31

Property
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The property clause of the interim Constitution (IC), s 28 of Act 200 of 1993, reads as follows:

‘(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.’

In the final Constitution of the Republic of South Africa, Act 108 of 1996 (FC) the property clause reads as follows:

‘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 restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

(9) Parliament must enact the legislation referred to in subsection (6).’
31.1 INTRODUCTION: A FRAMEWORK FOR THE UNDERSTANDING OF THE PROPERTY CLAUSES

The present distribution of property rights in South Africa is the product of a history of discriminatory practices which is well known. For large parts of this century the Group Areas Acts and Native Land Acts effectively prevented the majority of our population from acquiring, holding or disposing of immovable property. At the same time the political exclusion of the black population meant that the power and resources of the South African state tended to be used for the benefit of white South Africa.

Section 28 of the interim Constitution was drafted in negotiations between the African National Congress (ANC) and the National Party, two parties who had conflicting concerns relating to the constitutional protection of property in the context of this history. The ANC hoped to insulate future legislative programmes addressing the disparities of wealth in society from constitutional scrutiny in the name of property rights. The National Party sought to ensure that the Constitution could be used to protect the property of white South Africans from these legislative programmes. Section 28 is thus best understood as the product of a political compromise between the ANC and the National Party, a compromise in terms of which a right to property was included in IC Chapter 3, but the extent of the protection that it gave to existing property rights was intended to be circumscribed.

Section 25 of the final Constitution is a product of the same conflicting approaches to the constitutional protection of property. A strong anti-inclusion lobby had a significant impact on the framing of the new clause, which makes it abundantly clear that the preservation of the status quo in property holding is not its purpose. The clause is, in essence, a compromise achieved through negotiations between the ANC and its allies, and the Democratic and the National Parties.

31.2 THE MEANING OF ‘PROPERTY’

(a) The South African legal tradition

(i) Background

In the debates about the property clause in the Bill of Rights there has been a concentration on the question of the right to land and, in particular, the redistribution of land as an agricultural resource. This is not surprising in view of the systematic deprivation of the majority of South Africans of the right to own, and indeed to live and work, on land throughout the country over the twentieth century, and particularly in the last four decades of apartheid government. The redistribution of land to black South Africans is a pressing

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2 Native Land Act 27 of 1913 and Development Trust and Land Act 18 of 1936. Both these statutes and the Group Areas Act were repealed by the Abolition of Racially Based Land Measures Act 108 of 1991.
3 The history of these negotiations is described in detail by Matthew Chaskalson ‘Stumbling Towards Section 28: Negotiations over Property Rights at the Multiparty Talks’ (1995) 11 SAJHR 222.
issue and it has received considerable, and most certainly deserved, attention.\(^1\) But it is
important to consider that there are many other important sources of wealth — mineral rights,
shares in both public and private companies, and salaries, for example — and that these, too,
undoubtedly constitute property.\(^2\) Thus FC 25(4)(a) expressly states that ‘property is not
limited to land’.

On a jurisprudential level the South African law, following the Roman-Dutch legal
tradition, has had little difficulty in ascribing a meaning to the word ‘property’. On its own
the word generally designates the object of a right: in lay circles it denotes, more often than
not, immovable property — land and the structures attaching to land. To lawyers it denotes
both movable and immovable things. ‘Property law’, on the other hand, usually denotes to
lawyers the body of rules governing rights, real rights (in particular, ownership and posses-
sion), in things. The equivalent words in Afrikaans, ‘sake’ (things), and ‘sakereg’ (the law of
things), are even clearer, provided that one understands what a thing is.\(^3\)

(ii) The objects of rights

What constitutes the object of a right, or what is a ‘thing’? Although there may be some
difficulty in reaching agreement about a definition of a thing, there is general agreement that
tangible, or perceptible, objects of some value fall into the category of things. For some,
economic value, which is largely a function of scarcity, is essential to confer the legal status
of ‘thingness’ on an object. For others, sentimental value, or usefulness to persons, is
sufficient.\(^4\) A more contentious issue is the inclusion of incorporeals in the category of
things. Can a right, such as a share in a company, a mineral right or a personal right
arising from contract or delict, be the object of another right, such as ownership?

Certainly in Roman-Dutch law incorporeals were regarded as things, and South African
case law and even statutes, such as the Deeds Registries Act 47 of 1937, have had no difficulty
in regarding rights as objects of other rights.\(^5\) (Whether the phrasing of IC s 28 affects this

\(^1\) See the bibliography in AJ van der Walt (ed) Land Reform and the Future of Landownership in South Africa
(1991) ix, and the contributions in that volume. See also IC ss 8(3)(b), 121, 122 and 123, and FC s 25(5), (6), (7),
and (9), which deal with land. These are discussed above, Kentridge ‘Equality’ § 14.7(a) and below, Eisenberg
‘Land Rights’ ch 40.

\(^2\) See in this regard the view expressed over fifty years ago by Francis S Philbrick ‘Changing Conceptions of
Property in Law’ (1938) 86 University of Pennsylvania LR 691 at 692: ‘As a matter of fact, the total value under
our law today of proprietary rights which have no material object is probably enormously greater than the value of
such rights in all land and tangible chattels. This modern incorporeal property includes, p articularly, promissory
notes, bills of exchange, patent rights, and shares of corporate stock.’

\(^3\) Note, however, that in the Afrikaans version of s 28 the heading is ‘Eiendom’ and the section refers to ‘regte
in eiendom’.


\(^5\) The principal area in which this issue has arisen is in determining whether a cession in securitatem debiti can
be construed as a pledge of an incorporeal. The Appellate Division accepted this construction in National Bank of
South Africa Ltd v Cohen’s Trustee 1911 AD 235 and, after considerable academic debate, has reaffirmed it in a
number of cases, most recently Incledon (Welkom) (Pty) Ltd v Qwaqwa Development Corporation Ltd 1990 (4) SA
approach — can one have rights to rights in rights? — will be discussed below.) Some jurists regard the principle that one can have rights in rights as theoretically unsound, but their views have not yet been accepted by the courts and it is unlikely that a principle so firmly entrenched in our common and statute law could be easily undone. The inclusion of incorporeals in the category of resources which can be the objects of rights, and therefore constitute property, is in accordance also with trends elsewhere.

(iii) Comparative approach

In Anglo-American jurisprudence there is much debate over the meaning of the term ‘property’ and as to its coherence as a legal concept. The debate in the United States has arisen very largely because of the constitutional protection afforded to property by the Fifth Amendment to the American Constitution, which provides that no person shall be deprived of property without due process of law and that private property shall not be taken for public use without just compensation. Whereas South African law (and this would be true, too, of Continental civil systems with their roots also embedded firmly in Roman principle) has made a clear distinction between rights and the objects of those rights, Anglo-American law has taken a different path.

C B MacPherson, for example, has argued that the use of the term ‘property’ to designate things, or to designate exclusive, individual rights to private property, is inappropriate. Property, he maintains, is a right, not a thing, and we must distinguish between common property, private property, and state property. ‘As soon as any society,’ says MacPherson, ‘by custom or convention or law, makes a distinction between property and mere physical possession it has in effect defined property as a right . . . Property is a claim that will be enforced by society or the state, by custom or convention or law’.

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1 See below, § 31.3. The question does not arise in relation to FC s 25, which refers only to property, not to rights in property.
4 Again, following Roman and Roman-Dutch law, we distinguish between property in which individuals can have private rights (res in patrimonio) and things in which they cannot (res extra patrimonium) — a category including things to which every person in the state has a right (res communes) and things which are owned by the state, but to which all citizens have access (res publicae). For a comprehensive discussion of the history of the classification of things and the current status of South African law in this regard, see J D van der Vyver ‘The Étatisation of Public Property’ in D P Visser (ed) Essays on the History of Law (1989).
6 See contra Thomas C Grey ‘The Disintegration of Property’ in J Roland Pennock & John W Chapman (eds) NOMOS XXII: Property (1980 Yearbook of the American Society for Political and Legal Philosophy) at 69. Grey takes the view that the manifold use of the term ‘property’ is an indication that property no longer exists as a meaningful legal concept.
The ‘dephysicalization’ of property is not only a development of legal thinking: it results from changes in the economic base of society, advanced technology and, as mentioned above, in America, from the constitutional protection afforded to property but not expressly to other economic rights. The move to give rights the status of property has been, in large measure, a move to give the holders of resources other than perceptible corporeals protection from arbitrary governmental interference.

Foremost among the American writers who argued that the ‘new rights’ spawned by twentieth-century economic development and embodied in modern legal categories are an important aspect of wealth, and thus constitute property, is Charles Reich. He coined the term ‘the new property’. In a seminal article he suggested that to the extent that the state (in America) increasingly participates in the processes of production and consumption, and to the extent that social welfare and security have become a predominant part of modern life, rights against arbitrary administrative action should be given the same constitutional protection as are rights to other forms of property. Reich showed that the conceptual framework then prevailing failed to offer adequate protection against arbitrary action — cancellation or seizure of government largesse — by government. His work had a significant impact on the interpretation of the Fifth Amendment, so that many rights not hitherto conceived as property — such as the right to a driving licence, to tenure in employment, and to high-school education — were afforded protection under the Fifth Amendment.

(b) Attributing a meaning to ‘property’

The basis for treating rights as property is clearly present in South African law and it is thus easy to see how the American development will influence the South African courts in extending constitutional protection to rights other than those traditionally conceived to be real. Given the constitutional protection offered by IC s 28 and FC s 25, and on the

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1 ‘The New Property’ (1964) 73 Yale LJ 733. It is one of the most influential articles published: see Fred S Shapiro ‘The Most-Cited Articles from the Yale Law Journal’ (1991) 100 Yale LJ 1449.


3 See also Chaskalson ‘The Problem with Property’ 406–7 on the constitutional protection afforded to state employment in the West Indies. For an overview of the approach to the meaning of property in jurisdictions other than the United States, particularly in India and in Germany, see Chaskalson ‘The Problem with Property’ and (1994) 10 SAJHR 385; and A J van der Walt ‘Notes on the Interpretation of the Property Clause in the New Constitution’ (1994) 57 THRHR 181.

4 See Matthew Chaskalson ‘The Property Clause: Section 28 of the Constitution’ (1994) 10 SAJHR 131 at 132–3. The most recent dictum indicating the current approach of the Appellate Division is that of Hoexter JA in Administrator, Natal, & another v Sibiya & another 1992 (4) SA 532 (A) at 539A–B: ‘The word “property” would ordinarily tend to connote something which is the subject [sic] of ownership. In my view, however, the concept of “property” to which the audi alteram partem rule relates is wide enough to comprehend economic loss consequent upon the dismissal of a public sector employee.’ See also Transkei Public Servants Association v Government of the Republic of South Africa & others 1995 (9) BCLR 1235 (Tks), in which Pickering J held that a right to a state housing subsidy was property protected by s 28; Chairman of the Public Service Commission & others v Zimbabwe Teachers Association & others 1997 (1) SA 209 (ZS), 1996 (9) BCLR 1189 (ZS), where the court treated a public servant’s bonus as property for the purposes of s 16 of the Zimbabwean Constitution; and A J van der Walt ‘Notes on the Interpretation of the Property Clause’ 193.

[Revision Service 2, 1998]
assumption that it is crucial to limit the embrace of property so that economic development
is not strangled, and the rights of the apartheid era are not entrenched where there is no reason,
as a matter of public policy or morality, for their protection, while at the same time
acknowledging the need to create or recognize new forms of property, it will be essential to
apply a criterion which both restricts and augments the meaning and ambit of property.1

The property clauses contain no feature which defines property,2 and it may be that all
things conceived to be property in accordance with the tenets of Roman-Dutch law will be
afforded protection, while the 'new property' might not. That would be retrogressive. It would
be far better if courts were to fashion an approach that accords with changing conceptions
of policy and developments in technology. Thus, for example, rather than assume that the
Roman classification of things as being susceptible to private rights or else beyond the
patrimony of individuals should remain static, the courts should ask whether, as a matter of
policy, prevailing morality and, of course, as a matter of physical possibility, a resource
should be ‘propertized’.3

31.3 THE INTERIM CONSTITUTION: RIGHTS IN PROPERTY
The origin of the phrase ‘rights in property’ in the clause protecting property is far from clear.
Presumably the phrase was used to ensure that ‘property’ was not equated with ownership,
so that other rights would also be protected,4 but this does not of course appear from the
clause itself. And the Afrikaans term in s 28 — ‘eiendom’ — certainly does not assist in this
interpretation. On a first reading it appears that the phrase refers only to real, as opposed to
personal, rights. If this is so, then the traditional real rights such as ownership, mortgage,
pledge (in respect of movable things), servitudes, water rights, mineral rights, liens and so
on will be protected under s 28.

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1 See Chaskalson ‘The Problem with Property’ 407–8 on the problems that have arisen elsewhere as a result
of giving too wide an interpretation to ‘property’. But see contra Murphy ‘Property Rights and Judicial Restraint:
A Reply to Chaskalson’ (1994) 5 SAJHR 385 esp at 388–91 and Carole Lewis ‘The Right to Private Property in a
2 As pointed out above, FC s 25(4)(b)
states that property is not limited to land, but does not go any further in
setting out the meaning of property.
3 Should air, for example, continue to be regarded as res communis and not susceptible to ownership when it is
possible to capture and control it? Should air space, currently owned by the owner of the land beneath it, be viewed
differently in the twentieth century from the way it was regarded in the third century BC or AD, when it could not be
exploited in the same way as it is now? Should land, given the growth in the population and its relative scarcity,
be the object of individual ownership? Should rights to employment, pensions, welfare benefits and the
like be regarded as property such that they warrant constitutional protection? These and other questions should
be answered on the basis of a clearly defined test rather than by looking solely to traditional classifications, or on
the basis of ad hoc decisions. As to the framing of such a test, see Kevin Gray ‘Property in Thin Air’ (1991) 50
Cambridge LJ 252 and Carole Lewis ‘The Right to Private Property in a New Political Dispensation in South Africa’
(1992) 8 SAJHR 389.
4 See in this regard Lourens du Plessis & Hugh Corder Understanding South Africa’s Transitional Bill of Rights
(1994) 56. The authors, both on the technical committee responsible for the drafting of Chapter 3, explain that the
phrase ‘rights in property’ was used to appease the concerns of traditional leaders that the Western notion of
individual ownership does not cater for communal ownership.
But does the formulation exclude rights that are not traditionally recognized as real — such as the ‘rights’ of occupation of labour-tenants on farms, or ‘rights’ of squatters to undisturbed possession of their shacks? A clause framed along the lines of most property-protection provisions — where reference is made simply to protection of the right to property — would have allowed for arguments compelling protection of such rights as being ‘property’ within the broad meaning discussed above. ‘Rights in property’ may have a more limited ambit.¹

Although it has up till now been clear in South Africa that incorporeals can be the objects of rights and are regarded as property,² is this changed by the phrasing of s 28, which allows for the right to acquire and hold rights in property? Can one have a right to a right in a right? The answer should clearly be yes; but the awkward wording may leave room for the argument that only corporeals are protected. Again, comparative material, particularly from the United States, will be useful in rebutting this argument.³

31.4 THE POSITIVE GUARANTEE OF PROPERTY IN THE INTERIM CONSTITUTION: SECTION 28(1)

(a) The right to rights in property

The specific proprietary rights — rights of property — thus far discussed are not to be confused with ‘the right to property’ — that is, the notion of a general right to property vested in all people subject to a particular legal system.

What do provisions in constitutions and bills of rights mean when they refer to a ‘right to property’ or, in the case of s 28, a right to acquire and hold rights in property? A general ‘right to property’ conceals a variety of different claims which can be divided into four different, broad categories.

The first category includes claims to immunity against expropriation — claims which are made explicit in some Constitutions, notably that of the United States of America. And certainly s 28 also embodies such a claim. A claim of this kind is dependent on other claims about the right to property, however, and is certainly not the sole claim made by any provision in a constitution. As Jeremy Waldron states, the claim merely ‘adds a particular immunity to what is otherwise a pre-existing bundle of property rights’. Without some pre-existing claim (right) there would be no purpose in a claim to immunity against expropriation.

The second broad category embraces claims and theories concerning ‘natural’ property rights. In essence, on such a theory, a right of property stems from the fact that a person who first gains control of an object, and labours on it, creates a relationship with it such that, from a moral point of view, it would be wrong to take it away from her. The Lockean theory of a

¹ See contra A J van der Walt ‘Notes on the Interpretation of the Property Clause’ 193.
² See above, § 31.2.
right to property arising from one’s labour would fall into this class. Such rights are natural in the sense that the force of them can be recognized as valid, quite apart from the provisions of the prevailing legal system, and also in the sense that the relationship from which the rights, and corresponding duties, stem, are rooted in human nature. We do not suggest that s 28 embodies such a claim.

The third possible claim is that of eligibility to hold property. This claim is embodied in art 17 of the Universal Declaration of Human Rights: ‘Everyone has the right to own property alone as well as in the association of others.’ It is a right not to be excluded from the class of property-holders, but no more than that. Such a claim does not guarantee that anyone will become a property-holder. Section 28 also guarantees eligibility to become a right-holder — but does not give effect to the fourth claim embodied in the concept of a right to property, which is that of a general right to have private property.

The argument that all people have a right to claim property — that is delivery, presumably from the state — is often premised on the view that ownership of property has a moralizing effect on the owner — it promotes responsibility, self-reliance, freedom and control over at least some resources. This is also the claim that the right to property is a human right which is enforceable against the state in the same way that the right to free speech might be.

But it is clear that s 28 was not intended to embody a general claim to property: it is arguable whether such a right could ever be enforceable by the courts. Because of the scarcity of resources a court would be reluctant to compel the state (which guarantees the right) to provide property and thus fulfil its obligation to the citizen: the obligation is practically impossible to fulfil. The objection to a claim of this nature is exemplified in the arguments raised against the inclusion of rights to housing, education and health-care — the so-called economic, or second-generation rights — in a bill of rights.

One answer to this argument is that the right to property should be viewed as a negative right in that the state does not guarantee that all persons will have claims against the state for delivery: but the right imposes on the legislator an obligation not to pass laws which remove or curtail the right. Thus the legislator should not be permitted to enact laws which have the effect of making people homeless or propertyless. The right to property would be respected by the imposition of limitations on the powers of the legislature. And the exercise of police powers in respect of property could be limited by such a construction.

(b) Section 28(2) and the meaning of s 28(1)

The interpretation of the ‘right to acquire and hold rights in property’ in s 28(1) raises pertinently also the meaning of s 28(2) and its effect on the meaning of s 28(1). As pointed

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1 See in this regard Waldron The Right to Private Property 16ff and Lewis ‘The Right to Private Property in a New Political Dispensation’ 429–30.
4 Section 28(2) is discussed in greater depth below, § 31.4(b).
out by A J van der Walt, s 28 mirrors art 14 of the German Basic Law in that it provides both a positive (s 28(1)) and a negative (s 28(2)) guarantee of property rights. Van der Walt suggests that in order to make sense of this duplicated guarantee, the German Constitutional Court has decided that the positive guarantee should be seen not as a guarantee of individual rights but of the institution of private ownership. Thus the positive guarantee protects the legal institution, while the negative guarantee protects the specific rights of individual right-holders.

It is possible to read s 28 in a similar way, but one which takes into account the South African history alluded to above, § 31.1. If s 28 addresses a past in which the majority of people were deprived of access to property, then it is arguable that s 28(1) is a guarantee of general access to the legal institution of property. Section 28(1) would then be directed not against state action which limits individual rights to acquire, hold or dispose of rights in property, but rather state action which threatens to exclude people or groups of people from the possibility — eligibility — of acquiring, holding or disposing of such rights. The difference between this approach and the one that suggests that s 28(1) can be construed as a guarantee that the legislature will not enact laws that have the effect of making people propertyless depends on the approach that is taken to eligibility. If eligibility is viewed simply as formal legal eligibility, s 28(1) does no more than protect formal access to the institution of property: it does not promote a general right to property. On the other hand, it is possible to read s 28(1) as protecting substantive eligibility to hold, to acquire and to dispose of rights in property. On such a reading s 28(1) not only requires the legislature to refrain from interfering with formal eligibility to acquire, to hold or to dispose of rights in property. It also subjects to judicial scrutiny state action which has the practical effect of denying people access to property, so that those who are at present propertyless are not made worse off.

The discussion above has proceeded on the basis that s 28(1) protects access to the institution of property and is not designed to protect the rights of individual property owners. It is of course possible to interpret s 28(1) as a guarantee of individual rights to acquire, hold and dispose of rights in property. However, this interpretation does not sit easily with a notion of the Constitution as a bridge between our unjust and conflict-ridden past and our desired democratic future based on peaceful coexistence. A clause which guaranteed all existing rights in property would entrench privilege built on apartheid and would inevitably drag the conflict of the past with it into the future. Moreover, an interpretation of s 28(1) as a guarantee of individual rights in property struggles to account for the presence of s 28(2).

1 ‘Notes on the Interpretation of the Property Clause’ 194. See also Van der Walt ‘Property, Land, Environmental Rights’ in Dawid van Wyk, John Dugard, Bertus de Villiers & Dennis Davis (eds) Rights and Constitutionalism (1994) 489ff.
2 Van der Walt argues strongly against the adoption of such an interpretation of s 28(1). We agree that it would be wrong simply to transplant the German interpretation of the positive guarantee of property rights into South African constitutional law. German constitutional law addresses a specific history and a social context which differs from our own. Nevertheless, we argue that it is possible to draw on the German approach to the dual guarantee of property rights to give a meaning to s 28(1) that is conditioned by South African history.
3 This would appear to be the position of Murphy ‘Interpreting the Property Clause in the Constitution Act of 1993’ (1995) 10 SA Public Law 107.
4 See the discussion of s 28(2) below, § 31.5.
If any limitation of an individual right to acquire, hold or dispose of property infringes the content of the right protected by s 28(1), s 28(2) appears to be superfluous. It is difficult to conceive of a deprivation of rights in property which would not limit some right to acquire, hold or dispose of rights in property. If such a limitation infringed the protected content of s 28(1), it would by virtue of s 33(1) be permissible only if effected under authority of a law of general application. To state in s 28(2) that it would not be permitted ‘otherwise than in accordance with a law’ would then be redundant.¹

(c) Section 25 of the final Constitution: the contrast
Section 25 provides simply that no one may be deprived of property. It does not embody any positive right to property. Nor does it guarantee the institution of property. It does not even provide for formal eligibility to acquire and to hold property, let alone substantive eligibility. This might at first blush give cause for concern: can a country which did not recognize the right of all people to acquire property, and which prevented people of particular races from holding immovable property, at least in certain areas, afford not to guarantee at least eligibility to acquire and to hold property? The answer is to be found in FC s 9 — the equality clause — which should ensure that there is no discrimination in property holding on grounds of race, or any other ground.²

31.5 Protection from deprivation of property

(a) Deprivation of property and the administrative justice clauses
IC s 28(2) provides that no one shall be deprived of property rights ‘otherwise than in accordance with a law’. FC s 25(1) states that no one ‘may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property’. Both sections must be read in the broader context of the Bill of Rights. Particularly important in this regard are the administrative justice clauses.³ The right to administrative

¹ Murphy ‘Interpreting the Property Clause’ 123 suggests that s 28(2) is included in s 28 to shift the onus in the limitations clause inquiry from the government to the property owner: ‘The incorporation of specific limitations in certain clauses, it would seem, is intended to affect the onus of proof. Under the general circumscription clause the government is expected to show that the limitation is reasonable and justifiable. However, where there is an internal specific circumscription of the right in question, it may be argued, once the government meets the requirements of the internal circumscriptions the onus shifts to the applicant individual to show that the government interference is unreasonable and unjustifiable. Thus, in regard to s 28, once the government shows the deprivation is in accordance with law, or that the expropriation was for a public purpose and agreed, or just and equitable compensation has been paid, the limitation is presumed to be reasonable and justifiable unless and until the applicant establishes to the contrary.’ It is hard to see why this conclusion should follow from the wording of s 28. If s 28(2) and 28(3) are to be read as limiting or circumscribing s 28(1), they would define the content of the right protected by s 28. Thus state action that fell within the bounds of s 28(2) and s 28(3) would not infringe a protected right and there would be no need to proceed to the limitations enquiry under s 33(1).

² FC s 9(1) guarantees equality before the law, and equal benefit of and treatment by the law. FC s 9(3) lists the grounds of unfair discrimination, but makes it clear that the list is not exclusive. See further above, Kentridge ‘Equality’ ch 14.

³ IC s 24 and FC s 33.
justice is discussed elsewhere in this volume. Its significance for present purposes is that an exercise of administrative power which has the effect of depriving a person of property, even if it is permitted by IC s 28(1) or FC s 25(1), is not valid unless it satisfies the due process requirements of the relevant administrative justice clause. Thus administrative deprivations of property must be procedurally fair and must be substantively justifiable in terms of the reasons furnished by the administrator to the person whose rights have been affected. As most deprivations of property have, in South Africa, been effected by the exercise of administrative power, the administrative justice clauses may well turn out to be as important to the constitutional protection of property as the property clauses are.

(b) Non-administrative deprivations of property

(i) Section 28(2) of the interim Constitution: deprivation in accordance with a law

There are of course significant deprivations of rights in property which are effected directly by legislation and not by the exercise of delegated administrative power. What effect does s 28(2) have in these cases? In Park-Ross v Director: Office for Serious Economic Offences Tebut J seemed to rule out any inquiry under s 28(2) into the substantive merits of a law which authorized deprivation of rights in property. This conclusion is supported by several judgments in foreign jurisdictions. The Privy Council interpreted the similar art 13(1) in the Malaysian Constitution to mean that the only constitutional requirement for the deprivation of property is that it takes place in accordance with validly enacted legislation. A similar decision was reached by the Supreme Court of Canada in cases involving the property clause in the statutory bill of rights which preceded Canada’s Charter of Fundamental Rights and Freedoms. Following the European Court of Human Rights, our courts may well interpret s 28(2) to have a wider scope. The European Court has held that the rule of law requires that provisions of legislation must be adequately accessible and sufficiently precise to enable people to regulate their affairs in accordance with the law. For similar reasons the rule of law does not recognize the validity of legislation with retrospective effect.

1 See above, Klaaren ‘Administrative Justice’ ch 25.
2 IC s 24(b), FC s 33 read with clause 23(2)(b) of Schedule 6.
3 IC s 24(d), FC s 33 read with clause 23(2)(b) of Schedule 6.
4 1995 (2) SA 148 (C) at 168G–I: ‘Section 28, while it does provide that “no deprivation of any rights in property shall be permitted”, goes on to specifically say that such deprivation may occur “in accordance with a law”. It is obvious, therefore, that there may be a seizure of property pursuant to a search provided that it is permissible in accordance with a law. Section 6 of the [Serious Economic Offences] Act would be such a law. I do not think therefore that s 28 of the Constitution can avail applicants in their assault on s 6 of the Act.’ The scope of the inquiry under s 28(2) was expressly left open by the Constitutional Court in Harken v Lane NO & others 1997 (11) BCLR 1489 (CC) at paras 31 fn 17 (Goldstone J) and 84 (O’Regan J).
5 See the discussion of art 13 of the Malaysian Constitution in Government of Malaysia v Selangor Pilot Association [1978] AC 337 (PC) at 348A. Article 13 provides: ‘(1) No person shall be deprived of property save in accordance with law. (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.’
6 See, for example, National Capital Commission v Lapointe et al (1972) 29 DLR (3rd) 376.
7 Lithgow & others v United Kingdom (1986) 8 EHRR 329, § 110.
It is possible to argue that s 28(2) should be read as a general due process clause which would allow substantive due process review of any legislation interfering with property rights. Under substantive due process review the state must justify the objects of legislation, although the courts tend to defer here to judgment of the legislature. The state must also show that there is a reasonable relationship between the means employed by legislation and the purpose for which these means are employed. Substantive due process protection of property rights has an inauspicious history. It is most closely associated with the ‘Lochner’ period of US legal history, when a conservative US Supreme Court invoked the doctrine of substantive due process to strike down a wide range of industrial and social welfare legislation with which it did not agree. This period culminated in a constitutional crisis over Franklin Roosevelt’s New Deal. In Roosevelt’s first term of office the Lochnerist Supreme Court invalidated important pieces of New Deal legislation. When Roosevelt was re-elected in 1936 with overwhelming popular support he decided to tackle the court head on. Shortly after his re-election he presented draft legislation which would enable him to make six new appointments to pack the Supreme Court. This legislation was never enacted, but the court capitulated when faced with its prospect. In 1937 the line of Lochnerist decisions was reversed in West Coast Hotel v Parrish and substantive due process was never again invoked to frustrate New Deal legislation. That the application of substantive due process review precipitated the most significant constitutional crisis in the United States since the Civil War is not surprising.

There is an argument that, in the absence of clear constitutional authority, courts lack the institutional competence and the political legitimacy to pass judgment on the means and purposes of the legislature. For this reason courts ought not to read into s 28(2) any licence to conduct a substantive inquiry into the merits of legislation which effects a deprivation of property rights. Of course, this view presupposes that s 28(1) does not confer any substantive protection to individual property owners.

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1 See Murphy ‘The Interpretation of the Property Clause’. Of course, if s 28(1) is interpreted as a guarantee of all individual rights to hold, acquire and dispose of property, the ‘law’ contemplated by s 28(2) would have to satisfy the requirements of the limitations clause, s 33(1) and the inquiry under s 33(1) would cover a due process inquiry.


3 The period takes its name from Lochner v New York 198 US 45, 25 SCt 539 (1905), one of the founding cases of substantive due process protection of property rights.

4 300 US 379, 57 SCt 578 (1937).

5 The history of the New Deal crisis is discussed in some detail in Sutherland Constitutionalism in America (1965) 481–501 and in Pfeffer This Honourable Court (1965) 295–320.

6 This point was made emphatically by Justice Holmes in his series of dissents during the Lochner era. See for example Lochner v New York 198 US 45 at 75–6, 25 SCt 539 (1905) and Truax v Corrigan 257 US 312 at 342, 42 SCt 124 (1921). For examples of later decisions of the US Supreme Court which vindicated Holmes, see Williamson v Lee Optical of Oklahoma, Inc Co 348 US 438, 75 SCt 461 (1955); United States v Carolene Products Co 348 US 483, 58 SCt 778 (1955); Day-Brite Lighting Inc v Missouri 342 US 421, 72 SCt 405 (1952).

7 See S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at paras 42–3. See also Davis, Chaskalson & De Waal ‘Democracy and Constitutionalism: The Role of Constitutional Interpretation’ in Van Wyk et al Rights and Constitutionalism (1994) 1–131. Since West Coast Hotel v Parrish 300 US 379, 57 SCt 461 (1937) the US Supreme Court appears to have accepted this principle only partially. Thus in Ferguson v Skrupa 372 US 726, 83 SCt 1028 (1963) the Supreme Court rejected a challenge to a Kansas law preventing persons other than attorneys from engaging in the business of debt adjustment and advised the plaintiff (at 732) that arguments about the merits and demerits of debt adjustment ‘are properly addressed to the legislature, not to us’.

[Continued on p 31–13]
Section 25(1) of the final Constitution: non-arbitrary deprivation in accordance with law of general application

FC s 25(1) differs from IC s 28(1) in that it permits deprivation of property only in terms of law of general application, and prohibits all arbitrary deprivation of property whether such deprivations are effected by law or administrative action. The significance of these differences is now considered.

(aa) Law of general application

The term 'law of general application' is found in the limitation clause of the Bill of Rights and its meaning is discussed in the 'Limitation' chapter above. In the context of s 25(1) the term is designed to protect individuals from being deprived of their property by bills of attainder or other laws which single them out for discriminatory treatment.

(bb) Arbitrary deprivation of property

Arbitrary deprivations of property infringe s 25(1). An arbitrary deprivation would be one which was dependent simply on the will of the party effecting the deprivation. Section 25(1) thus prevents the capricious exercise of discretionary power to deprive people of property. Although Parliament and the provincial legislatures have general constitutional authority to enact laws, they cannot make laws which capriciously interfere with property rights or which authorize such interference by executive organs of state.

The scope of a prohibition against arbitrariness in legislation dealing with economic issues was considered by the Constitutional Court in S v Lawrence; S v Negal; S v Solberg. The court stated that legislative measures are arbitrary when they bear no rational relationship to the legislative goal they are intended to achieve. In so doing the court equated a ‘non-arbitrary’ standard of review with the ‘rationality review’ standard of minimal scrutiny in United States equality law. It emphasized that the prohibition against arbitrariness did not

Even with the emergence in the 1980s and 1990s of a court that aggressively protects the interests of private property owners against the state there has not been a single Supreme Court judgment which has invoked the doctrine of substantive due process to strike down a law infringing property rights on the grounds that the objects of the legislature were unacceptable. There have, however, been several cases in which legislation has been struck down as an unconstitutional violation of substantive due process in that the means that it employs are not sufficiently related to its objects to justify interference with property rights. See, for example, Moore v City of East Cleveland, Ohio 431 US 494 (1976) and Nollan v California Coastal Commission 483 US 825, 107 SCt 3141 (1987).

1 See above, Woolman ‘Limitation’ § 12.5. It is submitted that there is no difference between the meaning of ‘law of general application’ in FC s 25(1) and its meaning in s 36(1), the limitations clause.

2 The relationship between the limitation embodied in the prohibition against arbitrary deprivation and the limitations imposed by s 36(1) is discussed below, § 31.10(b).

3 See for example Attorney General of Lesotho & another v Swissbourgh Diamond Mines (Pty) Ltd & others 1997 (8) BCLR 1122 (LeCA), where the Court of Appeal of Lesotho set aside a military decree which arbitrarily expropriated the respondent’s mining leases. At 1129C–D Mahomed P stated the following: ‘All of these premises [of the rule of law] appear fundamentally to be invaded by the Revocation Order. It invades the protection of property without compensation and without any reason asserted to support such invasion.’

4 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC). Although the case concerned IC’s 26 (the right to economic activity), the discussion of issues of arbitrariness in the judgment has obvious implications for s 25(1).

5 See the discussion of minimal scrutiny above, Kentridge ‘Equality’ § 14.4(a) and the references cited therein.

involve a proportionality enquiry between means and ends, but only a rationality enquiry. The proportionality enquiry was excluded in order ‘to maintain the proper balance between the roles of the legislature and the courts’: in a democratic society it is not the function of courts to sit in judgment over the merits of socio-economic policies of the legislature.\(^1\) In justifying this restrained approach to its review jurisdiction, the court quoted\(^2\) from the judgment of the United States Supreme Court in *Carmichael, Attorney General of Alabama v Southern Coal & Coke Co.*\(^3\)

‘This restriction upon the judicial function, in passing on the constitutionality of statutes, is not artificial or irrational. A state legislature, in the enactment of laws, has the widest possible latitude within the limits of the Constitution. In the nature of the case it cannot record a complete catalogue of the considerations which move its members to enact laws. In the absence of such a record courts cannot assume that its action is capricious, or that, with its informed acquaintance with local conditions to which the legislation is to be applied, it was not aware of facts which afford reasonable basis for its action. Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.’

31.6 THE DISTINCTION BETWEEN DEPRIVATION AND EXPROPRIATION OF PROPERTY

IC s 28 and FC s 25 both draw a distinction between deprivation of property and expropriation of property.\(^4\) Expropriations are treated as a subset of deprivations. There are certain requirements for the validity of all deprivations.\(^5\) Expropriations, however, must satisfy two additional requirements: they must be performed pursuant to a public purpose (or, in the case of the final Constitution, in the public interest)\(^6\) and must be accompanied by the payment of just and equitable compensation.\(^7\)

(a) Expropriation distinguished from other forms of deprivation

The structure of the property clauses requires that the courts distinguish ‘expropriations’ from other ‘deprivations’ of property. It seems that the distinction is the well-established distinction between exercises of eminent domain and exercises of the police power.\(^8\) The word ‘expropriation’ is now used almost interchangeably with ‘compulsory acquisition’.\(^9\) Although the *Oxford English Dictionary* records that the original meaning of ‘expropriate’

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1 At para 42.
2 At para 43.
3 301 US 495 at 510 (1937).
4 In this respect IC s 28 and FC s 25 closely resemble many of the property clauses in post-independence Constitutions in Commonwealth countries which distinguish between deprivation of property and compulsory acquisition of property *(Harksen v Lane NO & others 1997 (11) BCLR 1489 (CC) at para 32).* See, for example, art 13 of the Malaysian Constitution (discussed by the Privy Council in *Government of Malaysia v Selangor Pilot Association* [1978] AC 337 (PC)) and s 16(1) of the Zimbabwe Constitution (discussed by the Zimbabwe Supreme Court in *Hewlett v Minister of Finance* 1982 (1) SA 409 (ZS)).
5 These have been discussed above, § 31.5.
6 See below, § 31.7.
7 See below, § 31.8.
8 See *Harksen v Lane NO & others 1997 (11) BCLR 1489 (CC) at para 32.* See also Murphy ‘Interpreting the Property Clause’ 117–19 and Van der Walt ‘Notes on the Interpretation of the Property Clause’ 195–9.
9 See *Harksen v Lane NO & others 1997 (11) BCLR 1489 (CC) at para 32* and *Hewlett v Minister of Finance 1982 (1) SA 409 (ZS) at 502C–D.*
was ‘to dispossess of ownership, to deprive of property’, its legal meaning now includes an element of acquisition. Thus the Appellate Division stated in *Tongaat Group Ltd v Minister of Agriculture* that ‘die gewone betekenis van die woord ‘onteiening’ verwys na ‘n handeling deur die Staat (of ander bevoegde instansie) waardeur o.a. grond van die eienaars ontleen word en die eiendom van die Staat word’. Similarly, in *Beckenstrater v Sand River Irrigation Board* Trollip J observed of ‘expropriation’ that ‘in statutory provisions . . . it is generally used in a wider sense as meaning not only dispossessions or deprivation but also appropriation by the expropriator of the particular right, and abatement or extinction, as the case may be, of any other existing right held by another which is inconsistent with the appropriated right’. Thus our courts do not allow claims in expropriation law against the state based on interference with property rights beyond the immediate act of acquisition of property by expropriation. Even state action which extinguishes property rights is not recognized as expropriation unless there is some transfer of the rights in question to the state or to a third party. It would follow that the ‘expropriations’ to which IC s 28(3) and FC s 25(2) refer are instances where the state, without the consent of the owner of the property concerned, acquires that property or transfers it to a third party. State interference with property rights which does not involve acquisition or transfer of property is not an expropriation, irrespective of the extent of the interference.

Several passages in the judgment of the Constitutional Court in *Harksen v Lane NO* may be read to suggest that an expropriation of property requires the permanent transfer of ownership. Such an approach would be consistent with the established South African statutory distinction between expropriation and taking the right to use temporarily. However, a rigid requirement that an expropriation be permanent may be inconsistent with the purpose of IC s 28 and FC s 25 in distinguishing between expropriation and deprivation of property. We argue below that this purpose is to facilitate the regulation of property in the public interest. Where the purpose of a temporary taking is essentially regulatory, as was the case in *Harksen v Lane NO*, the taking should be seen as a deprivation and not an

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2 1977 (2) SA 961 (A) at 972D.

3 1964 (4) SA 510 (T) at 515B–C.

4 See, for example, *Apex Mines Ltd v Administrator, Transvaal* 1988 (3) SA 1 (A).

5 This approach to the distinction between the police power and expropriation seems to have been accepted by the Constitutional Court in *Harksen v Lane NO & others* 1997 (11) BCLR 1489 (CC) at para 32. It differs from the approaches taken by the German courts and by the United States Supreme Court. The German approaches are discussed in Van der Walt ‘Comparative Notes on the Constitutional Protection of Property Rights’ (1993) *Recht en Kritiek* 263 and ‘Property Rights, Land Rights and Environmental Rights’ in Van Wyk et al (eds) (1994) *Rights and Constitutionalism* 455. See also G F Schuppert ‘The Rights to Property’ in U Karpen (ed) *The Constitution of the Federal Republic of Germany* (1988) 107. For a discussion of the approach of the United States Supreme Court see below, § 31.6(c).

6 1997 (11) BCLR 1489 (CC) at paras 34–6.

7 See, for example, the *Expropriation Act 63 of 1975*, the *Water Act 54 of 1956* and the *Prevention of Illegal Squatting Act 52 of 1951*.

8 The case dealt with s 21(1) of the *Insolvency Act 24 of 1936*, which provides for the estate of a solvent spouse to vest temporarily in the Master and then in the trustee of the estate of his or her insolvent spouse. Section 21(2) of the Insolvency Act provides a mechanism by which the solvent spouse can oblige the trustee to release his or her property which will not ultimately fall into the insolvent estate of his or her spouse. The purpose of this section is regulatory. The section is designed to protect creditors of the insolvent estate by ensuring that property which properly belongs in the insolvent estate is not taken out of that estate.
expropriation. However, it is possible to contemplate temporary takings which are not regulatory in purpose. Such takings should be subject to the constitutional requirement of compensation. If, for example, a city council uses its statutory powers to acquire the use of a private owner’s building as city council offices for six months while the old council offices are being renovated, the purpose of that acquisition is expropriatory rather than regulatory. The Constitution would accordingly require it to be compensated.¹

(b) Deprivation, expropriation and compensation

The effect of the distinction in IC s 28 and FC s 25 is that in the absence of an expropriation, compensation need not be paid, as of constitutional obligation, to a party who is deprived of property rights by state action.² The purpose of the distinction appears to be to enable the state to regulate the use of property for the public good, without the fear of incurring liability to property owners whose property rights are affected in the course of regulation.³ The property clauses thus recognize what Sax has described as ‘the two different kinds of private economic loss resulting from government activity and the two different respective roles played by government in the process of competition from which these losses arise’.⁴ When the state acts as a government enterprise it competes directly with private interests. When the state acts as a government regulator it mediates the competition between private individuals or corporations. Losses to individual property owners arising out of the former category of state action are accompanied by a corresponding benefit to a state enterprise and are thus compensable; losses to individual property owners as a result of the activities of the state as mediator result in no benefit to any state enterprise and are thus not compensable.

Many Commonwealth jurisdictions recognize a distinction between deprivation of property by the state and compulsory acquisition of property by the state, which is similar

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¹ Harken v Lane NO & others 1997 (11) BCLR 1489 (CC) at para 34 raises, but does not answer, the question whether the South African distinction between expropriation and deprivation should be seen as the same as the Indian distinction between compulsory acquisition and requisition. It is submitted that the distinctions are different. The temporary requisitioning of offices by a city council may be uncompensable under the Indian Constitution, but, for the reasons set out above, it is submitted that such requisitioning would be a compensable expropriation at South African constitutional law.

² As Van der Walt ‘Notes on the Interpretation of the Property Clause’ 199 points out, the use of the word ‘deprived’ in the property clause reflects ‘the outdated but still firmly entrenched perception that ownership (or property) is basically an unlimited right which is restricted by the state’. He argues that art 14 of the German Constitution is to be preferred to the South African property clause in that it makes clear that the content and limits of ownership do not pre-exist law, but are determined by law. Regulating legislation should not be seen as infringing an unlimited right of ownership. Rather it should be seen as determining the flexible content of that right at any given time.

³ The social importance of freeing the legislature in this way was emphasized by Stevens J in his dissent in First English Evangelical Lutheran Church of Glendale v County of Los Angeles, California 482 US 304, 107 SCt 2378 (1987) at 340–1: ‘The policy implications of today’s decision are obvious and, I fear, far reaching. Cautious local officials and land-use planners may avoid taking any action that might later be challenged and thus give rise to a damages action. Much important regulation will never be enacted, even perhaps in the health and safety area.’

⁴ Joseph L Sax ‘Takings and the Police Power’ (1964) 74 Yale LJ 36 at 62.
to the distinction in IC s 28 and FC s 25. Article 13 of the Malaysian Constitution is headed ‘Rights in Property’ and reads as follows:

1 (1) No person shall be deprived of property save in accordance with law.

2 (2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.’

In Government of Malaysia v Selangor Pilot Association the Privy Council considered the constitutionality of the Port Authorities (Amendment) Act 1972 in the light of art 13 of the Malaysian Constitution. The Port Authorities Act effectively prohibited any person other than the state from conducting the business of offering pilotage services in any area which had been declared a pilotage district. The respondents had been in business offering pilotage services in Port Swettenham since 1946. When, in 1972, Port Swettenham was declared a pilotage district under the Port Authorities Act, the respondents were forced to stop operating their business. They sued the Malaysian Government, alleging that art 13 gave them a constitutional right to be compensated for the loss of the goodwill of their business. The Privy Council found for the government. Viscount Dilhorne reasoned as follows:

‘Deprivation may take many forms. A person may be deprived of his property by another acquiring it or using it but those are not the only ways by which he can be deprived. As a matter of drafting, it would be wrong to use the word “deprived;” in article 13(1) if it meant and only meant acquisition or use when those words are used in article 13(2). Great care is usually taken in drafting of constitutions. Their Lordships agree that a person may be deprived of his property by a mere negative or restrictive provision but it does not follow that such a provision which leads to deprivation also leads to compulsory acquisition or use. If in the present case the association was in consequence of the amending Act deprived of property, there was no breach of article 13(1) for that deprivation was in accordance with a law which it was within the competence of the legislature to pass.

In relation to article 13(2) the question to be answered is: Was any property of the association compulsorily acquired or used by the port authority? Only if there was, could there have been a failure to comply with article 13(2). The only property, launches, etc, acquired by the port authority from the association was acquired by voluntary agreement. Even if the right of the association to employ licensed pilots which was destroyed by the amending Act can be regarded as a right of property, in the view of the majority of their Lordships the association’s right to employ pilots was not acquired or used by the port authority. Its right to employ them was given to it and acquired by it from the legislature.

It may be that the association by its enjoyment over a considerable period of time of a monopoly in the provision of pilotage services had acquired a goodwill, the value of which would be reflected on a sale by it of its business and of which it was deprived by the amending Act. But if that were so, it does not follow that the goodwill was acquired by the port authority from the association and in the opinion of the majority of their Lordships it was not.’

The only Commonwealth jurisdiction in which this distinction has been rejected by the courts was India. As Murphy points out in ‘Interpreting the Property Clause’ 115 the Indian Supreme Court held in State of West Bengal v Subodh Gopal Bose (1954) SCR 587 that there was no difference between the meaning of ‘deprived’ in art 31(1) of the Indian Constitution and ‘acquisition’ or ‘taking possession of’ in art 31(2). This judgment prompted the passing of the Fourth Amendment to the Constitution of India in 1955 to make clear that no constitutional claim for compensation would follow a deprivation of property unless ownership or a right to possession of that property accompanied the deprivation.

1 [1978] AC 337 (PC) at 347G–348D.
The Zimbabwean Supreme Court followed the approach of the Privy Council to the distinction between deprivation of property and compulsory acquisition of property in *Hewlett v Minister of Finance*.\(^1\)

The Commonwealth cases are useful in that they point our courts towards a recognition of the distinction between deprivations and expropriations of property for the purposes of compensation.\(^2\) Nevertheless, there are aspects of these decisions which remain unsatisfactory. In particular, the correctness of the decision reached by the Zimbabwe Supreme Court in *Hewlett* can be questioned. The case concerned legislation which extinguished certain existing legal claims against the state. The court found that the legislation in question deprived the plaintiff claim holders of property, but did not result in any compulsory acquisition of property by the state. This approach seems excessively literalist. The losses suffered by the plaintiffs were clearly accompanied by a benefit gained by the state. If the court had followed Sax’s distinction between state as competitor and state as mediator, it might well have found in favour of the plaintiffs.\(^3\)

(c) **Constructive expropriation**

In the United States the Supreme Court has blurred the Fifth and Fourteenth Amendment distinctions between deprivation of property and taking of property. In the US certain regulation of property rights may be treated as a taking even if the state does not actually acquire anything as a result of the regulation. This doctrine was first expounded in *Pennsylvania Coal Co v Mahon*, where Justice Holmes stated the following:\(^4\)

\[^1\] 1982 (1) SA 490 (ZS). See at 502F–H, where Fieldsend CJ stated: ‘It is perhaps of some significance to note that in almost all the post-colonial constitutions granted by Britain in Africa the section reciting the fundamental freedoms protected refers to the right not to be deprived of property without compensation whereas the sections giving actual protection provide that no property of any description shall be compulsorily taken possession of and no interest in or right in property of any description shall be compulsorily acquired except on certain conditions including compensation. This is clear recognition that there is a distinction between deprivation and acquisition, and also an indication that not every deprivation of property must carry compensation with it. Indeed, government could be made virtually impossible if every deprivation of property required compensation. A liquor licence, for example, is a valuable asset and may be regarded as property. If legislation were to provide for the compulsory transfer of such a licence to another without compensation it would almost certainly be unconstitutional. But if a government decided to introduce prohibition and to withdraw all liquor licences it could not be said that by its mere extinction a licensee’s licence had been acquired.’ See also *Chairman of the Public Service Commission & others v Zimbabwe Teachers Association & others* 1997 (1) SA 209 (ZS), 1996 (9) BCLR 1189 (ZS); *Davies & others v Minister of Lands, Agriculture and Water Development* 1997 (1) SA 228 (ZS), 1996 (9) BCLR 1209 (ZS). These decisions overturned *Davies & others v Minister of Lands, Agriculture and Water Development* 1995 (1) BCLR 83 (Z), where Chidyausika J, without considering *Hewlett*, held that excessive use of police powers (deprivation) was to be equated with compulsory acquisition.

\[^2\] See the use of the Commonwealth decisions by the Constitutional Court in *Harksen v Lane NO & others* 1997 (11) BCLR 1489 (CC) at paras 32–4.

\[^3\] The literalist approach of *Hewlett* is interesting in that it reflects an uneasy approach of the court to the extension of the concept of property. While the court was willing to accept that the concept of ‘property’ was broad enough to cover the legal claims, it was not willing to accept that the concept of ‘compulsory acquisition’ was broad enough to cover what had happened to the claims as a result of the legislation. It seems that once ‘property’ extends to cover incorporeal interests there must be a concomitant extension of the concepts of ‘compulsory acquisition’ and ‘expropriation’ to cover situations where the state gains a benefit by extinguishing the incorporeal property of a private person.

\[^4\] 260 US 393 (1922) at 415–16.
“The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. The general rule, at least, is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . In general it is not plain that a man’s misfortunes or necessities will justify his shifting the damages to his neighbour’s shoulders . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.’

Since Pennsylvania Coal ‘regulatory takings’ have been compensated by the US Supreme Court on various occasions.\(^1\) It remains extremely difficult, however, to draw any clear principles from the US case law in this regard. The point at which ‘regulation goes too far’ does not readily identify itself and the Supreme Court is forced, on its own admission, to approach cases involving alleged regulatory takings on an essentially \textit{ad hoc} basis.\(^2\)

The absence of clear guidelines to identify a regulatory taking leaves judges vulnerable to the charge of deciding these cases on the basis of personal predilections rather than constitutional principle. While this is in some respects an inevitable result of the institution of judicial review, there are good reasons for taking particular steps to minimize its scope in the context of review in the name of property rights. As has been discussed above, the constitutional protection of property rights is a particularly sensitive area of judicial review. A court protecting property rights will often be perceived as a court protecting privilege, and a court so perceived is vulnerable to attack from a state which is going to come under increasing popular pressure to eradicate the apartheid legacy of white privilege. For their own institutional protection the courts would thus be well advised, when dealing with constitutional challenges based on property rights, to ensure that their decisions are grounded on a set of principles that can clearly be derived from the constitutional text. For this reason it is to be hoped that our courts will not follow the \textit{ad hoc} jurisprudence of the US Supreme Court when it comes to distinguishing between expropriations of rights in property and other deprivations of rights in property.

This is not to deny that there is scope for the development of a doctrine of constructive expropriation for the purposes of claims for compensation brought under IC s 28 or FC s 25. Such a doctrine must, however, derive clear authority from the section. If the hallmark of an expropriation is the acquisition by the state of rights in property, a legislative or administrative scheme which is designed to have this effect can be characterized as an expropriation for the purposes of the property clause even if none of the individual elements of such a scheme obviously resembles an expropriation. Thus Sax has argued that compensation ought

\(^1\) For a discussion of this phenomenon in the context of Lucas v South Carolina Coastal Council 112 SCt 2886 (1992), one of the more important recent regulatory taking cases, see Richard A Epstein ‘Symposium on Lucas v South Carolina Coastal Council’ (1993) 45 Stanford LR 1369--455. See also F Michelman ‘Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law’ (1967) 80 Harvard LR 1165; J Sax ‘Takings and the Police Power’ (1964) 74 Yale LJ 36.

to be due under the Fifth and Fourteenth Amendments of the US Constitution where
government deliberately changes the zoning of a particular piece of private property in order
to deflate its value so that it can later be expropriated at a lower price or when the state sells
a developmental interest such as an oil lease and later takes back the interest through
regulation.¹ There would appear to be South African authority for this line of argument in
the dissenting judgment of Schreiner JA in Collins v Minister of the Interior. Collins was the
last of the ‘Coloured Vote’ cases. Schreiner JA ruled that a legislative amendment to the
composition of the Senate designed to circumvent a constitutional guarantee that legislation
affecting the Coloured vote could be passed only with the consent of a two-thirds majority
of both Houses of Parliament was unconstitutional:

‘The reasoning [of the respondent] is that so long as the legislation, required to remove the Coloured
voters from the common voters’ roll or to modify or repeal the language guarantee, can be split up
into stages, each of which taken by itself is legal, the whole is legal, even though the two or more
Acts required constitute a legislative plan to create a two-third majority by introducing into the
Legislature persons nominated for the sole purpose of securing that majority. There appears to be
no authority for the proposition that such piecemeal progression avoids invalidity, and it seems to
be contrary to principle. In general the parts of a scheme take their character from the whole. A
scheme to defraud is an obvious example. Another is a scheme to get round a legislative obstacle . . .
The same principle should apply where the obstacle is a constitutional protection against legislation
and the attempted means of avoiding it is legislative. There was of course no intention in the case
of the Senate Act to do anything known to be illegal, but neither was there any such intention in the
Colonial Banking and Trust Company case. There the parties obviously hoped that it would turn
out to be legal, yet the existence of the scheme was the decisive factor in the case.’²

31.7 EXPROPRIATION, PUBLIC PURPOSES AND PUBLIC INTEREST

(a) The interim Constitution: public purposes

Section 28(3) provides that the expropriation of rights in property shall be permissible for
public purposes only. ‘Public purposes’ has been used in a broad sense and in a narrow sense
in South African law. In the context of expropriation law the term has been understood to
include ‘things whereby the whole population or the local public are affected and not only
matters pertaining to the state or the government’.³ The Expropriation Act itself defines
‘public purposes’ broadly enough to include any purpose connected with the administration
of any law by an organ of state.⁴ Alongside this broad approach to public purposes is a
line of cases which define public purposes more narrowly and in contradistinction to
private purposes.⁵ Thus the Appellate Division has stated that the ‘acquisition of land by

¹ See Joseph L Sax ‘Property Rights and the Economy of Nature: Understanding Lucas v South Carolina Coastal
Council’ (1993) 45 Stanford LR 1433 at 1454n102. See also Sax ‘Takings and the Police Power’ (1964) 74 Yale LJ
36. See also the case of City of Plainfield v Borough of Middlesex 173 A 2d 785 (1961), where the zoning power
was used to effect what for all practical purposes amounted to an expropriation.
² Collins v Minister of the Interior 1957 (1) SA 552 (A) at 574 (emphasis added).
³ White Rocks Farm (Pty) Ltd & another v Minister of Community Development 1984 (3) SA 785 (N) at 793I. See
also Slabbert v Minister van Lande en ‘n ander 1963 (3) SA 620 (T) and Fourie v Minister van Lande 1970(4) SA 165 (O).
⁴ Section 1 of the Expropriation Act 63 of 1975.
⁵ See, for example, Rondebosch Municipal Council v Trustees of the Western Province Agricultural Society 1911
AD 271 at 283.
expropriation for the benefit of a third party cannot conceivably be for public purposes'.

If this narrow approach to public purposes is to be read into s 28(3), an expropriation for the purposes of transferring property from one private individual to another would appear to infringe s 28.

A narrow interpretation of s 28(3) would run counter to trends in comparative constitutional law. Foreign courts have been extremely hesitant to set aside expropriations of property on the grounds that the expropriation did not take place pursuant to a public purpose.

Even the US Supreme Court, which has been most active in the protection of property rights, defers to the state when a plaintiff raises objections to the purpose of an expropriation. In its most recent pronouncement on this matter the Supreme Court stated:

‘There is, of course, a role for the courts to play in reviewing a legislature’s judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the court in Berman made it clear that it is “an extremely narrow” one . . .

To be sure, the Court’s cases have repeatedly stated that “one person’s property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid [but] where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the clause . . .”’

‘[The] mere fact that property taken outright by eminent domain is transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. The Court long ago rejected any literal requirement that condemned property be put into use for the general public. A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no public purpose of government and would thus be void. But no purely private taking is involved in this case.’

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1 See Administrator, Transvaal, & another v J van Streepen (Kempton Park) (Pty) Ltd 1990 (4) SA 644 (A) at 661C-D. This dictum should not, however, be taken outside of its context. The case concerned the expropriation of land from the respondent for the purpose of establishing a private rail link to Sentrachem’s Chloorkop plant, a private undertaking which had the status of a strategic industry. The pre-existing rail link to the Chloorkop plant had earlier been expropriated for the construction of a public road and an ancillary purpose of the disputed expropriation was to minimize the compensation that would otherwise have been payable by the Administrator to Sentrachem. In these circumstances, while the expropriation may have been in the public interest, the purpose of the expropriation could hardly have been described as a public purpose. The same need not necessarily be true of expropriations which involve the transfer of land from one private party to another but which are performed pursuant to a land reform policy.

2 This would have obvious consequences for a legislative programme of land reform which was driven by expropriation. The Restitution of Land Rights Act 22 of 1994 would not, however, be affected by the requirement in s 28(3) that expropriations be for public purposes only. The Act was provided for in IC ss 121–123. In so far as it might have limited a right protected by s 28(3), it was therefore protected by the operation of s 33(2), which stated: ‘Save as provided for in subsec (1) or in any other provision of this Constitution, no law, whether a rule of the common law, customary law or legislation, shall limit any right entrenched in this Chapter’ (emphasis added).

3 For a review of US, British, Indian and international law in this regard, see A Eisenberg ‘“Public Purpose” and Expropriation: Some Comparative Insights and the South African Bill of Rights’ (1995) 11 SAJHR 207. Eisenberg shows that courts in most foreign jurisdictions give a broad reading to ‘public purposes’. But see also Clunies-Ross v The Commonwealth of Australia & others (1984) 155 CLR 193 (HC), [1985] LRC (Const) 292 (HC), in which the High Court of Australia adopted a narrower approach to ‘public purposes.’

4 Hawaii Housing Authority v Midkiff 463 US 1323, 104 SCt 7 (1984). The case involved expropriations for the purposes of urban land reform. The expropriations were designed to dilute existing monopolistic patterns of landownership in Hawaii by breaking up and reselling the expropriated property to a large number of individual private owners. The court held that these expropriations remained expropriations for a ‘public use’. (The Fifth and Fourteenth Amendments require that takings of property be for ‘public use’ which would appear to be even narrower than ‘public purpose’.)
Moreover, a narrow approach to s 28(3) would render potentially unconstitutional a wide range of politically uncontroversial and commercially efficacious legislation. To avoid anomalies of this nature it is recommended that ‘public purposes’ in s 28(3) be understood in a broad sense to refer to any act the purpose of which is to benefit the public. If ‘public purposes’ is to be read in a narrow sense, the imperative language of s 28(3) must be read subject to the provisions of the general limitations clause, s 33(1). On such a reading of s 28(3) an expropriation for a non-public purpose would survive constitutional challenge provided that the public interest in such an expropriation was sufficiently compelling.

(b) The final Constitution: public purpose or public interest

Section 25(2)(a) allows expropriations ‘for a public purpose or in the public interest’. The addition of the broader ‘public interest’ to ‘public purpose’, which was required by IC’s s 28(3), emphasizes that courts have limited scope to set aside an expropriation on the grounds of its purpose. While the Constitution does not permit expropriations designed solely to promote private interests, a court should generally respect the choices made by the legislature or executive as to where the public interest lies. Lest this not be recognized in a particularly sensitive context, s 25(4) provides that ‘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’.

1 Some examples which spring to mind include s 440K of the Companies Act 61 of 1973, which provides for the compulsory acquisition of minority shareholdings by a successful take-over bidder who owns 90 % of the shares in the company and s 24(1) and (2) of the Minerals Act 50 of 1991, which provide for the compulsory acquisition of surface landowners’ rights where this is in the interests of mining.

2 The fact that a court may have to resort to this sort of reasoning to make sense of s 28(3) is a product of the haphazard process by which the bill of rights was drafted. After reaching agreement on the property clause in bilateral agreements the ANC and the National Party could not decide whether to include the words ‘public purpose’ or ‘public interest’ in s 28(3). They were agreed that the state should have as broad an expropriation power as possible, but were unclear as to which term would provide the broader power. The issue was given to the Technical Committee on Fundamental Rights to settle. The Technical Committee dutifully researched the point and reported, incorrectly, that ‘public purpose’ was ‘more inclusive than the phrase “in the public interest”’. The property clause was then worded to permit expropriation only for ‘public purposes’ and the clause was accepted by the negotiating forum and enacted along with the rest of the Constitution. See Minutes of the Combined Meeting of the Technical Committee on Fundamental Rights in the Transition Period and the Ad-hoc Committee on Fundamental Rights, 8 November 1993, p 3. See also Eleventh Progress Report of the Technical Committee on Fundamental Rights in the Transition Period, 8 November 1993, p 10. The history of the drafting of s 28 is discussed in detail in M Chaskalson ‘Stumbling towards Section 28: Negotiations over the Protection of Property Rights in the Interim Constitution’ (1995) 11 SAJHR 241. This history may be admissible as a guide to the interpretation of s 28(3).

3 That ‘public interest’ is broader is indicated by the case of Administrator, Transvaal v J van Streepen (Kempton Park) (Pty) Ltd 1990 (4) SA 644 (A), cited above, § 31.7(a) in relation to the narrow meaning of ‘public purpose’. At 661C–D the Appellate Division stated the following: ‘Acquisition of land by expropriation for the benefit of a third party cannot conceivably be for public purposes. Non constat that it cannot be in the public interest.’ (Emphasis added.)

4 The meaning of ‘public purposes’ is discussed above, § 31.7(a).
31.8 **JUST AND EQUITABLE COMPENSATION**

Where property is expropriated, FC s 25(2) requires the payment of compensation. If there is no agreement as to compensation, the amount, manner and time period for payment of compensation are to be determined by a court of law as

'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 improvement of the property; and
(e) the purpose of the expropriation'.\(^1\)

\(\text{(a)}\) **A just and equitable amount of compensation**

The wording of FC s 25(3) controls how a court is to assess the *quantum* of compensation when a constitutional claim is made arising out of the expropriation of property.\(^2\) An expropriation statute will usually contain provisions for the quantification of compensation, but, irrespective of these provisions, the court will have to establish what compensation it considers to be just and equitable, taking into account all relevant circumstances, including those listed in s 25(3). If the resulting amount is more than that provided for in accordance with the expropriation statute, subject to questions of permissible limitations of s 25(3),\(^3\) the court will order payment of the just and equitable amount. If the just and equitable amount is less than that provided for in the statute, the court will order payment of the latter amount.\(^4\)

Ordinarily, just and equitable compensation would be market value compensation.\(^5\) However, by identifying as issues relevant to the *quantum* of compensation the extent of state investment and subsidy in the acquisition and improvement of the property,\(^6\) the use to

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1. The corresponding provisions of IC s 28(3) are similar: the court must determine just and equitable compensation ‘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’.

2. If a party relies on FC s 25(3) to found a claim of compensation, such reliance must be pleaded specifically. See *De Villiers en 'n ander v Stadsraad van Mamelodi en 'n ander* 1995 (4) SA 347 (T) at 354B–E, which considered the corresponding provisions of IC s 28(3).

3. See below, § 31.9.

4. Although FC s 25(3) is framed in the imperative form, a court would be unlikely to interpret it to prevent the state from paying more than just and equitable compensation under an expropriation statute which provided for payment of an amount in excess of that required by s 25(3). A bill of rights sets minimum standards which the state must observe. It is always open to the state to extend greater protection to rights than is required by the bill of rights. Thus the owner of property which is expropriated under the Expropriation Act 63 of 1975 will still be able to claim payment under s 12(2) of that Act of an amount as a *solatium*, even though payment of such a *solatium* probably exceeds the requirements of s 25(3).


6. Section 25(3)(d). There is no direct equivalent of s 25(3)(d) in IC s 28(3). Although IC s 28(3) does not expressly provide that questions of state investment or subsidy are relevant to the quantification of just and equitable compensation, there may be cases decided in terms of the interim Constitution where such questions are considered under the residual category in s 28(3) of ‘all relevant factors’.
which the property is being put, and the history of its acquisition, s 25(3) opens the way for compensation at less than market value to be recognized as just and equitable compensation in appropriate cases. Such cases may include those where the value of the property has been enhanced by the investment of public resources, which should be set off against market value for the purposes of compensation. They may also include cases involving property which is being underutilized or held for speculative purposes. They would usually include cases where property was acquired from the outgoing government for less than market value. Thus the government might be able to reverse the processes by which state assets were transferred cheaply, and sometimes gratuitously, into private hands in the period leading up to the first democratic elections in South Africa. The absence of a provision equivalent to s 25(3) in the Namibian Constitution meant that the post-independent Namibian state was unable to do this. In Cultura 2000 v Government of the Republic of Namibia the court struck down an attempt by the Namibian government to recover donations worth R8 million made by the Administrator-General shortly before independence. The donations had been made to a voluntary association whose main object was the preservation of the culture of ‘the Afrikaans, German, Portuguese, English and other communities of European descent as represented by the founding members’. The State Repudiation (Cultura 2000) Act 32 of 1991 (Nm), which nullified the donations, was declared unconstitutional inter alia on the grounds that it took property without providing just compensation.\(^1\)

In so far as s 25(3) recognizes that the interests of those affected must be balanced against the public interest in order to determine just and equitable compensation, it may, in exceptional cases, require payment of compensation greater than market value. There are cases where, because of peculiar circumstances, an expropriated property has a value to its owner which is considerably more than its market value. It may be that in such cases a court would hold that just and equitable compensation to the owner concerned would exceed the market value of the property expropriated.\(^2\) Militating against such approaches to s 25(3), however, is the fact that it is the benefit of the state and not the loss of the property owner that determines whether compensation is payable. Compensation requires an expropriation. So state action which causes losses to individual property owners without any accompanying benefit to the state does not give rise to a constitutional claim for compensation, irrespective of the extent of the loss caused to the property owner.\(^3\) It would then be anomalous if, in cases where there is an expropriation, the quantum of compensation were to depend not on the benefit to the state but on the extent of the loss of the property owner. The effect would be to allow such property owners compensation for the expropriation as well as for any additional non-expropriating deprivations of property which accompany the expropriation.

\(^1\) 1993 (2) SA 12 (Nm). An appeal against the judgment was partially successful, but the appeal did not deal with the sections of the Act which nullified the donations. The invalidity of these sections had been conceded by the Namibian government prior to the hearing of the appeal. See Government of the Republic of Namibia v Cultura 2000 1994 (1) SA 407 (NmS).

\(^2\) We are indebted to Richard Rosenthal for this point. Similarly, as Murphy has pointed out, ‘Interpreting the Property Clause’ 129, the reference in IC’s 25(3) to ‘the value of investments’ raises the possibility that compensation in excess of market value may be awarded under the interim Constitution in some cases where property is held with negative equity. Note, however, that ‘the value of investments’ is not listed as a relevant factor in FC’s 25(3).

\(^3\) See above, § 31.6.
Property

(b) The onus in respect of proving the amount of compensation

Section 25(2) provides that the amount of compensation must be ‘decided or approved’ by a court. It seems therefore to endorse the common-law position that there is no onus on a property owner to prove what compensation should be paid to him or her arising out of an expropriation. A court can, however, only determine an amount of compensation on the basis of evidence placed before it. Thus in practice there will be a burden on the owner of the property which has been expropriated to adduce sufficient evidence for the court to make its determination.

(c) Payment of compensation in a just and equitable manner

Section 25(2) and (3) require that the manner of payment of compensation must be just and equitable, reflecting ‘an equitable balance between the public interest and the interests of those affected’. It may, therefore, be open to the state to provide for compensation in a form other than cash (for example, government bonds) if the private interest in cash compensation is outweighed by the public interest in the expropriation in circumstances where constraints on public spending preclude full payment of compensation in cash.

(d) Payment of compensation within a just and equitable time

Like the amount and manner of payment of compensation, the time within which compensation is paid must be just and equitable. Ordinarily prompt payment of compensation would have to follow an expropriation. Section 25(2) and (3) do, however, leave open the possibility of delayed compensation in cases where this is just and equitable. The presence or absence of such a case will have to be assessed by a court, taking into account the same factors which are relevant to the quantification of just and equitable compensation. In this regard, the use to which property is being put may, in particular cases, be relevant to the time within which compensation is to be paid. If an owner is not using a particular property and does not intend to gain any material benefit from that property in the immediate future, it may well be just and equitable to allow delayed payment of compensation.

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1 See A Gildenhuys & G Grobler LAWSA vol 10 ‘Expropriation’ 143 para 159. This argument applies equally to IC s 28(3), which required the payment of compensation ‘determined by a court of law as just and equitable.’
2 IC s 28(3) did not expressly regulate the manner of payment of compensation, but merely provided for the payment of ‘such compensation . . . as may be determined by a court of law as just and equitable’. This formulation was sufficiently broad, however, to encompass issues relating to the amount of compensation and to the manner of its payment.
4 In this respect FC s 25(3) differs from IC s 28(3). Although s 28(3) provides for the payment of compensation within a period determined by a court to be just and equitable, the factors listed in s 28(3) are stated to be relevant to the quantum of compensation and not to the determination of the period within which compensation will be paid. The interim Constitution leaves the courts to determine what factors are relevant to assessing a just and equitable period for the payment of compensation.
5 FC s 25(3)(a).
31.9 LAND RIGHTS

Subsections (5), (6), (7) and (9) of FC s 25 confer certain rights to land. These rights are discussed below in a separate chapter.¹

31.10 LIMITATION OF PROPERTY RIGHTS

(a) Limitation under the interim Constitution

Although IC s 28 provides internally for the limitation of property rights by recognizing that certain deprivations and expropriations of property are constitutionally permissible, the rights protected by the section are themselves capable of limitation in terms of the general limitations clause, IC s 33.² For example, an expropriation of property in breach of the requirements of s 28(3) could be saved from invalidity if it passed the test set out in s 33(1). In order to do so it would have to be authorized by a law of general application which was reasonable and justifiable in an open and democratic society based on freedom and equality.³

As we have argued above, even if the public purposes requirement of s 28(3) is construed strictly, a statute may authorize expropriations in the public interest subject to the payment of just and equitable compensation and yet be constitutional. Such a statute is unlikely to be invalid for encroaching on the right contained in s 28(3) because it will probably satisfy the limitation requirements of s 33(1).⁴

If s 28(1) is interpreted as protecting individual rights to acquire, hold and dispose of rights in property, as opposed to protecting only general access to the legal institution of property,⁵ s 33(1) will have widespread application to statutes regulating property rights. On the expansive reading of s 28(1) all such statutes would limit the right it protects and would have to be justified in terms of s 33(1) in order to escape invalidity.

(b) Limitation under the final Constitution

The question of limitation of s 25 rights under the final Constitution is complicated by subsec (8), which states the following:

¹ See below, Eisenberg ‘Land’ ch 40.
² The limitations clause is discussed above, Woolman ‘Limitation’ ch 12.
³ The fact that law of general application is an element of the limitations test set out in IC s 33(1) means that any limitation of s 28(2), the right not to be deprived of property otherwise than in accordance with a law, will automatically fail the limitations test.
⁴ Section 26(1) of the Expropriation Act presents an example of a law which may limit IC s 28(3) rights in another respect. The section provides that where expropriations are performed pursuant to other laws, the compensation owing in respect thereof shall mutatis mutandis be calculated, determined and paid in accordance with the provisions of this Act. Thus s 26(1) lays down that the formula for the payment of compensation in the Expropriation Act, which differs from that in IC s 28, must be followed in all cases. The Expropriation Act formula will generally result in greater compensation than is required by IC s 28(3) because it provides for compensation in excess of market value. However, to the extent that it may provide for less compensation than IC s 28(3) in any cases, s 26(1) will be constitutional only if it can be justified in terms of the IC’s 33(1) limitations test.
⁵ See above, § 31.4.
‘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).’

Subsection (8) appears to have been included in s 25 on the assumption that none of the rights protected by s 25 would ordinarily be capable of limitation in terms of FC s 36(1). If s 25 rights were limitable subject to the test of s 36(1), any departure from the provisions of s 25 would be permissible if it were in accordance with the provisions of s 36(1). There would be no need to single out measures to achieve land, water and related reform in order to redress results of past racial discrimination.

How then is one to understand the relationship between s 25 and s 36(1)? In the case of measures contemplated by s 25(8) the first enquiry is whether the measures in question infringe rights protected by subsecs (1), (2) or (3) of s 25. If there is no infringement of these rights, the measures do not constitute a limitation of s 25 and there is no need to proceed to any enquiry under s 36(1) to determine their validity. If, however, there is an infringement of subsecs (1), (2) or (3), the limitations enquiry will determine the constitutionality of the measures. Even if they limit s 25 rights, measures contemplated by s 25(8) are constitutional if they can be justified in terms of s 36(1).

In the case of all limitations of property rights other than those contemplated by s 25(8) it seems that the constitutionality enquiry may in effect be confined to the terms of s 25 itself. If, for example, a law other than one providing for land, water and related reform effects an arbitrary deprivation of property, it may not be possible to attempt to justify the law in terms of s 36(1). The notion of illimitable rights, however, is not one which fits well within the scheme of Chapter 2 of the final Constitution.

There is certainly nothing within the terms of s 36(1) which suggests that it is inapplicable to particular rights. A court may therefore hold that all s 25 rights are subject to limitation under s 36(1) notwithstanding the fact that such an interpretation would render s 25(8) largely superfluous.

Whilst the relationship of s 25 to s 36(1) poses interesting theoretical questions, it is likely to be of little practical consequence. The negotiated compromise in respect of the constitutional protection of property is nowhere better illustrated than in relation to questions of limitation. Anxiety about protection of existing property rights is allayed differently in the various subsections of s 25. Does this mean that different standards, or tests, will be invoked to determine the validity of deprivations? Whatever the answer, the internal limitations of s 25 are such that it is only in an extremely rare case that a law or act will infringe a right protected by subsecs (1), (2) or (3) of s 25 and yet be justifiable under s 36(1). An arbitrary deprivation of property will not be ‘reasonable and justifiable in an open and democratic

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1 Note that the relationship between s 25 and s 36(2) is unaffected by s 25(8) in circumstances other than those relating to s 36(1). Thus all rights protected by s 25 may be limited where this is authorized by provisions of the Constitution other than s 36(1). See further above, Woolman ‘Limitation’ § 12.14.

2 See S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at paras 29–30 where the Constitutional Court discussed the general structure of chapter 3 of the interim Constitution with reference to the internal limitations clause in IC s 26 (the right to economic activity).

3 The purpose served by s 25(8) on such an interpretation would largely be symbolic. The subsection would emphasize the constitutional value attached to land and water reform and would thus reinforce the provisions of s 25(4)(a).
society based on human dignity, equality and freedom'. The same will generally be true of an expropriation which is neither for a public purpose nor in the public interest, or of one which is not subject to just and equitable compensation.

31.11 CONCLUSION

Judges interpreting a property clause must balance protection of private property rights against the need for regulation and expropriation of property rights for the common good. In South Africa this exercise is complicated by our past. The present distribution of property rights is the product of a history of government for the benefit of white South Africans. This history means there is a pressing need for legislative programmes of reconstruction and reparation, which will inevitably disturb existing property relations. Section 28 of the interim Constitution and s 25 of the final Constitution give expression to a political compromise around these conflicting concerns. Property is protected, but interference short of expropriation does not attract compensation. Compensation for expropriated property is to be determined by a court of law, but it can be adjusted below market value in appropriate circumstances.

The new government will face increasing political pressure to institute redistributive policies which address the legacy of discrimination in South Africa. Whatever policies are implemented in response to this pressure will involve some interference with property rights and legal challenges to these policies will be brought in the name of IC s 28 and FC s 25. In considering these challenges the courts would do well to adopt a purposive approach and to bear in mind the compromise which the sections seek to achieve. If they fail to do so and are overzealous in their protection of property rights, comparative legal history suggests that they run the risk of precipitating a constitutional conflict between court and state.

1 Arbitrariness is incompatible with an open and democratic society based on freedom and equality. S v Lawrence; S v Negal; S v Solberg 1997 (4) SA 1176 (CC), 1997 (10) BCLR 1348 (CC) at para 41.

2 See, for example, John Murphy ‘Insulating Land Reform from Constitutional Impugnment: An Indian Case Study’ (1992) 8 SAJHR 362; and Matthew Chaskalson ‘The Problem with Property: Thoughts on the Constitutional Protection of Property in the United States and the Commonwealth’ (1993) 9 SAJHR 388. See also A E Sutherland Constitutionalism in America (1965) 481–501 and Pfeffer This Honourable Court (1965) 295–320.