations of property (in terms of Sec. 25(1) of the Constitution) and expropriations (in terms of Sec. 25(2) of the Constitution) was to be construed. If a clear, categorical line were to be drawn between deprivations and expropriations as two separate constructions, there would be very little room for development of a doctrine of constructive expropriation. On the other hand, if expropriation were to be regarded as a particular species of deprivation, or if deprivation and expropriation were to be regarded as points on a continuum, with the severity of a specific imposition on property dictating whether, in addition to the requirements for deprivation, a number of requirements applicable only in cases of expropriation should be met. ***1. Harksen v Lane*** [22] The case of *Harksen v Lane* (80) represents a first attempt by the South African judiciary to elucidate the distinction between deprivations and expropriations of property. In this case, it was contended that a statutory provision resulting in (solvent) spouses of persons enmeshed in insolvency proceedings temporarily losing their property to the Master of the Court, (81) was in conflict with, inter alia, the constitutional property guarantee, (82) because it constituted an *expropriation* of the solvent spouse's property without providing for compensation. The Constitutional Court's decision did not support this contention. On the basis of comparative authority, (83) the court chose to base the distinction between deprivation and expropriation on the question of whether ownership is transferred to a *public authority for a public purpose*. (84) According to this test, a deprivation of property would not include transfer of ownership and would therefore not amount to an expropriation. [23] The court's approach was later criticised for lacking sophistication and being too restrictive. (85) More importantly, the court did not take cognisance of fundamental differences between the case at hand and decisions quoted as authority in reaching its decision. (86) Although the correct result was probably reached, the court's reasoning does not reflect the complexity of the distinction between deprivation and expropriation. In particular, the fact that the court chose expropriation, rather than deprivation of property, as point of departure, is open to criticism. The purpose of the particular statutory provision resembles the logic of forfeiture or

confiscation of property more closely than it resembles the logic of expropriation. (87) Ironically the reasoning of the *Harksen* court supports, without explicitly acknowledging, the idea that the relevant provision has a regulatory, rather than an expropriatory character, in that it is aimed at ensuring protection of creditors of an insolvent estate by avoiding the unlawful or fraudulent transfer of property belonging to the insolvent to the separate estate of the solvent spouse. The provision places the burden of proof of ownership upon the solvent spouse, (88) thus protecting the public interest by ensuring that property of an insolvent estate is available for fair distribution, and that property is not fraudulently disguised or withheld. Nevertheless, the legal question in the *Harksen* case focuses on the constitutionality of the relevant provision when viewed as an expropriation, rather than a deprivation of property. (89) The latter possibility was never even considered. (90) Consequently, the question as to the introduction of constructive expropriation into South African law was negated implicitly, whilst simultaneously an approach to deprivation and expropriation of property which views these as separate, non-related and non-continuous concepts was supported. ***2. Steinberg v South Peninsula Municipality*** [24] A more recent decision of the Supreme Court of Appeal, *Steinberg v South Peninsula Municipality*, (91) seems to support a different view. This case involved an application for an order directing the municipality to complete the process of expropriation foreseen for property belonging to the appellant. (92) Upon purchasing the particular land, the appellant was aware thereof that the property would be affected by a proposed road scheme approved, but not yet implemented, by the municipality. In case of implementation of the road scheme, expropriation of the specific land would become necessary for purposes of constructing the proposed road. Under South African law, approval of a road scheme, does not bind the relevant state authority to implement such a scheme at any point. (93) The application before the court was based essentially on an argument of constructive expropriation or inverse condemnation, i.e. that the uncertainty surrounding the implementation of the road scheme renders the appellant unable to develop or improve the property, and immobilises any alienation of the land, thereby depriving her of the economic value of her land. [25] The court distinguished between deprivation and expropriation in terms of the constitutional provisions on the basis of the requirement of payment of compensation, and the need to regulate private property for the public good without incurring liability for compensation. (94) Based on a consideration of the legal position in other jurisdictions, mainly the USA and India, the court acknowledged that there may be room to develop a narrow doctrine of constructive expropriation for the South African context, in cases where a public body utilises its power to regulate private property so excessively that it may be characterised as a deprivation which has effect of indirectly transferring those rights to the public body. (95) Admitting that development of a doctrine of constructive expropriation may induce confusion in the law and may hamper the constitutional imperative of land reform, (96) the court eventually chose to leave open the question as to the need to develop a doctrine of constructive expropriation in South Africa. It found, instead, that approval of the road scheme amounted to nothing more than an "advance notification of a possible intention to construct a road, which if implemented in the form approved, would result in a taking". (97) The reasoning of the Supreme Court of Appeal in this case signifies a different approach to the question of distinguishing between deprivation and expropriation of property than the absolute, categorical stance taken in *Harksen v Lane NO*. Instead, it favours the approach that deprivations and expropriations are different points on a single continuum, expropriation being a particular species of deprivation. ***3. First National Bank of SA t/a Wesbank v Commissioner for the South African Revenue Service*** [26] The question of constructive expropriation was not directly in issue in the case of *First National Bank of SA t/a Wesbank and the Commissioner for the South African Revenue Service*, (98) but the distinction between deprivation and expropriation of property featured once again, this time in the context of state regulation of movable property. The dispute here concerned the constitutional validity of a provision (99) authorizing extrajudicial attachment and sale in execution of one person's property to satisfy the tax debt of another. (100) The judgment dealt with a variety of issues, among which was the question whether detention and sale in execution of the vehicles belonging to First National Bank (FNB), who was not a tax debtor, was in conflict with the property clause in Sec. 25 of the 1996 Constitution. (101) For present purposes, only some elements of the Constitutional Court's decision, per Ackerman J, are relevant. In particular, it is necessary to assess the viability of a doctrine of constructive expropriation in the South African context, in the light of this important decision of the Constitutional Court. Further, it is necessary to consider the form such a doctrine should resemble if it is indeed to be incorporated in South African law. In this context the comparative approach of the judgment is especially interesting. [27] In essence, the Constitutional Court's decision regarding the constitutionality of the relevant provision turns upon the analysis of the requirement of "non-arbitrariness" in the context of constitutional property protection in South Africa. (102) The specific point at which the non-arbitrariness requirement is applied in the constitutionality inquiry, as well as the meaning attributed to non-arbitrariness are important in an attempt to identify whether the decision supports the introduction of the doctrine of constructive expropriation. The Court applies the requirement of non-arbitrariness in Sec. 25(1) of the Constitution as the determinative aspect of a decision as to whether a constitutionally protected property right had been subject to infringement, (103) i.e. as an element of the first-stage inquiry into the protective ambit of the property clause, rather than the second-stage limitation and proportionality analysis of constitutional justifiability of a specific imposition on property. The court then proceeds with a comparative legal analysis of deprivation of property (104) in which it considers the law of the USA, Australia, the Council of Europe, Germany and the UK. The analysis comprises synopses of the legal positions in the respective jurisdictions regarding the state's regulatory (police) powers over private property, the question of proportionality and rationality review of such regulatory powers, and the particular issue of forfeiture of property. The legal positions in the USA and Australia enjoy

more attention, whereas reference to the Council of Europe, Germany and the UK remain cursory. The court's conclusion, upon a consideration of foreign law, is that the formulation of property rights and their institutional framework differ, often widely, from legal system to system, and that it is impossible to determine the proper approach to the South African property clause merely on the basis of comparative law, because of differences in context, formulation and history. (105) Nevertheless, two important principles are drawn from the comparative perspective: (i) It is permissible in most jurisdictions, under specific circumstances, for legislation to deprive persons of property without payment of compensation, because of broader public interest. (ii) In order for such a deprivation to be valid, there must be an appropriate connection between the sacrifice the individual is asked to make and the public purpose this is intended to serve. It is the latter aspect in particular, which once again raises the question whether the South African legal system is ready to adopt a doctrine of constructive expropriation. If so, it must further be determined what legal system would best serve the needs of the South African society as far as adopting and developing a doctrine of constructive expropriation is concerned. [28] With regard to the relation between individual sacrifice and public interest, Ackermann J remarked that the question as to the appropriate connection between means and ends is not limited to an enquiry into mere rationality, but is less strict than a full and exacting proportionality examination: "It matters not whether one labels such an approach an 'extended rationality' test or a 'restricted proportionality' test. Nor does it matter that the relationship between means and ends is labelled 'a reasonably proportional' consequence, or 'roughly proportional', or 'appropriate and adapted' or whether the consequence is called 'reasonable' or 'a fair balance between the public interest served and the property interest affected'." [29] In the course of its quite striking decision, the Constitutional Court touches upon some of the constitutional principles underlying all enquiries about the constitutional justifiability of contested state actions, in particular, those related to infringements on property rights. However, the issue of whether constructive expropriation is at stake in this particular instance is not raised at all, not even as part of the in-depth analysis as to the non-arbitrariness requirement and its relation to the inquiry as to constitutional protection and regulation of property. (106) The reason for the disregard of the issue of constructive expropriation could possibly be linked to the court's finding that Sec. 114 of the Customs Act "casts the net far too wide" and therefore cannot be upheld constitutionally. (107) The case is resolved on the basis of invalidity and unconstitutionality, rendering an inquiry as to possible remuneration for excessive regulation unnecessary. **D. Conclusion** [30] An overview of South African case law connected to the issue of constructive expropriation indicates only that the matter is still anything but resolved. The different branches of the South African judiciary diverge on the issue of constructive expropriation as an element of property protection in South African law. Furthermore, it is not at all clear whether, and to what extent foreign law will be taken into account should the matter come up for adjudication in future. The different contexts within which other constitutions were drafted, the different social structures and milieu existing in other countries as compared with those in South Africa, and the different historical backgrounds against which the various constitutions came into being can all be factors dictating against legal comparison and reception of foreign legal ideas. The South African Constitutional Court has cautioned soon after its coming into existence against the danger of unnecessarily importing doctrines associated with those constitutions into an inappropriate South African setting. (108) [31] However, as yet no discernible trend can be identified as far as the issue of constructive expropriation is concerned. Legal comparison applied by the judiciary seems to have remained mainly within the American sphere of influence, in spite of the differences existing between constitutional property protection in South Africa and the USA. At the very most, it may be deduced from the decisions discussed above that the idea of constructive expropriation would probably be considered by the court only if it is raised explicitly by the parties, and only if a decision on the constitutionality and validity of the contested impositions on property in a specific case would be impossible or not viable. Moreover, the only outright judicial support for the notion of constructive expropriation was in the limited sense set out by the Supreme Court of Appeal in the *Steinberg* case as relating only to excessive impositions on property that indirectly result in transfer of rights to the state. [32] The question remains, therefore, whether the German model of compensation and equalisation payment has something to contribute to the development of South African legal theory on this issue. Admittedly, the manner in which the South African property clause of the 1996 Constitution was eventually phrased after the second round of negotiations about the drafting of the South African constitution, has to some extent broken the strong initial ties with constitutional property theory of the Federal Republic of Germany. Nevertheless, a number of considerations for maintaining legal comparative relations between the German and South African property orders remain. For one, the European roots of the South African legal system, still render the civil-law based system of Germany (109) eminently suitable as a comparative partner for the South African context, particularly in the field of property law, which has, in contrast to other fields of private law (like the law concerning unjustified enrichment and the law of delict) remained an unassailable stronghold of civilian jurisprudence. (110) Further, the mere fact that the South African constitutional property clause does not resemble its German counterpart as closely as might have been the case under the Interim Constitution, should caution against an uncalculated comparative approach, but does not categorically preclude an investigation into German law. The rich collection of German jurisprudence and scholarly work on constitutional property protection could still be beneficial in solving practical and dogmatic problems in balancing the interests of individuals with those of the society at large. The aim should be to prevent a one-sided comparative perspective, which could result in a transplant of wholesale dogmatic and practical solutions to South African property law from the highly acclaimed Anglo-American legal family, which might also not be tailored for the South African experience. [33] More importantly, though, the principles of German

constitutional interpretation correspond largely with those endorsed in the South African Interim and Final Constitutions. The constitutional and social history of the Federal Republic of Germany supports a notion of property that envisages, on the one hand, wider boundaries of public control and, on the other hand, continued individual security in accordance with the values of liberty and personhood. (111) This has enabled the courts to accord more importance to either social justice or individual freedom, depending on the demands of society at a specific time. (112) The German treatment of the dichotomy between social justice and individual freedom in cases where property rights are limited for the public benefit must inevitably lead to a better understanding of the South African situation. It is in line with the prevailing property theory in South Africa, which holds that, to be functional, ownership should not only be characterised by the existence of rights and entitlements accruing to the individual owners, but also by inherent duties, limitations and responsibilities toward society. (113) [34] Despite the uncertainties still prevalent in German law surrounding the categorisation of excessive impositions on property, and the resultant difficulties in determining the basis for compensation, it is submitted that German law still has a role to play in the development of South African constitutional property theory. The nuanced protection of property holders against excessive legislative regulation on the basis of social duty and individual sacrifice represents a system with many different points of interest for a legal system (like that of South Africa) in search of a solution to the problem of excessive legislative regulation. Admittedly, this comment is too limited in scope and space to fully explore the possibilities for legal production, comparison and reception on the particular issue of constructive expropriation. It may, however, serve as an introduction to possibly more thorough discourse in future.

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(1) Sec. 39 of the Final Constitution provides that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum - (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law and (c) may consider foreign law." The text of both the Interim Constitution and the 1996 Constitution is available online at http://www.constitution.org.za/.

(2) It is interesting to note that Sec. 39(para. 1)(c) FC does not give the court an injunction to consider foreign law, as is the case with international law in Sec. 39(para. 1)(b) FC. Despite fears that foreign case law might not be a safe guide to the interpretation of the bill of rights, many of the Constitutional Court's decisions contain extensive comparative analyses of constitutional law. See e.g. S v. Makwanyane 1995 (6) BCLR 665 (CC), par. 36-37; Sanderson v Attorney-General, Eastern Cape 1998 (2) SA 38 (CC), par. 26; and judgment of ACKERMANN J in Fose v Minister of Safety and Security 1997 (3) SA 786 (CC).

(3) The perseverance of Roman-Dutch legal principles in South African law during the time between 1910 and 1990 is – at least partly – linked to underlying political considerations, e.g. the nationalist motive to rid the pure (erroneously called) "civil" law in South Africa from English infiltration or "pollution," *á la* German pandectism J. Du Plessis, *The promises and pitfalls of mixed legal systems: the South African and Scottish experiences* (1998) 9 Stellenbosch Law Review (Stell LR) 340; R. Zimmermann *Synthesis in South African Private Law: Civil Law, Common Law and Usus Hodiernus Pandectarum* (1986) 103 South African Law Journal (SALJ) 265. Insofar as the historical approach to law enjoyed support in South Africa during this time, the influence of French socio-legal philosophy, for example the propagation of Stammler's ideas with regard to law and changing social conditions by the likes of Saleilles, Charmont and Demogue (See W.J. HOSTEN, A.B. EDWARDS ET.AL., INLEIDING TOT DIE SUID-AFRIKAANSE REG EN REGSLEER (1995) 207 ff.) which conceded the relativism of juristic ideals and acknowledged that the past could not provide all the materials for a critical approach to law, was rather limited in South Africa at the beginning of and throughout the twentieth century. Although much has been written about the growth and development of the South African law during this time, and the influence of the various strands of reception on the development of an independent legal culture, literature is strangely silent on the matter of how much the law was in fact defined by the political ideals of the governing class. Only towards the end of this period, in expectation of the reform of the constitutional and political dispensation, and with the advent of a new generation of lawyers and academics, the severe influence of apartheid on the laws of the land would enjoy more explicit critical analysis.

(4) J. De Waal, *A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights* (1995) South African Journal on Human Rights (SAJHR) 1 – 3; M. Chaskalson *The Problem with property: thoughts on the constitutional protection of property in the United States and the Commonwealth* (1993) 9 South African Journal for Human Rights (SAJHR) 336; J. Murphy, *Property rights and judicial restraint: a reply to Chaskalson* (1994) 10 South

African Journal for Human Rights (SAJHR) 388, 392; A.J. Van der Walt, *Towards a theory of rights in property: exploratory observations on the paradigm of post-apartheid property law* (1995) 10 SA Publiekreg / Public Law (SAPR/PL) 336; G. van Maanen, *Ownership as a Constitutional Right in South Africa – Articles 14 & 15 of the Grundgesetz: the German Experience* (1993) Recht & Kritiek,74 – 95; A.J. Van der Walt, *Comparative Notes on the Constitutional Protection of Property Rights* (1993) Recht & Kritiek, 263-297; D.G. Kleyn, *The constitutional proptection of property: a comparison between the German and the South African appraoch* (1996) 11 SA Publiekreg / Public Law (SAPR/PL) 402-445.

(5) See J. FEDTKE, DIE REZEPTION VON VERFASSUNGSRECHT (2000) and J. De Waal, *A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights* 1995 South African Journal on Human Rights (SAJHR) 1 ff.

(6) See the discussion of J. FEDTKE, DIE REZEPTION VON VERFASSUNGSRECHT (2000) 329 - 333.

(7) Sec. 121 - 123, text online at http://www.constitution.org.za/1993cons.htm

(8) Sec. 28 (Property): (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such rights. (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law. (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing agreement, to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value, the value of the investments in it by those affected and the interests of those affected.

(9) Sec. 25 (Property): (1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property. (2) Property may be expropriated only in terms of law of general application - (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court. (3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including - (a) the current use of the property; (b) the history of the acquisition and use of the property; (c) the market value of the property; (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and (e) the purpose of the expropriation. (4) For the purposes of this section - (a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and (b) property is not limited to land. (5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis. (6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. (7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress. (8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1). (9) Parliament must enact the legislation referred to in subsection (6).

(10) J. FEDTKE, DIE REZEPTION VON VERFASSUNGSRECHT (2000) 336 - 341 provides an overview of the different drafts of the final property clause that were considered in the course of 1995 and until the approval of the Final Constitution.

(11) Sec. 25(1) and (4) FC.

(12) Sec. 25(3) FC.

(13) Sec. 25(5) to (8) FC.

(14) I.e. the drafts of 9.10.1995 and 19.10.1995; as well as the second refined working draft of 9.11.1995.

(15) E.g. the Democratic Party's *Party Submission* 25.10.1995.

(16) E.g. J. Murphy, *The Ambiguous Nature of Property Rights* (1993) Journal for Juridical Science (JJS), 35 – 66; M.

Chaskalson, *The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth* (1993) 9 South African Journal for Human Rights (SAJHR) 388 - 411; J. Murphy, *Property Rights and Judicial Restraint - A Reply to Chaskalson* (1994) 10 South African Journal for Human Rights (SAJHR) 385 - 398; M. Chaskalson, *The Property Clause: Sec. 28 of the Constitution* (1994) 10 South African Journal for Human Rights (SAJHR) 131 - 139; J. Murphy, *Interpreting the Property Clause in the Constitution Act of 1993* (1995) 10 SA Publiekreg / Public Law (SAPR/PL) 107 - 130; A.J. Van der Walt, *Notes on the Interpretation of the Property Clause in the New Constitution* (1994) 57 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR) 181 - 203.

(17) Eg Transkei Public Servants Association v Government of the Republic of South Africa and Others 1995 (9) BCLR 1235 (Tk) 1246 et seq.

(18) M. Chaskalson, *The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth* 1993 South African Journal on Human Rights (SAJHR) 388 remarks that the case law of English speaking jurisdictions will exercise a dominant influence over the development of South African constitutional law because "most South African lawyers share my limitations [ie the 'inability to read any international languages other than English']". However, the "language barrier" argument holds true only partially. The abstract and deductive reasoning processes characteristic of the Romanic legal families of the European continent have frequently been used in South African constitutional law and private law for comparison. Cf J. Murphy, *Property rights and judicial restraint: a reply to Chaskalson* (1994) 10 South African Journal for Human Rights (SAJHR) 386. Moreover, J. De Waal, *A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights* (1995) South African Journal on Human Rights (SAJHR) 1 - 2 n 1 points out that South African legal scholars are "particularly well situated to benefit from the Basic Law and the Federal Constitutional Court's jurisprudence because so many have made use of scholarships to become familiar with the German language and legal system." These scholarships refer *inter alia* to financial support from the DAAD and BMW, as well as the Alexander von Humboldt Foundation and the Max Planck Institutes in Germany. However, traditionally it was mainly the scholars from Afrikaans-oriented universities that maintained relations with the law faculties on the European continent, while English-speaking public-law scholars tended to turn rather to the universities of the United States, Canada and Australia. The consequent gap that has developed between Afrikaans- and English-orientated constitutional literature can only be closed with renewed (and continued) interest by both groups of scholars in the possibilities offered by both the continental and the Anglo-American systems. The value of African legal systems as sources for legal comparison should also be kept in mind.

(19) A.J. Van der Walt, *Notes on the Interpretation of the Property Clause in the New Constitution* (1994) 57 Tydskrif vir Hedendaagse Romeins-Hollandse Reg (THRHR) 192 et seq.

(20) A.J. Van der Walt, *The Impact of the Bill of Rights on Property Law* (1993) SA Publiekreg / Public Law (SAPR/PL) 305 n 27.

(21) J. FEDTKE, DIE REZEPTION VON VERFASSUNGSRECHT (2000) 342.

(22) A.J.van der Walt, *The Impact of the Bill of Rights on Property Law* (1993) SA Publiekreg / Public Law (SAPR/PL) 315. In Germany, the treatment of the values of individual freedom and social justice, through application of constitutional principles and the provisions of Art. 14 GG, have resulted in a clear-cut framework within which the interests of the individual property owner can be weighed against those of the community at large. Thus, German law provides a good example of how the fundamental values of individual freedom and social justice interact in the development of a unique constitutional framework for property protection. This framework could be important in the South African context. Under the new constitutional order, the legal system will be confronted with the question as to which of these values should enjoy precedence in situations where both are at stake and compete with each other.

(23) Sec. 25(2)(a) read with Sec. 25(4)(a) FC.

(24) A.J. Van der Walt, *Moving towards recognition of constructive expropriation: Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 Forthcoming (2002) Stellenbosch Law Review (Stell LR).

(25) A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES – A COMPARATIVE ANALYSIS (1999) 19.

(26) A.J. Van der Walt, *Moving towards recognition of constructive expropriation: Steinberg v South Peninsula Municipality* 2001 (4) SA 1243 Forthcoming (2002) Stellenbosch Law Review (Stell LR).

(27) A.J. Van der Walt, *Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings* (1999) 14 SA Publiekreg / Public Law (SAPR/PL) 277.

(28) A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES – A COMPARATIVE ANALYSIS (1999)

discusses the treatment of this issue in a number of jurisdictions, notably Australia (51 ff.), the Council of Europe (104 ff., 111 ff.), Germany (143 ff.), India (216 ff), Ireland (237ff.), Switzerland (364 ff.), the United States (400ff.) and others.

(29) A.J. Van der Walt, *Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings* (1999) 14 SA Publiekreg / Public Law (SAPR/PL) 273-331 has undertaken a much more extensive comparative analysis of constructive expropriation than the attempt in this contribution.

(30) Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, [...] nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."

(31) Amendment XIV, Sec. 1: [...] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See, First English Evangelical Lutheran Church v. Los Angeles County 482 U.S. 304 (1987); JEROME A. BORRON AND C. THOMAS DIENNES, CONSTITUTIONAL LAW IN A NUTSHELL (1999) 181.

(32) A.J. Van der Walt, *Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings* (1999) 14 SA Publiekreg / Public Law (SAPR/PL) 282.

(33) Keystone Bituminous Coal Association v DeBenedictis 480 US 470 (1987).

(34) Cf Dolan v City of Tigard 114 S Ct 2309 (1994).

(35) This summary is based on the more extensive work of A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES – A COMPARATIVE ANALYSIS (1999) 417-440.

(36) A.J. Van der Walt, *Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings* (1999) 14 SA Publiekreg / Public Law (SAPR/PL) 280-281 relying on Miller v Schoene 276 US 272 (1928)

(37) Cf Hawaii Housing Authority v Midkiff 467 US 229 (1984).

(38) A.J. Van der Walt, *Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings* (1999) 14 SA Publiekreg / Public Law (SAPR/PL) 281.

(39) A.J. Van der Walt, *Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings* (1999) 14 SA Publiekreg / Public Law (SAPR/PL) 281.

(40) Various theories have been developed on the manner in which the complex relationship between the public-purposes requirement for exercises of the police power and the takings issue must be treated. Cf the discussion of A.J. Van der Walt, *Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings* (1999) 14 SA Publiekreg / Public Law (SAPR/PL) 283. Ever since the decision in Pennsylvania Coal Co v Mahon 260 US 393 (1922), it has been accepted that once it is recognised that a taking "goes too far", the burdensome effects of the regulation, rather than the public purpose it serves are the most important considerations.

(41) Regulations imposed for the narrow police-power function of protecting public safety and health are treated as "pure" exercises of the police power, not requiring compensation, whereas regulations reaching beyond the strict confines of public safety and health may be subject to the compensation requirement in the takings clause even though they satisfy - in a broader sense - the public purpose and due process requirements. The latter regulations can be legitimate even though not directly related to protection of public health or safety, but will require compensation if their effects on property owners are too severe. Hadacheck v Sebastian 239 US 394 (1915), Pennsylvania Coal Co v Mahon 260 US 393 (1922).

(42) Lucas v South Carolina Coastal Council 505 US 1003 (1992), Prune Yard Shopping Center v Robins 447 US 74 (1980); Yee v City of Escondido 503 US 519 (1992).

(43) Lucas v South Carolina Coastal Council 505 US 1003 (1992).

(44) Hodel v Irving 481 US 704 (1987).

(45) J.W. SINGER, PROPERTY LAW: RULES POLICIES AND PRACTICES (1993) 1228-1230. A.J. Van der Walt, *Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings* (1999) 14 SA Publiekreg / Public Law (SAPR/PL) 285-286.

(46) BVerfGE 50, 290, 344. Cf also H.J. PAPIER in GRUNDGESETZ KOMMENTAR (T.Maunz & G. Dürig eds) (1990) vol II par 1-6, par 18; R. WENDT in GRUNDGESETZ KOMMENTAR (M. Sachs ed.) (1996) 485.

(47) Art. 14 GG: *(1) (1) Das Eigentum und das Erbrecht werden gewährleistet. (2) Inhalt und Schranken werden durch die Gesetze bestimmt. (2) (1) Eigentum verpflichtet. (2) Sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen. (3) (1) Eine Enteignung ist nur zum Wohle der Allgemeinheit zulässig. (2) Sie darf nur durch Gesetz oder auf Grund eines Gesetzes erfolgen, das Art und Ausmaß der Entschädigung regelt. (3) Die Entschädigung ist unter gerechter Abwägung der Interessen der Allgemeinheit und der Beteiligten zu bestimmen. (4) Wegen der Höhe der Entschädigung steht im Streitfalle der Rechtsweg vor den ordentlichen Gerichten offen.* The official English translation of this text reads: (I) (1) Property and the right of inheritance shall be guaranteed. (2) Their substance and limits shall be determined by law. (II) (1) Property entails obligations. (2) Its use should also serve the public interest. (III) (1) Expropriation shall only be permissible in the public interest. (2) It may only be ordered by or pursuant to a law which determines the nature and extent of compensation. (3) Compensation shall reflect a fair balance between the public interest and the interests of those affected. (4) In case of dispute regarding the amount of compensation recourse may be had to the ordinary courts. *Press and Information Office of the Federal Government, Foreign Affairs Division* (1994). Numbering of the individual sentences added.

(48) BVerfGE 25, 112, 117; BVerfGE 50, 290, 340; BVerfGE 52, 1, 29.

(49) BVerfGE 58, 137 *(Pflichtexemplar)* ; B. PIEROTH & B. SCHLINK, GRUNDRECHTE (1998), m.n. 934-935.

(50) Eg BVerfGE 24, 367; BVerfGE 42, 263; BVerfGE 58, 300, 339ff.

(51) Eg. the examples from case law mentioned at note 50 above.

(52) BVerfGE 25, 112, 117; BVerfGE 50, 290, 340; BVerfGE 52, 1, 29.

(53) Specifically listed in Art. 14 III 1-3 GG.

(54) Art. 14 III 1 GG expressly stipulates that expropriation is only possible in the public interest. The legislature must, with regard to this question, determine what is meant by "public weal." This involves a consideration of the proportionality principle (*Verhältnismäßigkeit*) and is intimately connected with the constitutionality test. See BVerfGE 24, 367 (*Deichordnung*), 404. Therefore, a *Legalenteignung* will be tested against the question whether or not legislature has defined the public weal correctly. An *Administrativenteignung* will again be tested against the question whether or not the public interest has been served correctly by the executive. B. PIEROTH & B. SCHLINK, GRUNDRECHTE (1998), m.n. 942.

(55) H.J. PAPIER in GRUNDGESETZ KOMMENTAR (T.Maunz & G. Dürig eds) (1990) vol II par 447.

(56) BVerfGE 24, 367 (*Deichordnung*), 405; BVerfGE 74, 264 (*Boxberg*), 283; A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES – A COMPARATIVE ANALYSIS (1999) 129.

(57) *"Man kann finale Grundrechtseinwirkungen, die als solche vom Hoheitsträger als 'Griff' in den grundrechtlichen Bereich gewollt sind, von sonstigen Grundrechtseinwirkungen gleichen Effekts unterschieden, die dann also 'eingriffsgleich' wirken."* P. LERCHE in HANDBUCH DES STAATSRECHTS V (J. Isensee & P. Kirchhof eds.) (1989) m.n. 50.

(58) An infringement is direct if it follows from a state-created objective, if it puts into effect a situation created by the state, or if it would result in a responsibility for the state. BGHZ 92, 34, 41 ff.

(59) I.e., if an individual right holder *(Sonderopfer)* suffers because the general borderlines on the limitation of individual rights have been crossed and the curtailment would be of a unreasonable and unbearable intensity *(hinreichende Intensität).*

(60) F. Schoch, *Die Haftung aus enteignungsgleichem und enteignendem Eingriff* (1990) Juristische Ausbildung Jura 141.

(61) F. Schoch, *Die Haftung aus enteignungsgleichem und enteignendem Eingriff* (1990) Juristische Ausbildung (Jura) 140-141.

(62) B. PIEROTH & B. SCHLINK, GRUNDRECHTE - STAATSRECHT II ED (1991), m.n. 1019a. For further examples, see BGHZ 37, 44 (forest fire resulting from artillery shooting exercises); BGHZ 97, 369 (traffic noise infringing on the rights of landowners); etc.

(63) BVerfGE 24, 367 *(Deichordung)*.

(64) BVerfGE 24, 367, 418; IPSEN in, VERHANDLUNGEN DER TAGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (Von Hippel, Ipsen & Voigt et. al. eds.) (1952) 96 ff.; B. BRYDE in GG KOMMENTAR (I. Von Münch & P. Kunig eds.) (1992) m.n. 87 ff. R. WENDT in GRUNDGESETZ KOMMENTAR (M. Sachs ed.) (1996) m.n. 167. BVerfGE 25, 112; BVerfGE 58, 300; BVerfGE 84, 361.

(65) BVerfGE 47, 268, 287.

(66) B. BRYDE in GG KOMMENTAR (I. Von Münch & P. Kunig eds.) (1992) m.n. 89; B. PIEROTH & B. SCHLINK, GRUNDRECHTE (1998) m.n. 939.

(67) BVerfGE 58, 300.

(68) H. MAURER, ALLGEMEINES VERWALTUNGSRECHT, (11th ed. 1997) par 26 m.n. 88 defines

(69) H. MAURER, ALLGEMEINES VERWALTUNGSRECHT, (11th ed. 1997) Par 26 m.n. 1.

(70) BGHZ 90, 17, 29ff. See H. MAURER, ALLGEMEINES VERWALTUNGSRECHT, (11th ed. 1997) par. 26 m.n. 87 for an analysis of the true basis of the claim.

(71) Cf the discussion of the relevant passages from BVerfGE 58, 300 in H. MAURER, ALLGEMEINES VERWALTUNGSRECHT, (11th ed. 1997) par 26 m.n. 96 ff.

(72) H. MAURER, ALLGEMEINES VERWALTUNGSRECHT, (11th ed. 1997) par 26 m.n. 108 explains: *"Vergleicht man beide Rechtsfiguren, dann zeigt sich, daß es beide Male um Beeinträchtigungen des Eigentums geht, die normalerweise als Inhaltsbeschränkungen entschädigungslos hinzunehmen sind, aber ausnahmsweise zu besonderen und unzumutbaren Belastungen führen und dann einen Ausgleich bzw. eine Entschädigung fordern."*

(73) The idea of financially balancing out an excessive legislative regulation of property in order to avoid unconstitutionality of a specific action, was first raised by the Federal Constitutional Court in 1981 (BVerfGE 58, 137). Since this decision, the idea was developed into an independent concept mainly by the administrative courts and the Federal Court of Justice. Cf BVerwGE 77, 295; BGHZ 102, 350, 359 ff., BVerwGE 80, 184, 191 ff, BGHZ 121, 328, 332 ff etc.

(74) A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES – A COMPARATIVE ANALYSIS (1999) 143.

(75) In this context, the use of so-called *salvatorische Entschädigungsklauseln,* in the sense of provisions affording remuneration for disproportionate exercise of the state's powers rather than compensation for the expropriatory effects of a particular action, is characteristic. Cf Maurer par 26 m.n. 83 and 63.

(76) A.J. Van der Walt, *Compensation for excessive or unfair regulation: A comparative overview of constitutional practice relating to regulatory takings* (1999) 14 SA Publiekreg / Public Law (SAPR/PL) 288.

(77) This statement is questionable as far as equalization payment is envisaged by the legislature and/or administrative organ that will apply the particular regulation, and afforded only where other exceptional measures for the individuals detrimentally affected cannot viably be implemented. See the explanation of H. MAURER, ALLGEMEINES VERWALTUNGSRECHT, (11th ed. 1997) par 26 m.n. 84 ff.

(78) H. MAURER, ALLGEMEINES VERWALTUNGSRECHT, (11th ed. 1997) par 26 m.n. 109 indicates that the only possibility for the continued existence of the idea of *enteignende Eingriff* is an interpretation in terms of which this concept provides for a residual sphere of detriment due to legislative infringement, not covered by the notion of *Ausgleichspflichtige Inhaltsbestimmung*, such as accidental damage *(Zufall- oder Unfallschäden)* .

(79) See B. BRYDE in GG KOMMENTAR (I. Von Münch & P. Kunig eds.) (1992) m.n. 56 ff., 100-108; contra H.J.

PAPIER in GRUNDGESETZ KOMMENTAR (T.Maunz & G. Dürig eds) (1994) m.n. 377, 406 ff., 687 ff. The German Federal Court of Justice is, in terms of Art. 14 III 4 GG, the court of final instance in questions regarding the amount of compensation to be paid. This court is of the opinion that concepts of *enteignende Eingriff* and *enteignungsgleiche Eingriff* should remain intact. BGHZ 90, 17 at 20; BGHZ 91, 20 at 26 ff. See also BGH NVwZ 1986, 76 at 78; H. MAURER, ALLGEMEINES VERWALTUNGSRECHT, (11th ed. 1997) m.n. 87 ff. For an exposition of the different solutions to this discussion, see W.H. Von Heinegg & U.R. Haltern, *Keine Angst vor Art 14 GG!* (1993) Juristische Schulung - Zeitschrift für Studium und Ausbildung (JuS) 215-217.

(80) 1997 11 BCLR 1489 (CC).

(81) Sec. 21 (para.1) of the Insolvency Act: "The additional effect of the sequestration of the separate estate of one of two spouses who are not living apart under a judicial order of separation shall be to vest in the Master, until a trustee has been appointed, and, upon the appointment of a trustee, to vest in him all the property (including property or the proceeds thereof which are in the hands of a sheriff or a messenger under a writ of attachment) of the spouse whose estate has not been sequestrated (hereinafter referred to as the solvent spouse) as if it were property of the sequestrated estate, and to empower the Master or trustee to deal with such property accordingly, but subject to the following provisions of this Sec.." The remaining subsections of Sec. 21 of the Insolvency Act provide for the interests of the solvent spouse to be safeguarded in certain ways. Property of the solvent spouse may be released by the trustee in certain circumstances.

(82) This case was heard in terms of the Interim Constitution, in which Sec. 28 provided a constitutional property guarantee comparable to Sec. 25 of the 1996 Constitution.

(83) Harksen v Lane 1997 11 BCLR 1489 (CC) par. 33 (Zimbabwe): Hewlett v Minister of Finance 1982 (1) SA 490 (ZSC); Davies v Minister of Lands, Agriculture and Water Development 1997 (1) SA 228 (ZSC); Harksen v Lane 1997 11 BCLR 1489 (CC) par. 34 (India): HD Vora v State of Maharashtra 1984 AIR 866 SC, 869.

(84) Harksen v Lane 1997 11 BCLR 1489 (CC) par. 32, 33, 34.

(85) A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES – A COMPARATIVE ANALYSIS (1999) 338.

(86) See A.J. Van der Walt & H. Botha, *Coming to grips with the new constitutional order: critical comments on Harksen v Lane NO* (1998) SA Publiekreg / Public Law (SAPR/PL) 21-22 for a discussion of the authority.

(87) A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES – A COMPARATIVE ANALYSIS (1999) 338-339.

(88) Harksen v Lane 1997 11 BCLR 1489 (CC) par. 35.

(89) See A.J. Van der Walt & H. Botha, *Coming to grips with the new constitutional order: critical comments on Harksen v Lane NO* (1998) SA Publiekreg / Public Law (SAPR/PL) 17-41.

(90) This oversight was due probably to the applicant's heads of argument, which did not raise this issue in the course of the proceedings. Instead, the applicant chose to build her attack only upon averments that the vesting amounted to an expropriation. A.J. VAN DER WALT, CONSTITUTIONAL PROPERTY CLAUSES – A COMPARATIVE ANALYSIS (1999) 337-339.

(91) 2001 (4) SA 1243 (SCA).

(92) At 1245 E.

(93) At 1245 F-H.

(94) At 1246 B-C.

(95) At 1246H-1247 G

(96) At 1248 A-B.

(97) At 1249 E-F.

(98) A quo decision per CONRADIE J 2001 (3) SA 310 (C); Constitutional Court per ACKERMANN J 2002 (7) BCLR

702 (CC).

(99) Sec. 114 of the Customs and Excise Act 91 of 1964.

(100) In order to enforce payment of unpaid customs duties and penalties, the South African Revenue Service (SARS), acting in terms of s 114 of the Customs and Excise Act 91 of 1964, detained certain movable property in the possession (physical control) of two tax debtors, Lauray Manufacturers CC and Airpark Halaal Cold Storage CC. Property is detained on the premises of the debtor, as opposed to it being attached and removed for safekeeping by the creditor. Accordingly, A.J. Van der Walt, *Negating Grotius – The Constitutional Validity of Statutory Security Rights in Favour of the State: First National Bank t/a Wesbank v Commissioner of the South African Revenue Service 2001 (7) BCLR 715 (C)* , (2001) 17 South African Journal of Human Rights (SAJHR) 86-113 indicates that "detaining" the property therefore establishes a statutory fictitious pledge, as opposed to the statutory pledge or lien created by attachment and removal. Lauray was paying off a considerable amount in outstanding duties and penalties in monthly installments. To obtain security for the debt, SARS detained (among others) a vehicle belonging to FNB t/a Wesbank (FNB), who had reserved ownership as security for a credit agreement involved in financing the purchase of the vehicle. Upon the provisional winding up of Lauray, the SARS recovered just a fraction of the debt, and it therefore wanted to sell the detained vehicles to recover part of the outstanding balance. The tax debt of Airpark constituted an outstanding amount of customs duty. As security for this debt, SARS detained two vehicles on the premises of Airpark, both belonging to FNB, in terms of a credit agreement. When Airpark defaulted in paying off this debt in monthly installments as agreed, SARS attached the vehicles and removed them to a government warehouse for safekeeping prior to their intended sale in execution.

(101) Apart from the constitutional challenge to s 114 of the Customs and Excise Act on the basis of the constitutional property clause, the provision was also challenged on the basis that the administrative collection of customs duty, without a court pronouncing on liability, was arguably in conflict with s 34 of the interim Constitution or s 22 of the 1996 Constitution. In the Constitutional Court it was pointed out (par [25]) that the 1996 Constitution is applicable to both aspects of the dispute.

(102) Sec. 25(1) of the South African Constitution protects property by providing that no one may be deprived of property except in terms of law of general application, and that no law may permit arbitrary deprivation of property. Sec. 25(2) deals explicitly with expropriation of property, providing that expropriation may only occur in terms of law of general application (a) for a public purpose or in the public interest; and (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(103) Par 73 of the decision: "If the deprivation is not arbitrary, the Sec. 25(1) right is not limited and the question of justification under Sec. 36 does not arise".

(104) Par 74 - 103.

(105) Cf par 102.

(106) See par [64]-[73], and par [105]-[117].

(107) See par [114].

(108) Park-Ross v Director: Office for Serious Economic Offences 1995 2 SA 148 (C), 160F-H.

(109) J. Murphy, *Property rights and judicial restraint: a reply to Chaskalson* (1994) 10 South African Journal for Human Rights (SAJHR) 386.

(110) R. ZIMMERMANN & D. VISSER in SOUTHERN CROSS (R. Zimmermann & D. Visser eds.) (1996) 24-28.

(111) E. DE WET, CONSTITUTIONAL ENFORCEABILITY OF ECONOMIC AND SOCIAL RIGHTS (1996) 133.

(112) J. Murphy, *Property rights and judicial restraint: a reply to Chaskalson* (1994) 10 South African Journal for Human Rights (SAJHR) 388.

(113) D.V. Cowen, *New Patterns of Landownership - The Transformation of the Concept of Plenae in Re Potestas* (Unpublished paper, 1984); J.M Pienaar, *Nuwe Sakeregtelike Ontwikkelings op die Gebied van Grondhervorming* (Inaugural address, University of Stellenbosch) (1997); A.J. Van der Walt, *Towards the Development of Post-Apartheid Land Law: An Exploratory Survey* (1990) De Iure, 1-45; A.J. Van der Walt, *Tradition on Trial: A Critical*

Analysis of the Civil Law Tradition in South African Property Law (1995) South African Journal on Human Rights (SAJHR) 169-206; G. Van Maanen, *Ownership as a Constitutional Right in South Africa - Articles 14 & !5 of the Grundgesetz: The German Experience* (1993) Recht & Kritiek, 74-95; C. Lewis, *The Modern Concept of Ownership of Land* (1985) Acta Juridica, 241-266; A.J. Van der Walt, *Gedagtes oor die Herkoms en Ontwikkeling van die Suid-Afrikaanse Eiendomsbegrip* (1988) De Jure, 16-35, 306-325; A.J. VAN DER WALT in RIGHTS AND CONSTITUTIONALISM (D. Van Wyk & J. Dugard et. al. eds.) (1996); I. Kroeze, *Between Conceptualism and Constitutionalism* (Unpublished paper, 1997).